

**NOTICE OF IMPLEMENTATION OF  
NATIONAL POLICY 11-201  
DELIVERY OF DOCUMENTS BY ELECTRONIC MEANS**

**Notice of Policy**

The Commission has adopted National Policy 11-201, Delivery of Documents by Electronic Means ("NP 11-201" or the "Policy"). NP 11-201 is an initiative of the Canadian Securities Administrators ("CSA") and has been or is expected to be implemented as a policy in all of the jurisdictions represented by the CSA. NP 11-201 is being adopted concurrently with National Policy 47-201 ("NP 47-201"), Trading Securities Using the Internet and Other Electronic Means.

On June 13, 1997, the CSA published a Concept Proposal Respecting Delivery of Documents by Issuers Using Electronic Media (1997), 6 ASCS 1552 and solicited comments in connection therewith. As a result of the CSA's consideration of the comments received, on December 18, 1998, the CSA published for comment NP 11-201 and NP 47-201 at (1998), 7 ASCS 4433 (the "1998 Draft Policies").

During the comment period on the 1998 Draft Policies, which ended on February 17, 1999, the CSA received a number of submissions. The comments provided in these submissions have been considered by the CSA, and the final version of NP 11-201 being published with this Notice reflects the decisions of the CSA in this regard. Appendix A of this Notice lists the commenters on the 1998 Draft Policies and Appendix B provides a summary of the comments received and the responses of the CSA.

After reviewing the comment letters received in connection with its request for comments, the CSA decided to make a number of changes to NP 11-201. The changes made were not material and the CSA consequently are not republishing NP 11-201 for comment.

NP 11-201 and NP 47-201 are effective January 1, 2000.

**Substance and Purpose**

The substance and purpose of NP 11-201 is to state the views of the CSA on how obligations imposed by securities legislation (as defined in NP11-201) to deliver documents can be satisfied by electronic means. Under the Policy, the CSA indicate that, as a general principle, the delivery requirements of securities legislation may be satisfied by electronic means. The CSA state their views that there are four components to electronic delivery that should be satisfied in order to show good delivery: notice of delivery to the recipient, access of the recipient to the document, evidence of delivery and non-corruption or alteration of the document in the delivery process. The first three components can be satisfied through the use of a consent to electronic delivery delivered by a person or company to a proposed recipient of documents by electronic means.

**Summary of Changes**

The following changes have been made to NP 11-201:

- a) Drafting and clarification changes:
  - i) inconsequential drafting changes have been made to subsections 1.3(2)(b), 2.2(4), 2.5(2)5, 2.5(5), 2.6(2), 2.7, 3.1(1) and 3.1(2),

- ii) paragraph 2.5(2)1 has been amended to refer to a list of the *types* of documents that are electronically deliverable,
  - iii) subsection 2.1(7) has been amended to clarify the circumstances under which an issuer may refer an intended recipient to a third party provider's website,
  - iv) subsection 2.5(2) has been amended to clarify the following matters to be set out in a consent form:
    - A) notice of the availability of a paper version of the document need only be given if the deliverer will make a paper version available in accordance with the guidelines set out in subsection 2.3(6),
    - B) the procedures to be used by the deliverer to maintain the confidentiality of information about the recipient where necessary, and
    - C) that the intended recipient is not obligated to consent to electronic delivery,

and corresponding changes have been made to the sample consent form (Appendix A to the Policy),
  - v) clarification has been provided in subsection 3.4(1) regarding the use of multimedia communications; specifically, the CSA have stated their view that any information presented in multimedia communications that cannot be reproduced identically in non-electronic form should not be included in statutorily mandated disclosure documents, and
  - vi) a new subsection 3.4(2) has been added to clarify that issuers may use multimedia communications to compile and disseminate publicly available information;
- b) subsection 2.3(6) has been changed to state that registrants such as brokers and dealers are not required to make available a paper version of electronically delivered documents in the conduct of newly established businesses or divisions that operate on an electronic basis without paper, provided that such deliverers continue to comply with all applicable securities legislation in the conduct of their business;
  - c) subsection 2.5(6) has been changed to permit a deliverer to request a "blanket" consent to electronic delivery, provided that the intended recipient is made aware of the scope of the consent and has the technological capability to access documents to be delivered by each deliverer that proposes to rely on the consent; and
  - d) section 2.8 has been added to provide that electronic delivery of materials to recipients should be made contemporaneously with the mailing of the paper version of such materials even though the deliverer is able to electronically deliver such materials sooner.

