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Registrar of Securities, Northwest Territories
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SENT VIA EMAIL

Re: Notice and Request for Comment – Proposed Amendments to National Policy 11-201 (NP 11-201) *Delivery of Documents by Electronic Means* (the Notice)

The Investment Industry Association of Canada (**IIAC**) is pleased to provide the Canadian Securities Administrators (**CSA**) with our comments in response to the Notice.

The IIAC is a member-based professional association representing approximately 190 IIROC registered investment dealers across Canada (over 90% of the IIROC membership). Our members

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have a strong interest in improving the delivery of electronic documents for the benefit of shareholder clients. In general, we are encouraged by the CSA's efforts to facilitate electronic communications, and we commend the CSA for proposing amendments to NP 11-201 (the **Proposed Amendments** or the **Policy**) to recognize changing attitudes, practices and legislation in this area. However, we do note areas within the Proposed Amendments where we believe that more clarity could be provided, or where we believe that the CSA could make further or alternative changes in policy to align more closely with advancing demands of investors and technological capabilities.

In this submission, we have attempted to answer the questions posed by the CSA in the Notice (including the questions for investors, based on our members' experience with clients), and have also provided comments on specific sections of the Proposed Amendments.

Please contact me if you would like to arrange a follow up meeting to discuss these issues further.

Yours sincerely,

"*Andrea Taylor*"

Questions from the Notice

Are shareholders receiving documents electronically?

Preliminary estimates by our largest IIAC members indicate that approximately 20% of shareholder clients have chosen to receive documents purely by electronic means. A number of other clients have both electronic access and continue to receive paper documents through regular mail.

IIAC members recognize the value of transitioning legacy clients to electronic document delivery. A number of IIAC standing committees frequently discuss the internal programs that firms are using to promote electronic delivery among both clients and investment advisors. Electronic delivery is not only cost-efficient for our members (keeping costs low for clients), but also likely more effective, because paper mailings can be easily lost, and there is no means of knowing if they are actually opened and viewed.

For these reasons, our members are very interested in promoting electronic delivery of documents and welcome policy or legislative amendments that will facilitate this process. The importance of electronic delivery, and signing up clients for electronic delivery, was only emphasized further as the industry recently prepared for the Canada Post/CUPW strike. Concerted efforts were made at many firms to urge clients to register for electronic delivery in anticipation of the disruption of postal services. While we expect the 20% electronic document enrolment rate to increase substantially over time, we note that with respect to proxy materials that this will not necessarily lead to increased participation in shareholder voting. For more detailed recommendations in this area, we refer you to our previous submission on amendments to National Instrument 54-101 (*Communication with Beneficial Owners of Securities of a Reporting Issuer*) (**NI 54-101**) dated August 31, 2010. We also anticipate making further comment in response to the most recently released Request for Comments dated June 17, 2011.

Do you agree that the four basic components for electronic delivery provide an appropriate framework for electronic delivery?

Our members generally agree that the four basic components for electronic delivery outlined in the Policy (notice, access, unaltered document and evidence) provide an appropriate framework for electronic delivery. We agree that the changes made to these components in the Policy were long overdue to take into account the changing attitudes, practices and technological capabilities, both of investment dealers and their clients. However, we believe that the Policy is still overly paternalistic in its approach and not entirely in alignment with the client service trends of the industry.

Do you believe that the Policy presents any impediments to electronic delivery?

In general, we believe that many of the Proposed Amendments will assist in facilitating electronic delivery. However, we do believe that the Policy should be clarified in a few areas where it is unclear if the Policy supports current trends and practices in the financial services industry.

For example, we note that under proposed section 1.4(1), the list of documents to which the Policy applies is written as an exhaustive list of documents, and we recommend that the language in this section be amended to be less prescriptive. Specifically enumerating the documents does not allow for flexibility as the documents required to be delivered under securities legislation changes over time.

We also note that under proposed section 2.1(1), three out of the four elements of electronic delivery that previously referred to documents being "otherwise electronically made available" (elements 1, 2 and 4), have had these references removed. However, we note that in section 2.6(1), a "deliverer should retain records to demonstrate that a document has been delivered ***or otherwise made available*** to the recipient" (emphasis added), so it is not clear what the intended effect of these changes is. We also note that the word "sent" has been replaced by the word "delivered" throughout the document, and that the word "transmitted" has been added to the definition of "delivery" and that the Internet remains one of the means of delivery under the definition of "electronic delivery". Again, it is not clear what the effect of these changes is.

The removal of the language from proposed section 2.1(1) has caused confusion about whether or not a document can be delivered electronically by way of the recipient accessing a website under the proposed Policy. Combined with the issue about the proposed changes to section 2.2 (consent), it is unclear as to whether the CSA is effectively withdrawing its endorsement of delivery by access to a website, a result that seems inconsistent with the general push towards Notice-and-Access with respect to proxy materials under proposed changes to NI 54-101.

As such, we believe that further amendments should be made to make clear that the CSA continues to endorse electronic delivery of a document by accessing it on a website. We do not believe that merely putting a document onto a website is enough to satisfy the delivery requirements in the absence of consent from the recipient to retrieve the document, but discuss this more fully below in our discussion about notice and consent.

Please comment on the proposed amendments to remove guidance on the recommended form and substance of a consent to electronic delivery.

As mentioned above, we are concerned that the removal of certain language in the Policy effectively removes the ability for many of our members to obtain consent from and provide notice to their clients about website access to electronic documents.

