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BY E-MAIL

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Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
Financial and Consumers 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
(the "**CSA**")

c/o

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Dear Mesdames/Sirs:

Re: CSA Consultation Paper 51-405 - Consideration of an Access Equals Delivery Model for Non-Investment Fund Reporting Issuers

[1] Thank you for providing us with the opportunity to comment on the proposal described in CSA Consultation Paper 51-405 - Consideration of an Access Equals Delivery Model for Non-Investment Fund Reporting Issuers dated January 9, 2020 (the "**Consultation Paper**").

[2] Our comments below address some, but not necessarily all, of the potential regulatory issues derived from the proposal outlined in the Consultation Paper and respond to most of the questions outlined in section 4 thereof. Given the general nature of the Consultation Paper, our comments are mostly at a high level, and consequently incomplete as to details. We will be in a position to provide more specific and comprehensive feedback as details are provided for the regulatory proposals that may follow the Consultation Paper. When appropriate, we have used terms as defined in NI 51-102 and NI 54-101 (as defined below).

[3] In formulating our comments, we have when appropriate attempted to focus on the implications of the proposed access equals delivery securities regulatory framework from the perspective of the ultimate individual or retail investor. We believe that some of these implications may be less critical for institutional and professional investors or other professional market participants given the interactions that already exist among them.

[4] The comments provided herein are submitted without prejudice to any position that may in the future be taken by our firm on its own behalf or on behalf of any client.

[5] Our comments reflect, when relevant, our professional experience in advising issuers and investment bankers in connection with numerous capital markets transactions. Prior to submitting this letter, we also discussed with some industry participants. Though the comments in this letter are ours alone, we have taken into consideration the feedback we received from those with whom we discussed the matter.

1. Summary of our most significant comments

[6] Here is a summary of our most significant comments:

(a) we generally support the view that an access equals delivery securities regulatory framework for prospectuses, financial statements and related MD&A's is appropriate, pursuant to the terms proposed in the Consultation Paper. We also generally support the view that applying such framework to proxy-related materials may not be appropriate for the reasons outlined in the Consultation Paper (see paragraphs [39] and [54]);

(b) we encourage CSA not to hesitate in taking leadership with legislators and governments in identifying legislative amendments that might be required to fully implement an access equals delivery securities regulatory framework in the manner we describe in our comments below, particularly under certain corporate and other provincial legislations dealing more generally with electronic communications and e-commerce, when necessary. We fully acknowledge that CSA is not in a position to implement amendments to such legislations, if required (see paragraph [65]);

(c) CSA should articulate the key general principles to be relied upon in the drafting, interpretation and implementation of securities regulatory requirements governing communications, delivery (or access) through electronic infrastructures or other

means or digital platforms directed to investors. In addition, issuers should be clearly entitled to rely on electronic infrastructures as the preferred infrastructure for making accessible or delivering all their disclosure documents and in fulfilling all of their other disclosure obligations, while preserving the ability of individuals that so choose to select paper, and the Canadian postal system (see paragraphs [12] and [15]);

(d) a successful implementation of an access equals delivery securities regulatory framework would require clarifying in a national instrument the requirements regarding consent to electronic delivery of (or access to) disclosure documents, and the terms and conditions pursuant to which consent may be provided. These clarifications would also improve the current challenges faced by issuers, underwriters and dealers in delivering prospectuses in connection with securities offerings, and similarly ease some of the operational challenges associated with the use and reliance of notice-and-access. A number of changes to notice-and-access would also be required (see paragraphs [28], [38] and [57]);

(e) the consent provided by an individual or retail investor should apply to all issuers whose securities have been purchased by him or on his behalf, and be "portable", or effective, throughout the chain of intermediaries involved in the delivery of (or access to) disclosure documents to that investor as intended ultimate recipient. A generic description of disclosure documents is sufficient and appropriate (see paragraphs [29] and [31]);

(f) an individual or retail investor who agrees to provide an e-mail address or cellular phone number (or who select another acceptable electronic infrastructure) to an issuer or an intermediary holding securities on his behalf should be deemed to consent to the use of such electronic infrastructure (see paragraph [32]);

(g) SEDAR should be designated as the preferred electronic infrastructure to be relied upon by market participants and investors in Canada, although not exclusively (see paragraph [59]);

(h) the two-days rescission right which may be exercised upon delivery by a dealer of a prospectus should be repealed (see paragraph [43]);

(i) investment funds should benefit from the changes that may result from the Consultation Paper, particularly as to consent and notification (see paragraph [68]).