## Outstanding Matters

The CSA intend to pursue several issues arising from the comment letters received, including the following:

- a) establishment of a mechanism by which issuers and other market participants can obtain relief from certain provisions which currently preclude electronic delivery;
- b) permitting the use of electronic media for the proxy-solicitation and voting process; and
- c) the use of authentication technologies as “digital signatures”.

### **Text of Policy**

The text of NP 11-201 follows. Apart from minor changes described under the heading “Summary of Changes”, NP 11-201 is unchanged from the version published at (1998), 7 ASCS 4433.

**DATED:** December 15, 1999.

## **APPENDIX A to Notice of National Policy 11-201**

### **List of Commenters**

1. Tupper Jonsson & Yeadon by letter dated February 4, 1999.
2. CMG-Worldsource Financial Services Inc. by letters dated February 8, 1999.
3. Toronto Stock Exchange by letter dated February 10, 1999.
4. The Canadian Depository for Securities Limited by letter dated February 15, 1999.
5. Royal Trust Corporation of Canada by letter dated February 15, 1999.
6. ADP Independent Investor Communications Corporation by letter dated February 15, 1999.
7. Canadian Bankers Association by letter dated February 17, 1999
8. Sun Life Assurance Company of Canada by letter dated February 17, 1999.
9. Security Transfer Association of Canada by letter dated February 17, 1999.
10. Investment Funds Institute of Canada by letters dated February 17, 1999.
11. Bennett Jones by letter dated February 17, 1999.
12. McCarthy Tetrault by letter dated February 22, 1999.
13. Osler, Hoskin & Harcourt by letter dated March 25, 1999.

## APPENDIX B to Notice of National Policy 11-201

The following is a summary of the comments received and the CSA's responses thereto.

### **General Comments**

#### *Comments*

Most commenters agreed with the CSA's view that information technology advances can be successfully incorporated into the existing securities legislation framework without undermining investor protection. Many commenters expressed their support for the CSA's efforts in developing NP 11-201 and NP 47-201, which will facilitate more efficient and cost-effective communications with investors and will give investors more choice and flexibility in how they receive information.

One commenter asked that the CSA consider further the desirability of implementing NP 11-201 as a mandatory rule. Two commenters asked for greater clarity, requesting that some of the commentary published with the 1998 Draft Policies be included in NP 11-201. A number of the commenters raised concerns regarding the interaction of National Policy Statement No. 41 ("NP 41") with NP 11-201 and the procedure, form and content respecting investors' consent to electronic delivery of documents. While commenters generally provided favourable comments regarding the broad, facilitative approach outlined in both NP 11-201 and NP 47-201, concerns were raised that NP 11-201 does not specifically contemplate two-way communications between investors and market participants. One commenter asked that NP 11-201 clarify that the policies currently followed for mailed distribution of materials will be carried forward into the electronic environment without imposing additional burdens on market participants.

#### *Response*

*The CSA considered enacting NP 11-201 and NP 47-201 as mandatory rules. However, the CSA decided not to do so because of the constant and rapid change of the electronic medium. Consequently, NP 11-201 does not mandate any particular procedures or rules regarding the use of the electronic medium by market participants. Instead, NP 11-201 sets out guidelines while allowing participants to determine how they wish to comply with corporate and securities law requirements for the delivery of materials to securityholders. NP 11-201 does not change any substantive law requirement.*

*In response to the comments received, certain changes have been made to the sample consent form to add items not previously set out therein. The CSA have also liaised with the CSA committee responsible for reformulating NP 41, which will be replaced by National Instrument 54-101 ("NI 54-101"). The CSA forwarded commenters' views regarding the interaction of NP 11-201 with the rules regarding communications with beneficial owners of securities. The CSA intend to revisit the issue of two-way communication between investors and market participants after additional work is done to determine how best to address this matter.*

