



THE CANADIAN
BAR ASSOCIATION
L'ASSOCIATION DU
BARREAU CANADIEN

Access Equals Delivery Model for Prospectuses and Other Documents

**CANADIAN BAR ASSOCIATION
BUSINESS LAW SECTION**

March 2020

PREFACE

The Canadian Bar Association is a national association representing 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the CBA Business Law Section, with assistance from the Advocacy Department at the CBA office. The submission has been reviewed by the Law Reform Subcommittee and approved as a public statement of the CBA Business Law Section

Access Equals Delivery Model for Prospectuses and Other Documents

I. INTRODUCTION

The Business Law Section of the Canadian Bar Association (CBA Section) is pleased to comment on the Canadian Securities Administrators' proposed access equals delivery (AED) model for prospectuses and other documents.

The CBA is a national association representing over 36,000 jurists, including lawyers, Quebec notaries, law teachers and students across Canada. Its primary objectives include improvement to the law and the administration of justice. The CBA Section comprises lawyers from across Canada who are experts in all areas of securities law including securities filings, public offerings, corporate governance, continuous disclosure and the regulation of registrants.

II. QUESTIONS

Our comments are organized in accordance with the questions in the consultation document.

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

Yes. Regulatory and administrative practices have evolved to allow electronic delivery and to give investors the option of not receiving certain documents (e.g. financial statements). An AED model is a reasonable extension of these practices.

A primary objective of securities regulation is to ensure that relevant documents such as offering materials are accessible to investors. An AED model furthers this objective and we believe it is an opportune time to implement it – if effective investor protections are included.

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

Benefits

More efficient access: There is a benefit to issuers, investors and potentially dealers, in making the documents accessible in a timely and efficient manner. Investors would have easy access to all relevant documents to make informed decisions, and the convenience of not receiving voluminous paper documents. They would also have easy access on the issuer's website and the System for Electronic Document Analysis and Retrieval (SEDAR). Although navigating SEDAR can be complex, we expect that upcoming reforms to the SEDAR regime will enhance accessibility to disclosure documents online.

Reducing administrative burdens: For continuous disclosure documents such as financial statements and Management Discussions and Analysis (MD&A), an AED model would reduce administrative burdens – which could be especially beneficial for junior issuers.

Tracking delivery and receipt: Currently, there is no way of knowing if an investor has received a paper document let alone reviewed it. An AED system could assist with

tracking the delivery and receipt of the document and, potentially determining if it has been reviewed.

Reduced costs: We expect cost savings for issuers, investors and securities intermediaries.

Environmental benefits: The change would mean significant reduction in paper documents.

Limitations

Scope: An AED model would only work for shareholder reporting requirements not subject to other areas of law – e.g. corporate legislation – unless those other requirements are also updated to reflect the AED model.

Accessibility: While the number of individuals unable to access documents online is small, it will be important to also ensure access to paper documents in certain cases.

Potential vulnerabilities: An electronic system could be vulnerable to cyberattacks or prolonged power outages.

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

Yes. There is already a model in the *notice and access* system for proxy materials. It would be relatively easy to develop a similar process for prospectuses, financial statements and related MD&A.

AED should be implemented for interim financial statements and the related MD&A (other than for investors who opt out either wholly or in part – see our response to question seven below). Prospectuses are also governed by applicable securities legislation and trigger certain statutory rights based on delivery. This necessitates additional considerations that should be addressed to accommodate prospectus delivery under the new regime.

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.)?

Yes. We see no reason to distinguish between types of prospectuses.

(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.

Currently, prospectus withdrawal rights contemplate that the right to withdraw from an agreement to purchase securities may be exercised within two business days after receipt or *deemed* receipt of a prospectus.

In an AED model, calculating withdrawal rights as commencing on the date a final prospectus news release is issued is analogous to *deeming* receipt of a prospectus. This would, in general, parallel current withdrawal rights.

In addition to reduced costs and paper, we expect that in most cases this approach would also allow the offering to close more quickly. By calculating the withdrawal right period from the date of the news release – which could be the same day as the day a receipt is obtained for a final prospectus – rather than receipt (or deemed receipt) of a printed final prospectus, which will often be delivered at least one business day after the final prospectus has been receipted, the withdrawal right period would end sooner than under the current system, facilitating an earlier closing of the offering.

(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?**

A separate news release would be appropriate for both the preliminary and final prospectus. News releases inform the public of the offering and, under an AED regime, would serve the additional purpose of constituting a means of delivery. For a final prospectus, it also sets the date from which withdrawal rights would be calculated.

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?**

Subject to our comments below, AED should be extended to all disclosure documents requiring delivery to investors.

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?

There are significant investor engagement concerns. Investors may not be able to exercise their rights, such as voting and dissent rights, if access is delayed. This is particularly important in the case of rights offerings, take-over bids and “fundamental changes”, as contemplated by corporate legislation.

However, these concerns also exist with the current system as there is no guarantee that paper documents are received or reviewed prior to making investment decisions. An AED model could facilitate the delivery of documents and track receipt and, potentially, review of the documents.

We believe that extending the *notice and access* system – ideally streamlined to make it more cost-effective – would serve this purpose. Investors would still receive a physical notification of the transaction or meeting, but the disclosure document would generally not be delivered.

We recommend more consultations before implementing rule changes affecting documents other than financial statements, MD&A and prospectuses.

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.

We believe that an enhanced notice-and-access system as referenced above would not trigger significant changes to the proxy voting infrastructure.

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.

We recommend that access be as wide as possible and that issuers be encouraged to use multiple platforms. At this time, we believe that one of those platforms must be the issuer’s website and that all documents should continue to be posted to SEDAR – ensuring one place where investors can access all relevant information. Websites are commonly understood platforms and consistent with other regulatory contexts (i.e. stock exchanges) that mandate certain online disclosure.

We are not opposed to other “digital platforms” in addition to a website. A reference only to “digital platform”, however, may hinder access for investors who lack fluency with emerging technologies.

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

Yes, all issuers should have a digital presence where all their relevant information is available. For the moment, a website is preferable. Other platforms may also be acceptable, especially if future technological changes offer more advantages.

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?

For continuous disclosure and prospectuses, generally yes, a news release is sufficient. Financial statements and MD&A are released on a known schedule, and for prospectuses the brokerage community is involved in marketing the offering and can also reach out to interested clients.

Investors should be entitled to opt-out of AED for continuous disclosure documents. It would also be ideal to offer a “partial opt-out”, where the investor requires email notification that applicable documents are available.

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

The news release should include:

1. a brief description of documents;

2. to whom the documents may be relevant;
3. how the documents may be accessed (include links to all platforms); and
4. relevant timelines and deadlines.

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?

As this model has been implemented in other jurisdictions such as the U.S., European Union and Australia, we recommend ascertaining their experience and identifying lessons learned.

We understand that a separate consultation addresses the regulatory burden on investment funds (as opposed to the current consultation on non-investment fund reporting issuers). We note that several commentators advocated for an AED model. We recommend that the delivery model adopted be consistent for “non-investment fund reporting issuers” and for “investment fund reporting issuers” to the extent practicable.

III. CONCLUSION

We appreciate the opportunity to comment on the Canadian Securities Regulators’ consultation on “Access Equals Delivery” Model for Prospectuses and Other Documents. The CBA Section would welcome the opportunity to be of further assistance through future consultations, reviews or development of the initiative.