2. Identifying guiding principles governing communications, delivery and access through electronic infrastructures or other digital platforms

[7] The securities regulatory regime in Canada governing communications between issuers, their securityholders and various market participants or other service providers is particularly complex. CSA Consultation Paper 54-401 - Review of the Proxy Voting Infrastructure, dated

August 15, 2013 ("**Paper 54-401**"), illustrates some of this complexity, particularly in connection with the delivery of proxy-related materials. Such delivery involves multiple layers of actors carrying out various functions, different forms of securities ownership, different options for the exercise of voting rights through several different systems and databases, in addition to multiple forms of business organizations governed by various legislations that provide for different information rights, communication or delivery regimes, and regulatory oversight when the issuers are so regulated, like financial institutions. Some of the reasons underlying such complexity are outlined in Paper 54-401, and we submit that they are relevant in considering the proposed access equals delivery securities regulatory framework outlined in the Consultation Paper.

[8] We note that Paper 54-401 states that delivering the appropriate material to intermediaries and soliciting voting instructions is one of the functions encompassed in the proxy voting infrastructure in Canada.

[9] It is generally acknowledged that a significant number of securities issued by reporting issuers are held in what Paper 54-401 describes as the intermediated holding system. In addition, we note, when combining publicly available data from the Government of Canada and from CSA Multilateral Staff Notice 58-311, that a large number of non-venture and non-investment funds reporting issuers are governed by the *Canada Business Corporations Act* ("**CBCA**"). The CBCA primarily provides for mail delivery of financial statements and proxy-related materials in paper format, which is not the case for corporations governed by some provincial statutes, like in Québec. Amendments to relax these CBCA requirements, notably through notice-and-access, have been adopted but are not yet in force. Current CBCA requirements provide issuers with the right to be relieved from such delivery requirements in reliance on notice-and-access, but only a fraction of them, to our knowledge, avail themselves of this option, which need to be renewed yearly. CBCA requirements also allow for delivery of electronic documents (as defined) when written consent and the designation of an information system (as defined) for their receipt have been obtained from the addressee.

[10] Voting rights, information rights like financial statements and participation to a takeover bid are generally legally cast in respect of registered holders only. CSA have for a long time attempted to bridge the "information gap" between registered and non-registered holders, particularly from the perspective of individual or retail investors. The adoption of *National Instrument 54-101* ("**NI 54-101**") and its predecessor in the mid '80 is an illustration of such an initiative in connection with shareholders' meetings and the exercise of voting rights thereat. CSA efforts and initiatives regarding the proxy voting infrastructure have generally focussed on the proper exercise of voting rights and vote reconciliation under NI 54-101 (information rights were excluded from the discussion in Paper 54-401). We however note that CSA expressed its interest in electronic delivery as early as 1997.

[11] Communications between issuers and investors in general, which include disclosure requirements and delivery of securityholder materials and prospectuses, other than proxy-related materials, are governed by different provisions found in securities legislations and other securities regulatory requirements.

[12] In light of the above, we submit that the focus of the Consultation Paper, reliance on electronic access for selected disclosure documents, should be broader than as currently contemplated. We submit that CSA should consider articulating the key general principles to be relied upon in the drafting, interpretation and implementation of securities regulatory requirements governing communications, delivery (or access) through electronic infrastructures or other means or digital platforms ("**electronic infrastructures**") directed to investors and issuers' securityholders, or on their behalf, and fulfillment of other issuers disclosure requirements.

[13] We submit that there are inherent merits in formulating a general principles framework, as this will likely minimize inconsistencies between securities requirements and other corporate or legislative ones when determining if, when and how reliance on electronic infrastructures is allowed, or not, and under what circumstances, including those currently contemplated under NI 54-101. We further submit that this may constitute an occasion for CSA to provide direction for reducing the use of paper documents primarily by issuers or on their behalf, and promoting a paperless environment associated with compliance with current communication and delivery securities regulatory requirements. We acknowledge that implementing securities regulatory requirements reflecting such principles may be achieved through successive phases, and support the proposal that prospectuses, financial statements and related MD&A's comprise the initial phase of such implementation.

[14] In our view, it would be appropriate and relevant for CSA to:

(a) establish the principles to facilitate how to determine consent by individual or retail investors to agree to communications, delivery or access through electronic infrastructures, irrespective of how the securities are held by such investors, and in particular when securities are held through several intermediaries on their behalf;

(b) establish the principles pursuant to which notification to individual or retail investors that securityholder materials and other disclosure documents are available should be made, in which situations, and the format such notification should take, and select the situations where the protection of individual or retail investors reasonably warrants notification to be made, together with those where notification would be unwarranted;

(c) implement alignment between manners to obtain consent to communications through electronic infrastructures and the various notifications sent or requested from individual or retail investors under current securities regulatory requirements applicable to the delivery of securityholder materials and other disclosure documents;

(d) ensure that securities regulatory requirements are technologically neutral, and allow issuers and individual or retail investors to take advantage of the electronic infrastructure that is the most relevant for their needs; and

(e) consider requesting exchanges, other marketplaces and relevant SROs to review their current policies and rules on this topic to ensure coordinated implementation.

