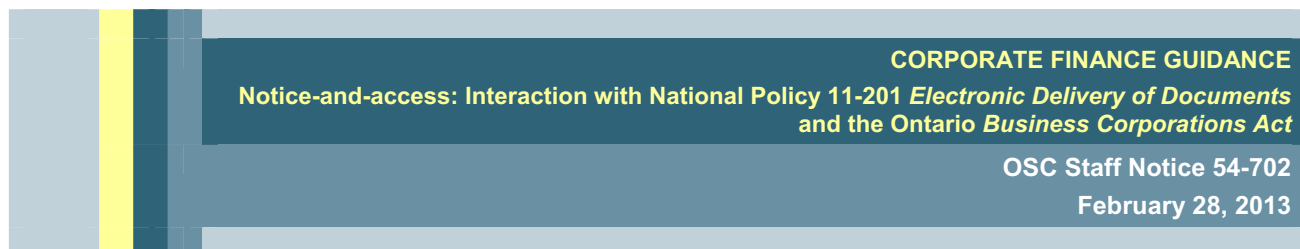


1.1.4 OSC Staff Notice 54-702 – Corporate Finance Guidance – Notice-and-access: Interaction with National Policy 11-201 Electronic Delivery of Documents and the Ontario Business Corporations Act



The purpose of this staff notice is to provide staff guidance to reporting issuers, intermediaries and others involved in the sending of proxy-related materials to registered holders and beneficial owners of an issuer's securities (collectively, **shareholders**) on:

- the interaction of notice-and-access with National Policy 11-201 *Electronic Delivery of Documents* (**NP 11-201**); and
- whether reporting issuers incorporated under the *Ontario Business Corporations Act* (**OBCA**) can use notice-and-access.

This notice represents the views of Commission staff which do not have the force of law. These views are also not legal advice and should not be relied on as such.

Introduction to notice-and-access and interaction with NP 11-201

1. What is notice-and-access?

Notice-and-access is a method for reporting issuers to send proxy-related materials to shareholders that is set out in National Instrument 51-102 *Continuous Disclosure Obligations* (**NI 51-102**) and National Instrument 54-101 *Communication with Beneficial Owners of a Reporting Issuer* (**NI 54-101**). Amendments to NI 51-102 and NI 54-101 adopting notice-and-access came into force on February 11, 2013. In particular, notice-and-access can be used to deliver proxy-related materials for meetings that take place on or after March 1, 2013.

Under notice-and-access, a reporting issuer can send proxy-related materials to a shareholder by:

- posting the relevant management information circular and other proxy-related materials on a website that is not SEDAR;
- sending (by prepaid mail, courier or the equivalent, or any other agreed-upon method) a notice package consisting of:
 - a notice informing shareholders that the proxy-related materials have been posted, and an explanation of how to access the materials; and
 - the relevant voting document (a form of proxy or voting instruction form); and
- providing a toll-free telephone number for the shareholder to request a paper copy of the information circular (and if applicable, other proxy-related materials) at no charge.

Notice-and-access therefore incorporates the use of documents in electronic form that are posted on a website as a method of satisfying the obligation to send proxy-related materials. A reporting issuer generally will send shareholders a paper copy of the notice of meeting and the form of proxy. However, it will not send a paper copy of the management information circular. Instead, the circular is sent through a combination of (i) the issuer posting the information circular on a website, and (ii) the shareholder being notified of its availability and how to access the electronic document. The shareholder is also notified that the shareholder can call the toll-free number provided by the issuer to request that a paper copy of the information circular be sent to him or her free of charge. Upon receiving the request, the reporting issuer must send the information circular by first class mail, courier or the equivalent, within specified timeframes.

2. How does notice-and-access interact with NP 11-201?

NP 11-201 sets out the Commission's views on how the delivery requirements of Ontario securities legislation can be satisfied through electronic delivery – see in particular section 2.1(1) of NP 11-201.¹ The Commission has stated, in connection with delivering proxy-related materials and annual financial statements and MD&A under section 4.6(5) of NI 51-102, that notice-and-access is consistent with the principles for electronic delivery set out in NP 11-201. The Commission also has provided guidance on interpreting the provisions of NI 51-102 and NI 54-101 relating to notice-and-access in the Companion Policies to those instruments.