### **Specific Comments**

#### 1. Consent to Electronic Delivery

##### A. "Blanket" Consents and Multiple Deliverers

## Comments

A majority of the commenters raised concerns about the provisions in NP 11-201 regarding the use of consent forms, particularly the requirement that a consent form should only authorize electronic delivery by one deliverer. One commenter submitted that NP 11-201 could be interpreted such that a single consent form provided to a transfer agent could be treated by that agent as a consent to the electronic delivery of materials for *all* applicable issuers represented by that agent. Several commenters also stated that an intermediary such as a trustee, custodian, broker, or mutual fund dealer should not be required to obtain a separate consent each time a client invested in a new issuer's securities or purchased new funds through a broker or dealer. Additionally, four commenters suggested that both a dealer and the fund companies from whom an investor purchased funds through such dealer should be entitled to rely on a single consent obtained by the dealer. One commenter felt that if an intermediary obtained a consent to electronic delivery, and there were several intermediaries in a "chain", that consent received by such intermediary, which was also an intermediary itself, should be deemed to be a consent on behalf of all clients in the "chain". Another commenter, however, thought that as a general rule, a blanket consent would not be appropriate, but suggested that NP 11-201 provide an exception where the business of the deliverer is carried on wholly electronically. Two commenters stated that the various provisions of section 2.5 raised doubts as to whether a "blanket" consent could be obtained and suggested that the matter be clarified to allow an issuer or intermediary to secure a "universal" or "blanket" consent.

## Response

*The CSA have amended subsection 2.5(6) of NP 11-201 to allow for a "blanket" consent to be used where appropriate, for example, for all mutual funds managed by one manager or for all funds within a fund family. Likewise, an intermediary such as a dealer, trustee or custodian will be able to obtain a blanket consent in respect of more than one issuer provided that the method of electronic delivery and the hardware and software required to access electronically delivered documents will be consistent across different issuers. However, the CSA maintain their position that a blanket consent to electronic delivery will not generally be acceptable unless: (a) the intended recipient is aware that consent is being sought in respect of more than one deliverer (potentially including deliverers not presently contemplated by the recipient), and (b) the recipient has the technological capability to access the documents to be delivered by each proposed deliverer. Market participants, including intermediaries, are encouraged to structure their affairs to take advantage of the efficiencies and cost savings offered by the electronic medium as long as appropriate steps are taken in obtaining an informed consent.*

## B. Notice and Evidentiary Burden

### Comments

Three commenters stated that it should be mandatory for a deliverer to obtain a written consent to electronic delivery and to specify the steps that the deliverer will take to give notice to the investor. One of these commenters also suggested that a deliverer should *not* be allowed to give an intended recipient the option of monitoring the deliverer's website on a regular basis, thereby eliminating any need for the deliverer to give separate notice that a document has become available; the commenter further suggested that it is not appropriate for NP 11-201 to provide that notice can be effected "in any manner" (such as solely through newspaper advertisements, for example). Additionally, one of the commenters felt strongly that deliverers should *not* be allowed to deliver documents electronically without obtaining a recipient's prior consent because the result could be a further disenfranchisement of securityholders, who at the present time do not always receive documents on a timely basis. On the other hand, other commenters

were not opposed to allowing deliverers to decide whether or not to obtain prior consent to electronic delivery, although one commenter suggested that subsection 2.1(5) of NP 11-201 specifically outline the evidentiary burden that deliverers would have to meet to prove due delivery if they chose to deliver documents electronically without obtaining prior consent.

*Response*

*In light of the overriding approach taken by the CSA, NP 11-201 will not mandate that deliverers obtain prior written consent to electronic delivery. NP 11-201 is intended to allow parties to take advantage of technological advancements by providing general guidance to market participants regarding the use of electronic media, rather than set out particular mandatory procedures or rules. The responsibility remains with market participants to determine what is reasonable to comply with the laws as set out in applicable governing legislation. Market participants are reminded that they bear the evidentiary burden of providing that documents were in fact delivered. The CSA are of the view that it is not practicable to outline specifically the evidentiary burden if a deliverer chooses not to seek prior consent. Finally, market participants are reminded that they continue to be responsible for complying with their legal obligations under securities legislation regardless of the form of delivery employed.*

C. "Paperless" Market Participants

*Comments*

One commenter suggested that NP 11-201 should not preclude market participants from setting up operations where all communications would be effected electronically and that such deliverers should not be under any obligation to provide a paper version of documents delivered electronically. Two commenters disagreed with this approach noting that, at least for certain types of corporate actions, documents should continue to be available in paper format.