3. Facilitating reliance on electronic infrastructures

[15] We are of the view, mostly for the reasons outlined in the Consultation Paper, that issuers (the term used in *National Policy 11-201* ("**NP 11-201**") is "deliverer") be clearly entitled to rely on electronic infrastructures as the preferred infrastructure for making accessible or delivering securityholder materials and other disclosure documents to their securityholders (NP 11-201 describes the person receiving such documents as "recipient", or "intended recipient") and in fulfilling all of their other disclosure obligations under applicable securities regulatory requirements, while preserving the ability of intended recipients that so choose to select paper, and the Canadian postal system, when securityholder materials and other disclosure documents are to be delivered to them.

[16] When modern securities legislations were enacted in Ontario in the late '70, and early '80 for Québec, the infrastructure available to issuers to disseminate and deliver securityholder materials and other disclosure documents was essentially the Canadian postal system. Private courier services were also available, and often used to communicate with CSA, but much less with investors. Material news were (and still are) disseminated by press releases through wire services, and sometimes reproduced in whole or in part in newspapers. There was no discussion as to direct access by investors, as there was no real option that could allow such access in a cost-effective manner.

[17] The same is true for corporate legislations adopted at of before that time.

[18] We submit that the situation today allows for more flexibility in the selection of and reliance on communication infrastructures for purposes of accessibility and delivery of securityholder materials and other disclosure documents to investors. In fact, and as indicated above in paragraph [15], electronic infrastructures should become the preferred ones.

[19] We further note that SEDAR has played a significant role in widening access by investors and the general public to securityholder materials and other disclosure documents. We further submit that fulfilment of other disclosure requirements by issuers should benefit from such flexibility.

[20] With the technology that has been available for many years, Canadian investors now conduct their research online and expect to find relevant information and documentation at websites rather than receive hard copies of such documentation in the mail. Likewise, Canadian investors today typically have a multitude of personal online accounts relating to such diverse needs as financial services, consumer spending and social media.

4. Consent to delivery through electronic infrastructures

Consent is to be obtained under current requirements

[21] One of the key impediments to the use of electronic communication tools:

(a) by issuers, underwriters and dealers during the course of a public offering; and

(b) by issuers or other intermediaries acting on behalf, or to the benefit, of individual or retail investors as recipient or intended recipient;

is the need to obtain the express consent from the intended recipient to use such tools, the specificity of such consent, including the identification of the documents covered by the consent, and its length of time We note the CSA view contained in NP 11-201, and reproduced in the Consultation Paper, that failure by an issuer (a "deliverer" under NP 11-201) to obtain such consent "may make it more difficult to demonstrate that the investor [or intended recipient] had notice of, and access to, the document, and that the investor actually received the document". This CSA view is to be read in conjunction with section 5(5) of *Companion Policy 54-101CP* ("**CP 54-101**"), which states that the guidelines set out in NP 11-201 are applicable to documents sent under NI 54-101, and particularly the suggestion that consent be obtained to an electronic transmission of a document. In addition, Form 54-101-*"Explanation to Clients And Client Response Form"*, specifically states, under the heading "Electronic Delivery of Documents", that "[s]ecurities law permits us [the intermediary] to deliver some documents by electronic means if the consent of the recipient to the means of delivery has been obtained". Even though the Consultation Paper state that securities legislation does not require express consent to be obtained, we submit that the above statements are akin to a requirement to obtain express consent prior to electronically delivering a document.

[22] As we indicated above in paragraph [9], CBCA requirements currently allow for delivery of electronic documents (as defined) when written consent and the designation of an information system (as defined) for their receipt have been obtained from the addressee. We note that under these requirements, the consent of the addressee would likely be required under an access means delivery securities regulatory framework as the addressee need to indicate the information system (as defined) where the electronic document is to be received.

[23] As other commentators that carry significant capital market legal practices have noted in response to previous consultations, our experience reveals that issuers, their underwriters, other dealers and their respective representatives involved in the distribution of a prospectus offering want to be able to deliver, or provide access to, prospectuses and associated marketing materials electronically, either by e-mail or through another acceptable electronic infrastructure. The need to have obtained prior express (or implied when allowed) consent to such electronic delivery (or access to) makes it often difficult for them to do so. This difficulty is further amplified by current legislation governing electronic communications, particularly that known as Canada's Anti-Spam Legislation, in situations where it is applicable and where exemptions are not readily available.