Notice-and-access is not the only means by which a reporting issuer can satisfy its obligations to send proxy-related materials using electronic delivery or electronic documents. While there is no specific requirement under securities legislation to obtain the consent of an intended recipient prior to using electronic delivery, the Commission has stated that prior consent should be obtained when issuers deliver proxy-related materials using methods other than (i) notice-and-access; or (ii) prepaid mail, courier or the equivalent.² The process of obtaining express consent, and then delivering the document in accordance with that consent, can enable the issuer to achieve some of the basic components of electronic delivery under NP 11-201.³

Notice-and-access and reporting issuers incorporated under the OBCA

We do not think that it is necessary for reporting issuers incorporated under the OBCA to obtain exemptive relief from the Commission under section 113 of the OBCA in order to use notice-and-access. In our view, and as explained in more detail below, the OBCA does not prevent a reporting issuer from sending proxy-related materials using notice-and-access in compliance with NI 51-102 and NI 54-101.

The OBCA does not contain any provisions regarding the sending of proxy-related materials to beneficial owners. The OBCA does, however, contain provisions regarding the sending of proxy-related materials to registered shareholders.⁴ The OBCA also requires that an OBCA corporation send a copy of the annual financial statements and auditor's report to all registered shareholders who have informed the corporation that they wish to receive a copy of those documents.⁵

The definition of the term “send” in the OBCA is inclusive, and includes to “deliver” and “mail.” It does not prohibit the use of electronic delivery or electronic documents, including the procedures contemplated by notice-and-access. Nor does the OBCA impose an obligation that a reporting issuer obtain consent in order for a reporting issuer to use electronic delivery methods to send proxy-related materials. The OBCA also provides that a document or notice “may” be sent by:

- prepaid mail;
- personal delivery; or
- electronic means in accordance with the *Electronic Commerce Act, 2000* (the **ECA**).⁶

We note that the ECA states that a recipient cannot be required to use or accept a document in electronic form without his or her consent. Our view is that under notice-and-access, a shareholder is not required to use or accept the electronic form of information circular (or any other relevant proxy-related materials) since shareholders have the option of requesting a paper copy at no charge to the shareholder. The ECA also states that electronic information or an electronic document is not provided if the information or document is merely posted on a website. Under notice-and-access, issuers must do more than merely post their proxy-related materials on a website. In particular, issuers must mail the notice package to shareholders in advance of a meeting, which will inform them of, among other things, the website posting of the proxy-related materials.⁷

¹ See section 3.5 of the Companion Policy to NI 51-102 (**51-102CP**) and section 5.4(10) of the Companion Policy to NI 54-101 (**54-101CP**).

² See section 5.1 of 54-101CP.

³ See section 2.2 of NP 11-201. The Commission also has noted in section 5.5 of 54-101CP that where documents are sent electronically under NI 54-101, it may still be appropriate to obtain consent in order to achieve the basic components of electronic delivery set out in section 2.1 of NP 11-201.

⁴ See sections 96 (notice of meeting), 111 (form of proxy) and 112 (circular) of the OBCA.

⁵ See section 154(3) of the OBCA.

⁶ The Commission previously has reviewed the legal framework for electronic delivery under the ECA, and has stated that the components of electronic delivery in NP 11-201 are compatible with the legal framework for electronic delivery under the ECA. See section 2.1(2) of NP 11-201.

⁷ See also section 4.1(3) of NP 11-201, which states that merely making proxy documents available for access on a website will not constitute delivery of these documents in accordance with the four components of effective delivery set out in NP 11-201.

Questions

Questions may be referred to:

Winnie Sanjoto, Senior Legal Counsel

Tel: 416.593.8119

Email: wsanjoto@osc.gov.on.ca