*Response*

*Given the current technological climate and the fact that not all investors have the ability to utilize electronic communications, the CSA are of the view that, for most market participants, it is not appropriate at this time to do away with a paper-based system. Nevertheless, the CSA recognize that some market participants may wish to set up completely paperless systems. The CSA have therefore made certain changes to subsection 2.3(6) of NP 11-201 to account for such a business model for brokers and dealers who establish new businesses or divisions that are intended to operate on an electronic basis without paper. Registrants are reminded, however, that refusal to deliver a paper version of documents may constitute a breach of their obligations under securities legislation. The CSA remain of the view that it is not appropriate at this time for issuers, and for market participants who are or may be required to deliver documents on behalf of issuers, to use an entirely paperless business model. It is recommended that such parties continue to make available, at no cost to investors, paper versions of documents delivered electronically if requested to do so.*

*It had also been brought to the CSA's attention that an issuer or other deliverer may be in a position to send documents electronically several weeks prior to being able to send out paper versions of the same documents because of the time involved in preparing paper copies for mailing. The CSA are of the view that electronic delivery of materials to investors should be made contemporaneously with the mailing of the paper version of such materials, even if the capability exists to deliver the electronic version sooner. A new section 2.8 has been added to the Policy to address this matter. The CSA also note that delivery*

*requirements under securities legislation contemplate that delivery will be made at the same time to all securityholders.*

D. Draft Form of Consent

*Comments*

Two commenters suggested that the phrase “list of documents” used in the sample consent form should be clarified to refer to a list of the *types* of documents to which a consent would apply. Two commenters suggested that the consent form itself contain, at a minimum, the information set out in paragraphs 2.5(2)1 through 7. Additionally, one of the commenters recommended that the consent form state that consent to electronic delivery cannot be required as a condition of doing business.

*Response*

*The consent form is intended to provide guidance and can be modified to fit the circumstances applicable to a particular market participant. The CSA note that the contents of paragraphs 2.5(2)1 through 7 are already referenced in the consent form. In response to the comments received, the form has been modified to refer to a list of the types of documents that can be delivered. The form has also been modified to state that a recipient is under no obligation to consent to electronic delivery. Finally, the form has been changed to include a reference to procedures to be taken by a deliverer to maintain confidentiality and to specify that in certain circumstances, a paper version of documents delivered electronically may not be made available by the deliverer.*

2. Interface of NP 11-201 with Policy on Communication with Beneficial Owners of Securities

*Comments*

Four of the commenters felt that it was important that NP 11-201 be integrated with NI 54-101, the proposed instrument dealing with communications with beneficial owners of securities. Two commenters stated that to adopt NP 11-201 in isolation would lead to inequities between the treatment of registered and non-registered securityholders; three of the commenters suggested that the CSA consider the adoption of an interim rule permitting electronic delivery of documents to beneficial owners of securities, provided such delivery satisfies the criteria set out in NP 11-201.

With regard to the interface between NP 11-201 and NI 54-101, one commenter submitted that it was inconsistent to allow an intermediary to obtain a “blanket” consent to not deliver certain documents (which is allowed under NI 54-101) while at the same time requiring such an intermediary to secure consent to electronic delivery of documents on an issuer by issuer basis. One commenter suggested that NI 54-101 should be amended to eliminate the requirement to obtain prior consent to electronic delivery and another stated that NP 11-201 should specify that a trustee or custodian can be the “deliverer” of documents to beneficial owners of securities.

One commenter requested that NP 11-201 be amended to state explicitly that the term “prepaid mail” found in securities legislation cannot be interpreted expansively so as to include the sending of documents electronically and that NP 11-201 should set out which delivery obligations in securities legislation preclude electronic delivery. Another commenter asked that the definitions in NP 11-201 be clarified so that there was no uncertainty regarding the ability to deliver trade confirmations electronically.