Consent and delivery instructions for securityholder materials

[24] Challenges associated with the need to obtain prior consent to electronic delivery are further amplified by the complex requirements found in NI 54-101 and *National Instrument 51-102* ("**NI 51-102**"), like for example those providing for the delivery instructions of securityholder materials to registered holders and intermediaries holding securities on behalf of others. In this situation, registered holders and intermediaries will only receive financial statements and related MD&A's if they so request in response to the yearly request form sent to them by the issuer (see section 4.6 of NI 51-102), subject to corporate law requirements if any. Section 3.5 of *Companion Policy 51-102CP* ("**CP 51-102**") clearly states that financial statements and related MD&A's need only be sent to the persons that request them, and add that when the response request is being received from an intermediary, the issuer is only required to deliver to the intermediary. Failure to respond will override standing instructions for the delivery of paper financial statements under NI 54-101.

[25] Under the provisions of notice-and-access, and particularly Form 54-101F1, a beneficial owner is entitled to decline receiving financial statements that are not part of proxy-related materials, among others. The form goes on to state that the beneficial owner has to confirm his choice of receiving or not securityholder materials.

[26] We note that manners to obtain and collect consent to electronic delivery in connection with proxy-related materials vary significantly. Sometimes, consent is integrated to the yearly request form referred to above, which may itself be part of the proxy form. In other situations, the security holder is invited to register through a digital platform maintained by a transfer agent, or another service provider, or is provided with a specific form to be filled to so register.

[27] We further understand that reliance by a significant number of issuers and the vast majority of intermediaries on third parties to carry out the distribution or mailing of proxy-related materials add to the complexity in the application of these provisions. In this regard, we have anecdotal evidence that in practice, proxy-related materials are mailed and made available in paper to intermediaries in the vast majority of cases, even when notice-and-access is relied upon, and that communications via e-mail or other electronic infrastructures are not frequent.

Terms and conditions for consent to electronic infrastructure for all documents

[28] In light of the above, and in particular the CBCA requirements, we submit that CSA should contemplate providing in a national instrument the terms and conditions pursuant to which consent may be provided by an intended recipient for all circumstances where securityholder materials and other disclosure documents are required to be delivered (or access provided) to such intended recipient (and particularly when such recipient is an individual or retail investor), including the manner and infrastructure that may be used for transmitting and obtaining such consent, from whom (beneficial owner, registered holder, intermediary, client, proximate intermediary, third party retained for distribution tasks), the type of securityholder materials and other disclosure documents required under securities regulatory requirements to be delivered to the intended recipient, the effective length of time of such consent, and other

relevant aspects. At the same time, requirements for the delivery of (or access to) securityholder materials and other disclosure documents should to the extent possible be streamlined, and aligned as to the options to receive, or not, these documents through electronic infrastructures as the preferred option.

Documents identified in the consent

[29] Regarding the type of securityholder materials and other disclosure documents identified in the consent, we submit that a generic description of such documents adequately fulfils the regulatory objective underlying the obtaining of consent for their delivery (or access) through electronic infrastructures, and is consequently sufficient and appropriate. Securities regulatory requirements, and in some cases corporate legislations, identify as a matter of law the documents to which an investor, as an intended recipient, is entitled further to, or in connection with, the purchase of securities of an issuer. Issuers whose constating documents are contractual in nature, like income trusts or limited partnerships, are generally subject to similar obligations to the benefit of their securityholders. In all cases, the type of documents is specific (for example, annual and interim financial statements, prospectuses, information circular for shareholders' meeting, takeover bid circular and directors' circular in connection with a takeover or issuer bid), and the list thereof relatively short. We submit that since the type of such documents is already identified, and that their delivery is mandatory, requesting a consent specific to a particular document of a particular date, or for a particular event (like a prospectus for a given offering, a financial statement for a given period, or an information circular for a given securityholders' meeting) is unwarranted.

[30] As indicated above in paragraph [10], voting rights, information rights like financial statements and participation to a takeover bid, are generally legally cast in respect of registered holders. The adoption of NI 54-101 attempted to bridge this "information gap" in connection with securityholders' meetings and the exercise of voting rights thereat. However, we submit that in all of the above situations, it is the ultimate individual or retail investor that the regulatory requirements attempt to protect, and more particularly seek to provide with the necessary information allowing him to take an informed investment decision in relation to his securities ownership. As we have indicated above in paragraph [19], we note that SEDAR has played a significant role in widening access by all investors and the general public to securityholder materials, prospectuses and other documents prescribed under securities regulatory requirements. In other words, delivery no longer equates access, and we submit that securities regulatory requirements (and corporate ones when applicable) should acknowledge this reality.

