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Nova Scotia Securities Commission
Superintendent of Securities, Newfoundland and Labrador
Superintendent of Securities, Yukon Territory
Superintendent of Securities, Northwest Territories
Superintendent of Securities, Nunavut

c/o

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comments@osc.gov.on.ca

Dear Sirs/Mesdames:

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

This comment letter is provided to you in response to CSA Consultation Paper 51-405 – *Consideration of an Access Equals Delivery Model for Non-Investment Fund Reporting Issuers* (the "Consultation Paper"). Following our initial comments we will respond to each of the specific questions set out in the Consultation Paper. We appreciate the opportunity to provide this comment letter and hope that our submissions will be of assistance.

We are enthusiastically supportive of the CSA's proposal to continue to reduce the regulatory burden on public company issuers and other market participants, and believe that a modernization of the requirements for the communication of information to investors, and the market generally, would be a welcome development. We strongly encourage the CSA to pursue this initiative as a priority for 2020.

While the Consultation Paper is framed as a consideration of an "access equals delivery model", we believe it would be helpful to consider the topic of information communication requirements under securities laws more broadly as part of this initiative. The difference between access equals delivery, as discussed in the Consultation Paper, and electronic delivery, as discussed in National Policy 11-201 *Delivery of Documents by Electronic Means* ("NP 11-201"), seems to be teetering on a knife's edge, given the significant overlap between them. We also note that we do not agree with the premise that access equals delivery should always entail a requirement to issue a press release to notify investors or other market participants that they may access a document that has been filed on SEDAR, or elsewhere, for that document to be considered "delivered", and that in certain cases the filing of, and thereby the provision of access to, a document on SEDAR, without further action, should be sufficient to constitute delivery of that document to all parties to whom delivery is required.

We urge the CSA to consider developing, as part of the Consultation Paper process, a delivery model that addresses all requirements for the delivery of information or documentation under securities laws to investors or the market, integrating the very laudable and timely principles of the proposed access equals delivery model with the existing electronic delivery principles of NP 11-201 in a rationalized way.

We suggest that the first step in developing a framework for a comprehensive access equals delivery regulatory model should be to catalog the currently known and available delivery methods for communicating information or delivering documents ("Delivery Methods"), and then assess which method is best suited to be mandated as the required method of delivery for each type of information and document ("Information Types").

Delivery Methods

While other methods for delivering written information do exist,[1] in practical terms we believe that methods listed below are effectively the only methods of communication that

[1] For example, we do not include fax transmission in the list of Delivery Methods, as the practice of faxing documents has largely been replaced by e-mailing PDF copies of documents instead. Given the limited number of market participants who currently have and use fax machines, we do not believe that faxing should be considered a reliable or viable Delivery Method.

would be practical for consideration as appropriate to satisfy the requirements of Canadian securities laws for delivery any of the Information Types that will be discussed below:

- Delivery by regular mail (Canada Post);
- Delivery by courier or messenger service;
- Delivery by e-mailing a PDF or similar electronic version of the document;
- Delivery by way of e-mailing a link which, when clicked, will retrieve a PDF or similar electronic version of the document;
- Delivery by way of a web-based portal or similar electronic document service or system which transmits or delivers a PDF or similar electronic version of the document, or a link which, when clicked, will retrieve an electronic version of the document;
- Delivery by way of posting an electronic version of the document on the issuer's website or another third party website;
- Delivery by way of filing an electronic version of the document on SEDAR;
- Delivery by way of an advertisement in a publication of general circulation that either contains the required information or provides a means to access the required information; and
- Delivery by way of issuing a press release that either contains the required information or provides a means to access the required information.