While generally we believe that the removal of the language requiring consent and the specific form of consent removes unnecessary technical guidance and duplication with other statutes, we note that language has also been removed from the Policy that provides guidance about consent and notice where electronic delivery is effected by placing a document on a website. As part of their account opening procedures, many of our members receive consent from clients to deliver documents electronically in this fashion, effectively also giving notice of electronic delivery. The consent and notice evidences the agreement of the client to monitor the website, "eliminating any need for the deliverer to provide separate notice" to the client, as described in the current NP 11-201 (section 2.2(3)). This section has been removed from the proposed Policy.

However, the proposed Policy retains section 2.3(2) (currently section 2.2(2)), which states that "a deliverer intending to effect electronic delivery by permitting intended recipients to access a document posted to a website should not assume that the availability of the document will be known to recipients without ***separate notice*** of its availability" (emphasis added). The retention of this section, and the removal of section 2.2(3), suggest that the CSA wishes to effectively end the current practice of investment dealers delivering account statements and confirmation statements online, or wish to introduce a requirement that dealers must provide written notice every time a document is posted online, even when it is posted at the same time every month in the case of monthly account statements.

In our opinion, if intentional, this kind of approach is overly paternalistic and not in keeping with emerging trends that our members see with respect to best practices in client management. We believe that a policy that requires written notice every time a document is updated or provided to be contrary to what clients want and demand. The current client experience has been developed over time to take advantage of technology in order to ensure that the most up-to-date information is available to the client in the format that they require. Clients can log onto their personalized websites to view account information, and do not need to wait to receive a monthly statement or trade confirmation – they can be accessed in real time. Some clients might find the separate notice of every document posted online to be unnecessary "junk" mail, and as pointed out by our members, because proposed section 2.3(1) allows notice to be given in electronic manner, it is conceivable that a client would receive notice by email that they will receive a document by email – a redundant practice that will likely confuse clients and lead to increased complaints.

We believe that the Policy does not take into account practices that have developed over time through consultation with our members' clients, and should be leveraged and promoted. As such, we believe that the Policy should allow for these practices to continue, and should make it explicitly clear that where a client has been given notice of such an electronic delivery system, and has been provided with instructions on how to access and monitor these documents, and has consented to the electronic delivery system, a "separate notice" is not required.

We recommend retaining the language in current NP 11-201 sections 2.2(3) and (4), that provides guidance with respect to placing a document on a website, and reflects current practice where the client agrees to monitor the website on a regular basis.

Additionally, we also wonder why section 3.3(6) in the Proposed Amendments, dealing with delivery of documents by referral to a third party website, such as SEDAR, was moved to Part 3 Miscellaneous Electronic Delivery Matters. It seems as though it more appropriately fits in section 2.3 (Notice) or 2.4 (Access).

Do the requirements of other legislation, including electronic commerce legislation and corporate legislation, impact your ability to satisfy the four basic components for electronic delivery described in the Policy?

As articulated in previous submissions to the CSA on proposed amendments to NI 54-101, we are concerned about the requirements of corporate legislation that may impact our industry's ability to satisfy the components for electronic delivery described in the Policy.

In particular, section 252.3(2) of the *Business Corporations Act (Canada)* (**CBCA**) states that requirements under the CBCA to provide a document are satisfied by the provision of an electronic document where "the addressee has consented, in the manner prescribed, and has designated an information system for the receipt of the electronic document."[1] Section 7 of the CBCA Regulations provides that this consent shall be "in writing". Subsection 153(1) of the CBCA places a duty upon intermediaries to forward copies of shareholder documents (including a "written" request for voting instructions) to beneficial shareholders "without delay after receipt of the notice of the meeting". Shares of the corporation may only be voted if this duty has been fulfilled.[2] Section 153(2) of the CBCA restricts the ability of the intermediary (the investment dealer) to vote the shares unless the intermediary has received "written voting instructions from the beneficial owner". Furthermore, section 153(8) makes the non-compliance with these requirements an offence, liable on summary conviction to a fine and/or imprisonment.

It is not clear that an electronic system of document delivery (such as Notice-and-Access, as proposed for NI 54-101) would fulfill the obligations of investment dealers under the Canadian corporate law statutes that contain these provisions. The IIAC has not been able to identify any provisions that allow for exemptive relief for investment dealers from the obligations in question, and is unaware of what further obligations would be involved with obtaining such relief if it is indeed available.

We understand that the CSA does not propose to provide guidance on the interpretation or application of non-securities legislation in relation to electronic delivery. However, we believe that in the case of the proposed system of Notice-and-Access involving proxy materials where delivery and consent requirements intersect with corporate requirements, that the assistance of the CSA will be crucial in obtaining comfort that what is being proposed in NI 54-101 complies with all requirements for all participants. As supporters of Notice-and-Access, we would like to continue to work with the CSA and other affected parties to complete a comprehensive analysis, and to obtain regulatory comfort that all corporate law requirements will be met under a Notice-and-Access system of delivery.

[1] The Manitoba Corporations Act also contains a provision allowing the electronic delivery of documents with prior express consent. All of the other affected jurisdictions are silent on this matter.

[2] R.S., 1985, c. C-44. Variations on this obligation are also present in Alberta, Saskatchewan, Manitoba, Newfoundland and Labrador, Northwest Territories, Yukon Territory, and under the Bank Act. The variations generally deal with the persons on whom the obligation is placed. In some jurisdictions, the duty is placed upon a "registrant" or similarly narrowly defined group. The definition of "intermediary" in section 147 of the CBCA is more inclusive in its scope.