[31] We would further suggest, in light of the above, and as some other commentators have done in previous consultations, that the consent provided by an individual or retail investor need not be specific to a particular issuer, but apply to all issuers whose securities have been purchased by him or on his behalf, and that the consent provided by an individual or retail investor be "portable", or effective throughout the chain of intermediaries involved in the delivery of (or access to) securityholder materials and other disclosure documents to that investor as intended ultimate recipient. We submit that implementing such "portability" is appropriate, given the prominence of the current intermediated holding system in Canada and the current

methods to obtain and collect consent to electronic communications in connection with proxy-related materials.

The form of consent

[32] Regarding the form of consent, CSA could for example state that an individual or retail investor who agrees to provide an e-mail address or cellular phone number (or who select another acceptable electronic infrastructure) to a deliverer that is an issuer (when the individual or retail investor is registered) or an intermediary holding securities on his behalf, is deemed to consent to the use of such electronic infrastructure. We would further suggest, as indicated above, that such consent bind all intermediaries involved in the distribution of securityholder materials and other disclosure documents to this individual or retail investor, unless such person request paper delivery. This is what we described above as consent "portability". Reliance upon such number or e-mail address would be valid until replaced or until the recipient otherwise notify the deliverer. We submit that providing an e-mail address or cellular phone number, or selecting another acceptable electronic infrastructure, is in principle similar to providing a mailing address for purposes of paper delivery by mail. We note that under the *Canada Post Corporation Act*, leaving mail at the place of residence or business of the addressee thereof, depositing mail in a post office box or other device provided for the receipt of mail to the addressee thereof, and leaving mail with an agent or other person who may reasonably be considered to be authorized to receive mail by the addressee thereof are deemed to be delivered to the addressee.

[33] We further note that proposed amendments to Section 13.2 of *Companion Policy 31-103CP* provide that the sufficient information about a client's personal circumstances include, both for individuals and non-individuals, his address and contact information. Providing an e-mail address or cellular phone number, or selecting another acceptable electronic infrastructure, could allow such person to receive or access prospectuses through such electronic infrastructure. Although we acknowledge that this might not represent consent allowing the electronic sending of a prospectus to a person who does not have an existing relationship with a registrant, we nevertheless believe it would represent an improvement over the current situation.

[34] We also note that Form 54-101F1 sent by intermediaries to their clients allows clients to provide their e-mail address if they have one.

[35] Registered firms and their registered personnel are subject to extensive regulatory requirements under *National Instrument 31-103* and equivalent rules of the Investment Industry Regulatory Organization of Canada and the Mutual Fund Dealers Association of Canada regarding their relationships with their clients. These regulatory requirements include extensive relationship disclosure information (**"RDI"**) as well as enhanced know-your-client (**"KYC"**) obligations that will take effect under the client focused reforms. We believe that these relationships provide CSA with a means for ensuring that Canadian investors are comfortable with accessing information through electronic infrastructures generally. If CSA have any remaining concerns regarding the efficacy of making access through electronic infrastructures the preferred one, we believe those concerns could be addressed through further RDI and KYC

disclosure that explains to each client how they may locate information on electronic infrastructures relating to their personal investments.

[36] In making these suggestions, we assume that appropriate controls for integrity and data protection to which these entities, or deliverers, are subject under applicable legislation or other regulatory requirements are fully complied with.

[37] We also submit that there is no conflict between the implementation of such terms and conditions and the provisions of other provincial legislation governing e-commerce, or in Québec *An Act to establish a legal framework for information technologies.* The purpose of securities regulatory requirements providing for delivery of securityholder materials and other disclosure documents is clearly different from that animating such legislations. As we indicated above in paragraphs [10] and [30], individual or retail investors that purchased securities of an issuer are beneficiaries of information, voting and participation rights imposed on the issuer or acquirer in specific circumstances. We also submit that the exemption regime contained in the regulations under Canada's Anti-Spam Legislation would be available.

[38] We submit that the successful implementation of an access equals delivery securities regulatory framework is premised on clarifying the requirements regarding consent to electronic delivery of (or access to) securityholder materials and other disclosure documents required under applicable securities regulatory requirements, and submit that CSA have the authority to do so. Without these clarifications, it is unclear if CBCA corporations will be able to fully take advantage of such regulatory framework. In Québec, such clarifications would complement the provisions of *An Act to establish a legal framework for information technologies.* We also submit that the above proposals could in a meaningful manner improve the current challenges faced by issuers, underwriters and dealers in delivering prospectuses in connection with securities offerings, financial statements and related MD&A's. We further submit that implementing these proposals would similarly ease some of the operational challenges associated with the use of and reliance on notice-and-access for proxy-related materials. We are, however, mindful of the need to contemplate appropriate changes to some corporate legislations to fully give effect to the above.