The prescribed Delivery Method for any particular Information Type could include any one or more of the methods listed above. As part of the process for adopting an access equals delivery regime, we would propose that the CSA consider "assigning" each of the Information Types listed below to one of three tiers of required Delivery Methods, based on the nature of the document or information:

Full Delivery Requirement **–** For information or a document subject to a "Full Delivery Requirement", we propose that the sender should be required to file the information or document on SEDAR as the first step. Once the SEDAR filing has been made, the filer would then be required to deliver a short "informational document" to the required recipients. In order to advance the principles of the Consultation Paper, including efficiency, reduction of cost and waste, and environmental sustainability, the "informational document" would not be required to include the full text of the SEDAR

filed document, but rather consist of a short summary describing the nature of the SEDAR filing together with instructions as to where and how the actual document required to be delivered may be obtained – which may (but need not) include the sender's website or a third party website, in addition to referencing the filing made on SEDAR. The "informational document" could be delivered, at the sender's election, either: (i) by making physical delivery of the informational document to the required recipients by mail, courier or messenger; or (ii) delivering the informational document electronically by any means compliant with NP 11-201; or (iii) delivering the informational document to the required recipients by any other method to which a particular recipient has provided a consent that has not been withdrawn. We believe that the filing of information and documents of this type on SEDAR, combined with the requirement to deliver an "informational document" containing notice of the SEDAR filing to the intended recipient, should be sufficient for these Information Types, and that the issuance of a press release should not be prescribed as an additional requirement for securities law compliance purposes (noting that voluntary issuance of a press release is always an available option).

Press Release as Delivery Requirement – For information or a document subject to a "Press Release as Delivery Requirement", we propose that the sender should be required to file the information or document on SEDAR, and then also be required to issue a press release alerting the market to the fact that the SEDAR filing has been made, and providing instructions as to where and how the actual document or documents required to be delivered may be obtained, which may include the sender's website or a third party website, in addition to the filings made on SEDAR.

Filing as Delivery Requirement – For information or a document subject to a "Filing as Delivery Requirement", we propose that the sender should only be required to file the information or document on SEDAR, without being required to take any further steps to bring that filing to the attention of the required recipients. The public availability of the document filed on SEDAR would constitute immediately effective delivery to all required recipients.

Information Types

In our view, a comprehensive access equals delivery model should specifically consider and address each of the following types of information and documents, and designate them as either subject to a Full Delivery Requirement, a Press Release as Delivery Requirement, or a Filing as Delivery Requirement, as appropriate depending on the nature and purpose of each type of communication. The categorization we would propose for consideration is set out below:

Prospectuses **–** Consideration of the delivery requirements for a prospectus is complex, given that different rules and policies may be appropriate in different circumstances. For example, in the circumstances of an initial public offering, the requirements for delivery of a preliminary and final prospectus or amendments to those documents may justifiably be different from the requirements appropriate for a short-form prospectus offering. It is interesting to note, in particular, that the CSA has already embraced, since the inception of the short form prospectus rules, an access equals delivery model for the documents incorporated by reference into a short form prospectus, which form the core of the required disclosure regarding the issuer. It has been well accepted that investors purchasing securities in a short form prospectus offering should be expected to seek out, on their own initiative, the financial statements, MD&A, material change reports, proxy circulars and other documents previously filed by the issuer.

We wish to draw to the attention of the CSA the importance of exercising caution when considering the application of the U.S. "access equals delivery" model discussed in Annex A to the Consultation Paper in the Canadian context. In the United States, an investor is considered to have made its investment decision on the basis of the preliminary prospectus (or preliminary prospectus supplement) it has in hand at the time it enters a binding commitment to purchase the securities, as supplemented by any additional pricing-related or other information which may be delivered prior to that time. The purchase commitment is made well before the final prospectus is available. The analysis applied to a Canadian prospectus offering is different. Due to the availability of withdrawal rights, Canadian investors in a prospectus offering are considered to have made their investment decision only after they have received the final prospectus containing pricing information, and the withdrawal rights have expired. Putting this point another way, under the U.S. Securities Act of 1933, the final prospectus containing pricing information is a document made available to an investor solely as a matter of record, after a binding investment decision has already been made. In contrast, in Canada the final prospectus containing pricing information is, in theory, the document on which the investment decision is actually based. Given that difference, as a policy matter, the appropriate method for delivery of a U.S. final prospectus and a Canadian final prospectus could potentially be justifiably different as the documents, in theory, serve different purposes at different points in the investment decision process.