## Response

*The CSA will not delay implementing NP 11-201 pending reformulation of NI 54-101. The CSA have, however, liaised with the committee reformulating NI 54-101 to achieve integration of NP 11-201 with NI 54-101 in order to facilitate the use of electronic delivery methods in the procedures established for communications with beneficial owners of securities.*

*The CSA are of the view that market participants should satisfy themselves as to which legislative provisions preclude electronic delivery. The CSA are currently considering possible solutions to legislative impediments to electronic delivery, including permitting applications for exemptions from certain legislative provisions in securities legislation that currently preclude the use of electronic methods of delivery. The CSA will also undertake to liaise with the provincial and federal authorities responsible for the administration of applicable corporate statutes to assist in the process of removing legislative barriers to electronic methods of delivery.*

*The CSA are of the view that NP 11-201 does not preclude a trustee or custodian from delivering documents to beneficial owners of securities.*

*The CSA note that subsection 1.3(1) explicitly includes trade confirmations within the list of documents that can be delivered electronically.*

#### 4. Electronic Delivery Using SEDAR or Other Third Party Providers

##### Comments

Two commenters requested that subsection 2.1(7) of NP 11-201 be clarified because the current wording may lead to uncertainty regarding:

1. whether it is acceptable for deliverers to obtain written consent from securityholders to enable such deliverers to refer securityholders to the SEDAR website to access public filings (provided SEDAR continues to offer ready access to filed documents on a timely basis); and
2. whether third party providers of electronic delivery services can post documents to be delivered on a website or whether actual "delivery" of documents by such third party providers is required.

One commenter suggested that if prior consent is obtained, a deliverer should be allowed to refer an intended recipient to a third party provider such as SEDAR. Another commenter wanted assurance that the SEDAR website would be able to handle the projected increased volume of traffic, especially once proxy-related materials are permitted to be sent and voting is permitted to be done electronically. Another commenter suggested that SEDAR satisfies the requirements of NP 11-201 and that it can be used successfully in the disclosure, dissemination and shareholder communication processes.

##### Response

*The CSA have made changes to subsection 2.1(7) to make it clear that referring an intended recipient to a third party website will generally not constitute valid delivery unless the recipient has previously consented to this form of delivery. Further, the CSA note that subsection 2.1(7) does not prohibit referrals to third party sites; it merely recommends that there be prior agreement with the third party for this arrangement and that, in such case, the third party may deliver the documents by sending them to*

*the recipient or by sending notification to the recipient each time a document is available on its website, unless consent to an alternative method of delivery has first been obtained (i.e., prior agreement by recipient to monitor the third party's website).*

5. Delivery of Unaltered Documents

*Comment*

One commenter suggested that deliverers should only be obliged to take “reasonable” as opposed to “appropriate” measures to ensure that electronic documents are not tampered with or altered.

*Response*

*The CSA are of view that it is not sufficient to take reasonable steps if such reasonable steps are not appropriate to ensure that electronic documents are not tampered with or altered. The CSA have amended subsection 2.6(2) of NP 11-201 to provide that deliverers should ensure that all reasonably appropriate and necessary technical steps are taken to ensure that documents are not altered.*

6. Inability to Effect Electronic Delivery

*Comments*

One commenter was of the opinion that section 2.7 of NP 11-201 imposes a higher burden on issuers to effect delivery than is currently the case because securities legislation does not generally require redelivery of documents if there is a failure in delivery. The commenter suggested that, at most, an obligation to redeliver should arise only if documents are not delivered due to a “systemic failure” rather than because the recipient has not kept the deliverer apprised of his or her current e-mail address, for example. Another commenter, while not questioning the requirement to effect delivery by alternative means if electronic delivery is not successful, specified that NP 11-201 should provide sufficient time for alternative methods of delivery to be effected, especially if a chain of intermediaries is involved.