5. When investors should be notified that a document is available

For prospectuses, financial statements and related MD&A's

[39] We submit that there is no need to notify an individual or retail investor that a prospectus has been filed or that financial statements and related MD&A's are available on SEDAR or an electronic infrastructure. Consequently, we support the view that an access equals delivery securities regulatory framework for these documents is appropriate, pursuant to the terms proposed in the Consultation Paper regarding press releases, but subject to the remarks below. We share the views of other commentators that carry significant capital market legal practices expressed in response to previous consultations when they describe the current offering dynamic in Canada associated with short-form prospectuses, and would add that there are no reasons that would warrant a different course of action for initial public offerings. We note as well that CSA

have granted a growing number of reliefs from the requirement to deliver prospectuses in connection with ATM distributions, and that the regulatory requirements governing such types of offerings are in the process of being amended to codify such practice.

[40] The proposed requirement that press releases be published reflects, in our experience, current market practices of a large number of issuers when initiating a prospectus offering and announcing their financial results. However, we submit that base shelf prospectuses would only require press releases when a supplement providing for a specific offering is filed.

[41] Filing the press releases on SEDAR is aligned with our suggestion that SEDAR be the preferred electronic infrastructure for market participants in Canada, but note that currently, only press releases announcing material changes are generally so filed. SEDAR filings may attract civil liability, and we would suggest that consideration be given to such an impact.

[42] We note, however, that changes to the *Securities Act (Québec)* (the "**Québec Act**") may be required to implement this regulatory regime, as the combined reading of sections 29 to 32 appears to request the distribution of a paper copy of the prospectus by mail for the investor to exercise the rescission right conferred to him under section 30 thereof. Consideration should be given to the possibility of granting a blanket exemption waiving such obligation during an interim period.

Repealing the two-days rescission right

[43] We suggest that CSA give consideration to repealing the two-days rescission right that currently exist under securities legislation in Canada, and which may be exercised upon delivery of a prospectus by a dealer.

[44] We have reviewed the legislative history of the introduction of the rescission right in Québec, and submit that such review provides an interesting perspective in the context of the Consultation Paper.

[45] As currently drafted, section 30 of the Québec Act was introduced in 1982, when a new Securities Act was adopted. The Québec Act came into force in 1983. At that time, the rescission right was available to the subscriber only upon failure to receive the preliminary prospectus. The reference to the preliminary prospectus was removed in 1987. The section was further amended in 2011 to add a reference to the delivery of other documents prescribed by regulation, and the delivery of an amendment thereto.

[46] Section 30 is completed by section 214, which allow the person who subscribed or acquired securities without having received the prospectus required to have been delivered to such person to seek rescission of his purchase or price revision, and claim damages. However, such damages can only be claimed from the dealer that failed to comply with section 29 requiring such dealer to deliver the prospectus to the investor.

[47] During the parliamentary debates where the Québec Act was discussed, the then Minister of Finance indicated that such rescission right was derived from similar provisions contained in

the *Consumer Protection Act (Québec)* adopted in 1971 and dealing with itinerant vendors, a defined term under the such legislation. According to the Minister, the rescission right provided the investor with a "cool off" period, or an afterthought period.

[48] The predecessor to section 30 was introduced in 1955, and was applicable in situations entirely different from those summarized above.

[49] As we indicated above in paragraph [35], we submit that registrants are today, and have been for some time, subject to strict rules governing their dealings with clients and the financial products they offer them, and are subject to extensive regulatory oversight, that are not comparable to those in place at the time the rescission right was introduced. The analogy with itinerant vendors might have been relevant at the time; we submit that it is no longer relevant by any standard.

[50] Based on our experience and anecdotal evidence derived therefrom, it is very rare that an individual or retail investor exercises the rescission right conferred by section 30. Our experience also reveals that the determination of the two-days period is at best approximate, since it is premised on a deemed reception in the ordinary course of mail. Logistical challenges of all sort make the delivery of the prospectus, and the related rescission right, cumbersome, time consuming and costly, and we would submit with little or actual benefit to the investor.

[51] We also note the following:

(a) as indicated above in paragraph [39], CSA have granted a growing number of waivers from the prospectus delivery requirements for ATM financings, which we submit reflect some receptivity on the part of CSA on the need to maintain such rescission right;

(b) there have been significant discussions both in Canada and in the US in the past few years to further reduce the settlement time for securities transactions made through an exchange, currently fixed at three business days. Generally, Canada-US cross-border prospectus transactions close within this time frame, while Canadian ones close within five business days. Should settlement time be further reduced, we submit that there will be a conflict between such settlement timing and that currently used to determine when the rescission right has expired;

(c) for a long time, secondary trading in Canada has outpaced and outweighed primary issuances, the only ones (with the exception of control block distributions) that trigger rescission rights. The situation was the reverse when rescission rights were introduced. We submit that it is now difficult to reconcile different regulatory rescission regimes triggered by the manner the purchase of the security is made (prospectus offering relative to the purchase of a similar security on a marketplace or recognized exchange), while the same information about the issuer is publicly available. We acknowledge that the above comment is more relevant for additional offerings.