In our view, however, prospectuses are an Information Type for which the appropriate Delivery Method should be a Filing as Delivery Requirement. We believe this is true for preliminary prospectuses, final prospectuses, prospectus supplements and amendments thereto, whether short form or long form, as well as base PREP prospectuses and supplemented PREP prospectuses. An investor in a

securities offering (other than a rights offering by prospectus, which is discussed below) is actively making an investment decision to participate in the offering, having been offered and accepted the opportunity to participate in the offering. We believe that all investors should be sufficiently familiar with the SEDAR filing system to know that all types of prospectuses are available on SEDAR, and that filing on SEDAR, without more, should definitively be a satisfactory Delivery Method for this Information Type. We would urge the CSA to eliminate the complexity and uncertainty of requiring the physical or electronic delivery of a final prospectus to investors to "start the clock" on the time period during which withdrawal rights may be exercised. Rather, we propose that the filing and public availability of a final prospectus on SEDAR (including a rights offering prospectus) should constitute concurrent and immediate delivery of the final prospectus to all purchasers, and that withdrawal rights should begin to run at the time of public availability. We do not believe that it should be necessary to issue a press release as part of the required Delivery Method for prospectuses, although disclosure of the offering by way of press release may of course be required for other reasons such as an issuer's timely disclosure obligations.

Rights Offering Circulars and Prospectuses – As a rights offering involves providing an extraordinary and unscheduled entitlement to existing shareholders of a reporting issuer, we believe that it is appropriate to impose a Full Delivery Requirement for rights offerings, whether conducted under a prospectus or rights offering circular. We note that the current mechanism for prospectus exempt rights offerings in Section 2.1 of National Instrument 45-106 *Prospectus Exemptions* ("NI 45-106") already is much in line with the proposed Full Delivery Requirement model, as the issuer is required to prepare a *notice* of the rights offering that must be filed on SEDAR and "sent" to shareholders, to alert shareholders to the fact that a rights offering is taking place. However, the rights offering circular itself is not required to be "sent" under the current rules, but only made accessible through filing it on SEDAR. As with other final prospectuses, we would propose that a final prospectus for a rights offering should only be subject to a Filing as Delivery Requirement, and that withdrawal rights should start to run at the time that a final rights offering prospectus becomes publicly available on SEDAR.

We note that the rights offering prospectus exemption for issuers with a minimal connection to Canada (Section 2.1.2 of National Instrument 45-106 *Prospectus Exemptions*) requires that all materials "sent" to other security holders also be filed on SEDAR and "sent" to each security holder resident in Canada. We would propose that for this Information Type, the permitted Delivery Method should be the same method that is used to send the materials to non-Canadian shareholders, whatever that may be.

Management Information Circulars – Although reporting issuers are required to have annual general meetings of shareholders meetings every year, the precise time at which the meeting is scheduled is not prescribed and may vary from year to year. Further, special meetings may occur at any time. In order to ensure that shareholders are able to exercise their voting rights, we believe that notice of the meeting should be subject to a Full Delivery Requirement, containing instructions regarding where and how to access all other relevant materials, including the management information circular and required accompanying documents. We note that in any case the proxy voting process requires the delivery of a unique "control number" to each registered and beneficial owner which must appear on the proxy or voting instruction form. As a result, it may be most practical to require that the proxy or voting instruction form bearing that control number should be subject to a Full Delivery Requirement, rather than only notice of the meeting.