*Response*

*NP 11-201 sets out guidelines rather than specific requirements for electronic delivery. The obligation to deliver documents is found in applicable governing legislation and NP 11-201 is not intended to alter that obligation so as to impose additional burdens on market participants. Market participants should adopt reasonable policies and procedures to deal with failed electronic delivery.*

7. Confidentiality of Documents

*Comment*

One commenter suggested specific revisions to section 3.2 of NP 11-201 to make it clear that a deliverer's obligation to maintain confidentiality extends only to confidential *information* in a document rather than to the document itself, where the document contains a mix of confidential and non-confidential information.

*Response*

*The CSA agree that the obligation to maintain confidentiality extends only to confidential information, but*

*believe no change is necessary to clarify this matter.*

8. Liability for Hyperlinked Information

*Comments*

Two commenters were of the view that if a deliverer uses hyperlinks to provide access to other documents and information, only the *original* information provider should be held responsible for any misrepresentations or inaccuracies in the hyperlinked information. Similarly, another commenter stated that it would be unacceptable, for example, to impose liability for inaccurate or misleading hyperlinked information on a transfer agent carrying out its responsibilities in the course of an electronic distribution of proxy-related materials.

*Response*

*NP 11-201 is not proscriptive but rather contains a warning as to the possible consequences of incorporating hyperlinks into a statutorily mandated disclosure document. Ultimately, whether liability would attach for errors and misrepresentations in hyperlinked information and the persons liable therefor is a question of law to be applied to the particular facts of a case.*

9. Delivery of Proxy-Related Materials

*Comments*

Several commenters suggested that the CSA should ensure that all potential barriers to electronic communications are resolved coincidentally with the adoption of NP 11-201, including legislative changes to permit electronic delivery of proxy-related materials. Other commenters similarly suggested that the Policy should be amended to permit a *two-way* flow of information by electronic means, including the electronic delivery of proxy-related materials and the electronic return of completed proxies and voting instructions. Another commenter requested that NP 11-201 set out which proxy-related materials can be delivered electronically and which are required to be delivered by pre-paid mail. The commenter also noted that there appeared to be a conflict between subsections 1.3(1) and 1.3(3) of NP 11-201.

*Response*

*The CSA will conduct further deliberations regarding the manner in which the rules regarding delivery of proxy-related materials and proxy solicitation can be incorporated into the electronic medium. The CSA are of the view that market participants should satisfy themselves as to which proxy-related materials can be sent electronically and which must be sent in paper format.*

*The CSA also note that there is no conflict between subsections 1.3(1) and 1.3(3) of NP 11-201 because the former is expressly made subject to the latter.*

10. Multimedia Communications

*Comments*

One commenter recommended that NP 11-201 provide more guidance regarding the allowable use of multimedia communications in statutorily mandated disclosure documents. This commenter requested

that a definition of “multimedia communications” be added into NP 11-201. The commenter also suggested that the potential for misrepresentation when information is presented other than in text format should not result in a complete bar to the use of multimedia communications in presenting information in statutorily mandated disclosure documents. The commenter urged the CSA to reconsider its position on this issue and suggested that the prospectus review process could be used, during a trial period, to establish standards with respect to the types of multimedia communications that would be acceptable in statutorily mandated disclosure documents.

#### *Response*

*Clarification regarding the use of “multimedia communications” in statutorily mandated disclosure documents has been provided in section 3.4 of the Policy. The CSA are of the view that graphics, charts and photographs can be included in statutorily mandated disclosure documents so long as such information can be provided in both electronic and non-electronic formats. Communications in the form of video, animation, audio, etc. cannot be readily reproduced in a non-electronic format. The CSA therefore remain of the view that it is not appropriate for issuers to incorporate these types of multimedia communications into statutorily mandated disclosure documents. There are other avenues available for multimedia communications that can be used by issuers and other market participants. Where issuers are of the view that a certain proposed form of multimedia communications would materially enhance an investor’s understanding of a proposed offering of securities, issuers may discuss this matter with staff of the appropriate securities regulatory authority. Issuers wishing to use the electronic medium to compile and disseminate publicly available information (e.g., prepare a CD-Rom with historical financial statements) may do so, as provided in subsection 3.4(2) of the Policy. The CSA will also recommend that the issue of multimedia communications be canvassed in the course of the review of the current rules relating to permissible methods of advertising and the continuous disclosure regime.*