[52] In light of the above, we submit that the implementation of an access equals delivery securities regulatory framework for prospectuses in the context outlined in the Consultation Paper, is an excellent occasion to further reduce the regulatory burden of issuers and registrants in connection with the delivery of prospectuses, and that the two-days rescission right currently contained in the Québec Act, and similar provisions in other CSA legislations, should be repealed.

[53] As we noted above in paragraph [42], amendments to current securities legislations may be necessary to effectively implement an access equals delivery securities regulatory framework for prospectuses, financial statements and related MD&A's.

For proxy-related materials, takeover bid and issuer bid disclosure documents

[54] We generally support the view that an access equals delivery securities regulatory framework for proxy-related materials may not be appropriate for the reasons outlined in the Consultation Paper, although this is the area where issuers would most benefit from such a regime in terms of reduction of costs and regulatory burden. We however submit, as mentioned in paragraphs [13], [15] and [28] above, that clarifying the requirements regarding consent to delivery (or access) through electronic infrastructures, stating that reliance on electronic infrastructures is the preferred infrastructure for making accessible or delivering securityholder materials and other disclosure documents and streamlining the delivery options and instructions to receive or not securityholder materials under NI 51-102 and NI 54-101 could provide issuers with valuable benefits compared to the current situation, and allow them to reduce their regulatory burden without compromising retail investor protection. We also submit that these improvements would unlikely require changes to corporate legislation.

[55] A number of additional requirements of notice-and-access should be revisited, including the longer timing required to rely thereon. Other commentators have in response to previous consultations indicated a number of areas where improvement to notice-and-access could be implemented to facilitate reliance on such process and make it more effective. We have anecdotal evidence to the effect that notice-and-access is in practice seldom used for documents other than proxy-related materials.

[56] We submit that in essence, the same comments are equally applicable to disclosure documents required to be distributed during a takeover bid and an issuer bid, as well as in connection with rights offerings financings. We also note that except for this type of financing transaction, the Consultation Paper does not address distribution of securities under prospectus exempt market regulatory requirements, whether contained in *National Instrument 45-106* or elsewhere.

6. Revisiting notice-and-access

[57] We understand that the Consultation Paper focusses on obtaining views as to the appropriateness of introducing an access equals delivery securities regulatory framework in the Canadian market. We have indicated that its successful implementation would require a number of changes and simplification to notice-and-access, as mentioned under the headings "Consent to

delivery through electronic infrastructures" and "For proxy-related materials, takeover bid and issuer bid disclosure documents". These suggestions reflect the fact that vote collection and delivery of proxy-related materials to non-registered holders, which may include financial statements and related MD&A's, are subject to the regulatory requirement contained in NI 54-101. Non-registered holders, as indicated above, form the vast majority of securities holders. As we also indicated above, other commentators have in response to previous consultations either provided data illustrating reliance on notice-and-access for both registered and non-registered holders, or provided suggestions of areas where improvement to notice-and-access could be implemented. Anecdotal evidence that we have allow us to believe that such improvements remain relevant today. We invite CSA to obtain additional data that would assist in the preparation of regulatory requirements giving effect to the Consultation Paper, including information as to actual paper delivery of proxy-related materials and relevant electronic infrastructures.

[58] In our view, CSA should formulate their regulatory requirements regarding notice-and-access within the context of today's technologies that are widely available to Canadian investors and the comfort level that Canadian investors have developed with using such technology as their primary means for accessing information.

7. SEDAR as the preferred electronic infrastructure to be relied upon by market participants and investors in Canada

[59] SEDAR is a digital filing system directly under CSA control and oversight. Securityholder materials and other disclosure documents are required to be filed on SEDAR to satisfy securities regulatory filing requirements in selected circumstances (for example, when launching a takeover bid or for the filing of an early warning report). This is essentially why we submit that SEDAR should be designated as the preferred electronic infrastructure to be relied upon by market participants and investors in Canada, although not exclusively.

[60] We suggest that for additional electronic infrastructures where securityholder materials and other disclosure documents may be posted, like the website of an issuer or service provider, discretion be left to issuers as to the choice of such infrastructure, that no mandatory websites or electronic infrastructure be required to be maintained by issuers or on their behalf, and that the requirements applicable to electronic infrastructures be technologically neutral to allow for future technological developments. We would, however, suggest that regulatory requirements provide for indications as to where, and how, securityholder materials and other disclosure documents can be found on such electronic infrastructures. Electronic formats to be used should at minimum be those allowed for filing on SEDAR.