Financial Statements and MD&A

We believe that the current model requiring the sending of request forms to investors, or alternatively sending annual financial statements and MD&A to all investors, and also sending interim financial statements to investors that request them, should be replaced by new Delivery Method requirements for those Information Types. All investors are aware that reporting issuers are required to file annual and interim financial statements and, in the modern computer age, should be expected to have the means of accessing those documents on SEDAR and knowing when to do so based on their regular filing deadlines. For the purposes of securities law compliance, we propose that a Filing as Delivery Requirement should apply. While as noted in the Consultation Paper there may be other reasons the issuer may wish to, or be required to, preserve the option of paper delivery, we do not believe that the investor protection objectives of the securities laws should prescribe doing so.

Take-Over Bid and Issuer Bid Circulars

Take-over bids and issuer bids are unscheduled corporate events, and afford investors with a unique and time-limited opportunity to sell their shares. For these reasons, we believe that it is important to maintain a Delivery Method for these Information Types that will bring them to the attention of beneficial owners of securities on a timely basis. For this reason, we propose that a Full Delivery Requirement should apply for notice of the bid. We do not believe, however, that actual delivery of the bid documents is necessary for that purpose, so long as the notice to shareholders includes information as to where the actual bid documents and related documentation may be found on SEDAR. Alternatively, the CSA

may conclude that imposing a Full Delivery Requirement is not in fact necessary to bring a take-over bid or an issuer bid to the attention of shareholders, and that imposing a Press Release as Delivery Requirement would be sufficient for this purpose.

We note that a number of the take-over bid and issuer bid exemptions afforded by National Instrument 62-104 *Take-Over Bids and Issuer Bids* require bid materials that are sent to other securityholders to be filed on SEDAR and "sent" to securityholders in Canada. We would propose that for this Information Type, the permitted Delivery Method should be the same method that is used to send the materials to non-Canadian shareholders, whatever that may be. Further, we believe that for the purposes of these exemptions, there should no longer be a required to publish an advertisement as a prescribed Delivery Method. We believe that newspaper advertisements are no longer a reliable means of communicating information to securityholders who often no longer look at print editions of the daily news. Further, there is typically significant lead time and cost involved in purchasing the advertising space, and advertising space is not always available. We would urge the CSA to replace any requirement or condition of an existing exemption which necessitates the publication of an advertisement with a Press Release as Delivery requirement instead.

Responses to Consultation Paper Questions

Set out below are our responses to the specific questions raised in the Consultation Paper.

1. Do you think it is appropriate to introduce an access equals delivery model into the Canadian market? Please explain why or why not.

We believe it is fully appropriate and timely to introduce an access equals delivery model into the Canadian market. As the CSA is aware, the adoption of access equals delivery will bring Canada more in line with the current rules and practices of other major securities markets, including the United States. We believe that access equals delivery will reduce the regulatory burden for issuers by assisting them in reigning in operating costs though savings in both printing and mailing costs and will provide consistency and, in the context of securities offerings made by prospectus, greater certainty to the market regarding the period of availability of withdrawal rights to investors. However, we believe that access equals delivery would be best implemented through the tiered approach we have proposed, imposing as appropriate in the context either:

- a Full Delivery Requirement, which would require "pushing" a notification to the recipient through physical or electronic delivery and also making a SEDAR filing; or

- a Press Release as Delivery Requirement, which would require only a press release and SEDAR filing; or

- a Filing as Delivery Requirement, which would require only a SEDAR filing.

2. In your view, what are the potential benefits or limitations of an access equals delivery model? Please explain.

As the CSA is aware, and as noted above, printing and mailing costs represent a significant cost for reporting issuers. Moving to an access equals delivery model will reduce costs for all issuers, though larger issuers with broader shareholder distribution have the potential for greater cost savings.