[61] We would further recommend that the current CSA work to redesign and modernize SEDAR take into account the goal of making information regarding specific issuers more easily accessible by investors. For example, retrieving fund facts, ETF facts and financial statements of individual mutual funds should be easier than is currently the case. We believe that CSA should set for itself the goal of making SEDAR as user-friendly as possible since the mandatory posting of fund facts to the websites of investment fund managers is contemplated. In this way, SEDAR

could better fulfill our recommendation of being the primary preferred electronic infrastructure to be relied upon by market participants and investors in Canada.

8. Legislative and regulatory amendments to be considered

[62] As we indicated in our introductory remarks, our comments address some, but not necessarily all, of the potential regulatory issues derived from the proposed access equals delivery securities regulatory framework outlined in the Consultation Paper. Given its general nature, our comments are consequently incomplete as to specific details and changes.

[63] Despite the above, we have indicated that implementing an access equals delivery securities regulatory framework will require a number of amendments to current securities regulatory requirements and policies. It could also require in certain CSA jurisdictions amendments to securities or corporate legislation. In addition, changes to the CBCA already adopted will need to come into force. Additional amendments should also be considered to implement guiding principles governing reliance on electronic communication infrastructures, as we submitted in paragraphs [12] and [13].

[64] In addition to those already discussed in paragraphs [21], [24] to [28], [38], [42], [54] and [57] relating to NI 51-102, CP 51-102, NI 54-101, CP 51-101 and the rescission right under the Québec Act, additional consideration should be given to amendments to *National Policy 51-201* and the repeal of NP 11-201 in its current form. As we submitted in paragraph [28], adoption of a national instrument should be contemplated, which instrument could incorporate some of the provisions of NP 11-201.

[65] Although we fully acknowledge that CSA is not in a position to implement amendments to legislation, we encourage CSA not to hesitate in taking leadership with legislators and governments in identifying legislative amendments that might be required to fully implement an access equals delivery securities regulatory framework in the manner we described above, particularly under certain corporate and other provincial legislations dealing more generally with electronic communications and e-commerce, when necessary. We note that delivery requirements of securityholder materials and other disclosure documents in corporate legislation are easily identifiable, and fairly limited.

9. Application to investment funds

[66] Though the Consultation Paper is soliciting feedback relating to issuers other than investment funds, we wish to take this opportunity to comment on the importance of CSA undertaking similar changes with respect to investment funds.

[67] On December 11, 2019, our firm provided extensive comments to CSA on the proposals described in Reducing Regulatory Burden for Investment Fund Issuers - Phase 2, Stage 1 set out in CSA Notice and Request for Comment dated September 12, 2019 (the "**RID Proposals**"). In our comments, we proposed that websites of investment fund managers or their funds not be made mandatory until CSA extends notice-and-access to provide an offsetting reduction of regulatory burden. We further recommended a wider use of notice-and-access to reduce

regulatory burden for investment funds, and supported the proposed codification of past rulings allowing notice-and access for investment funds, which rulings were, in the words of CSA, drafted with reference to notice-and-access in NI 51-102 and NI 54-101 and adapted for investment funds.

[68] We submit that investment funds should benefit from changes that may result from the Consultation Paper and discussed in our comments above, particularly as to consent and notification. We reiterate our suggestion that a wider use of notice-and-access be contemplated by CSA in respect of investment funds, as there are no reasons supporting significant differences between investment funds and other reporting issuers. Assuming that the RID Proposals are implemented, we note the following continuing differences between investment funds and other issuers:

(a) unlike other reporting issuers, mutual funds generally distribute their securities on a continuous basis and are purchased largely by retail investors seeking diversification and professional investment management. The securities regulatory framework acknowledges this difference by requiring that investors receive a copy of the fund facts before each purchase, or the ETF facts after each purchase in the secondary market (in the latter case, even if the purchase is not part of distribution). Given the volume of trading activity which occurs in mutual fund and ETF securities on a daily basis, significant savings in cost and efficiency would be achieved by extending notice-and-access to the delivery of fund facts and ETF facts;

(b) unlike the current provisions of NI 54-101 applicable to non-investment fund issuers, there are no provisions in NI 54-101 nor the RID Proposals that would permit the delivery of continuous disclosure information of investment funds through notice-and-access. We see no policy reason why the regime applies to the financial statements and MD&A of non-investment fund issuers, but not the financial statements and management reports of fund performance of investment funds.

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We trust that the foregoing comments will be of assistance to the CSA. We would be pleased to elaborate upon our comments at your request. If you would like to discuss our comments further, please do not hesitate to directly contact us.

Yours truly,

FASKEN MARTINEAU DuMOULIN LLP

Gilles Leclerc