Secondly, assuming the CSA adopts our recommendation regarding the period during which withdrawal rights may be exercised in a prospectus offering (as discussed further below in question 4(b)), market participants will have greater certainty regarding the operation of these rights. Currently the period during which withdrawal rights may be exercised runs for a specified period commencing at the time the purchaser receives the prospectus, which is currently often difficult if not impossible to determine with certainty when the prospectus is delivered through conventional methods such as courier service, or the mail. Having greater certainty regarding the commencement and expiry of the withdrawal period will reduce the risk exposure of market participants seeking to close securities offerings as quickly as practicable, particularly in light of the global evolution toward shorter settlement cycles for both secondary market trades and new issues.

Finally, adopting an access equals delivery model will bring Canada more in line with comparable markets, such as the United States, where various access equals delivery rules have been in place for a number of years, including the access equals delivery model for delivery of prospectuses in securities offerings.

We do not believe that the Delivery Method we are proposing for consideration for various Information Types would in any way prejudice market participants.

For example:

- in the case of a prospectus, the issuer and its underwriters or agents will be seeking to sell securities and therefore will be reaching out to prospective purchasers to make them aware of the transaction. In this respect we would expect the issuer and its underwriters or agents to be actively reaching out to prospective purchasers to make them aware of the

transaction, and the availability of the prospectus on SEDAR should constitute a satisfactory Delivery Method;

- in the case of a take-over bid circular or issuer bid circular, the acquiror or issuer, as applicable, is seeking to have the receiving shareholders agree to tender some or all of their shares. In these transactions, we expect that even if issuers are able to take advantage of an access equals delivery model in respect of a take-over bid circular or issuer bid circular, a notice regarding the transaction, letter of transmittal or notice of guaranteed delivery is, in our view, likely to be mailed to each shareholder in order to get the benefit of higher participation rate; and

- in the case of a management information circular or proxy circular, the issuer or dissident solicitor is seeking support from shareholders. In this case, we would anticipate that issuers and dissidents will continue to mail circulars, proxy cards and voting instruction forms to registered and beneficial shareholders in order to solicit sufficient support whether required to do so or not, but in our view they should not be required to deliver full copies of lengthy documents which can easily be accessed on SEDAR instead.

In this respect, we expect that changes to the permitted Delivery Method for these Information Types will not have significant short-term impact on market practice, as self-interest will drive applicable market participants to continue to ensure that recipients receive the information required in order to make fundamental decisions (where applicable). Accordingly, we view the benefits of modernizing the regulatory requirements surrounding the Delivery Method for various Information Types as significantly outweighing any potential detriments.

3. Do you agree that the CSA should prioritize a policy initiative focussing on implementing an access equals delivery model for prospectuses and financial statements and related MD&A?

We agree that the CSA should prioritize modernizing the prescribed Delivery Method for prospectuses and financial statements and related MD&A, as well as other Information Types.

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.)?

In our view the Delivery Method prescribed for all types of prospectus should be filing on SEDAR. We do not see a need to differentiate between the different types of prospectus.

(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.

In our view, an investor's withdrawal right should run from the date on which the final prospectus has become publicly available on SEDAR. The current withdrawal period runs from the date of receipt of the final prospectus (whether by way of physical or electronic receipt), which has in practice resulted in a longer settlement cycle for new issues in Canada than in the United States and other countries (with closing typically on a T+5 basis as compared to U.S. practice of closing on a shorter settlement cycle). The longer settlement cycle in Canadian offerings is a function of the need to provide sufficient time to permit the withdrawal rights to expire, necessitated by the timing requirements for printing, distribution and mailing of the final prospectus, which is still often required where electronic delivery in accordance with NP 11-201 is not feasible. A Delivery Method allowing for the public availability of the final prospectus on SEDAR to be deemed to constitute immediate delivery of the final prospectus to investors, and having the withdrawal right period commence at that time, would provide certainty of timing to market participants without prejudicing investors, who will be aware that the final prospectus must be filed and made publicly available on SEDAR. The unnecessary time delay between the filing of the final prospectus and closing could be reduced accordingly, potentially reducing any interim period closing risk. In addition to certainty of timing for the withdrawal right period, running the period from dissemination of the press release would provide consistency of withdrawal rights across all purchasers, providing greater certainty to issuers.

(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?

We do not believe a news release should be ***required*** as a component of the prescribed Delivery Method for any prospectus. Although an issuer or its underwriters/agents may choose to issue a press release for marketing reasons in connection with a preliminary prospectus, or to satisfy timely disclosure obligations or ensure the information is "generally disclosed" for insider trading purposes, we do not believe such a news release should be required by regulation. In the twenty-three years since the SEDAR system was implemented, investors have become well aware that all prospectuses must be filed on SEDAR, and know how to retrieve them. The issuance of a news release specifically related to a prospectus filing would impose an unnecessary disclosure obligation for no added investor protection benefit.

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.

In our view, the CSA should actively pursue Delivery Method requirements to implement a modernized access equals delivery model for all Information Types. For the reasons discussed above, we do not believe that investor protection or investor engagement concerns outweigh the benefit of realizable savings and benefits to issuers and other market participants. Self-interest will drive continued investor outreach, which should have the effect of avoiding immediate changes to proxy voting infrastructure (until such time as an entirely electronic proxy infrastructure model can be developed and implemented).

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.

Although technologies are constantly evolving and social media outlets are becoming more prevalent and common for issuers, we believe that an issuer's website remains a principal communication tool. As such, we believe that

reference to a "website" is appropriate for posting of information regarding applicable documentary disclosure. However, we do not believe that the CSA should mandate that copies of applicable documents actually be posted on an issuer's website, only that filing on SEDAR should be required. Investors should have the expectation that all required information regarding the issuer will be available on SEDAR. The location of an issuer's website may be difficult to find, and the specific placement of disclosure documents on the website is uncertain. We would suggest that issuers should be invited to post duplicate copies of disclosure documents, or link to or make reference to the availability of the specific disclosure document under the issuer's profile on SEDAR, but not be subject to a mandatory requirement to do so.

(b) Should we require all issuers to have a website on which the issuer could post documents?

As noted above, we believe that a link from an issuer's website to the SEDAR website should be sufficient, and not mandated. Although many issuers have robust websites that also include all relevant continuous disclosure documents in addition to having filings on SEDAR, we do not believe that issuers without the resources to maintain all continuous disclosure documents on their website should be prejudiced and precluded from using access equals delivery. The purpose of the SEDAR website is to ensure that continuous disclosure documents are readily accessible and we do not see the benefit of a mandated duplication.

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?

We believe that filing a document on SEDAR should, by itself, constitute a sufficient Delivery Method for many Information Types, and except for certain specific Information Types as discussed above, a news release should not be required to alert investors that a document is available on SEDAR. In many cases issuers have procedures in place that go beyond the issuance of a news release in order to keep their shareholders informed, including through voluntary electronic mailing lists for dissemination of press releases and other continuous disclosure documents. In addition, as noted above, for many of the disclosure documents that the CSA is specifically inquiring about, issuers and other market participants have a vested interest in ensuring their message is received. We do not believe the CSA should impose any obligations for Delivery Methods other than filing on SEDAR

or, for certain Information Types as discussed above, either the delivery of an informational document or the issuance of a press release.

(b) What particular information should be included in the news release?

We do not believe the CSA should impose specific requirements regarding the information that should be included in a news release (other than the fact that a SEDAR filing has been made), when required as a Delivery Method. Issuers should be free to include in any news release the information that the issuer itself determines to be appropriate.

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?

Please refer to our comments above.

We would be happy to discuss our comments with you; please direct any inquiries to James R. Brown (jbrown@osler.com or 416.862.6647) or Rob Lando (rlando@osler.com or 212.991.2504).

Yours very truly,

(signed) Osler, Hoskin & Harcourt LLP

Osler, Hoskin & Harcourt LLP