

TWO OUT OF THREE AIN'T BAD - PROPOSED ACCESS-BASED MODEL FOR DELIVERY OF FINANCIAL STATEMENTS AND MANAGEMENT REPORTS OF FUND PERFORMANCE BY INVESTMENT FUND REPORTING ISSUERS STRIKES ONE SOUR NOTE

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The Canadian Securities Administrators (the “**CSA**”) recently published for public comment proposed amendments^[1] to National Instrument 81-106 – *Investment Fund Continuous Disclosure* (“**NI 81-106**”) and related instruments (the “**Proposed Amendments**”) that are designed to provide an “access-based” model for the delivery of annual and interim financial statements and management reports of fund performance (collectively, the “**Designated Documents**”) by investment fund reporting issuers (“**IFRIs**” or “**Funds**”).

The CSA has opted for a different access-based model for IFRIs than the model that is currently being proposed for non-investment fund reporting issuers because they believe that the typical investor in a non-investment fund reporting issuer has different informational needs than the typical investor in an IFRI. As a result, the CSA did not propose an access-based model for offering documents of IFRIs (Fund Facts, ETF Facts, or prospectuses as applicable) because they are of the view that there are significant benefits to the typical investor in Funds in receiving the relevant offering documents rather than only having access to them.

The goal of the Proposed Amendments is to modernize existing delivery practices and reduce the regulatory burden on IFRIs, together with the associated beneficial environmental impacts, without diminishing investor protection. While the Proposed Amendments achieve many of these goals, we find the requirement to notify securityholders of the availability of new Designated Documents by way of a news release to be somewhat antiquated and burdensome in light of the stated goals of the Proposed Amendments.

Existing Requirements for Delivery of Designated Documents

Currently, pursuant to NI 81-106, an IFRI is required to send paper copies of all Designated Documents to registered holders or beneficial owners of the securities issued by the Fund (each, a “**Securityholder**”).^[2]

Alternatively, an IFRI is permitted to solicit annual delivery instructions (“**Annual Instructions**”) or request standing instructions (“**Standing Instructions**”) from Securityholders with respect to the Designated Documents that they wish to receive or if they wish to opt out of receiving all Designated Documents.^[3] In the event that Standing Instructions are provided, NI 81-106 currently requires the IFRI to send an annual notice (“**Annual Notice**”) to such Securityholders reminding them, amongst other things: (i) where they can access the Designated Documents; (ii) of their right to receive the Designated Documents; and (iii) how they can change their Standing Instructions.^[4]

Proposed Amendments

The Proposed Amendments would repeal the existing requirements to send Designated Documents, to solicit Annual Instructions or Standing Instructions, as well as the requirement to send Annual Notices, and replace them with requirements to:

1. post the Designated Documents on the Fund’s designated website, ensuring that the Designated Documents appear in a prominent manner (to a reasonable person) on the designated website;
2. include a statement on the Fund’s designated website that:
 - (a) explains the choices Securityholders have to receive Designated Documents;
 - (b) describes how Securityholders may provide the Fund with Standing Instructions to receive either electronic or paper copies of all of the Fund’s Designated Documents, commencing as of the date the next Designated Document filed after the Securityholder provides the Standing Instructions; and
 - (c) explains that the Fund will continue to follow the instructions provided by the Securityholder until they are changed by the Securityholder.
3. send paper or electronic copies (as specified by the Securityholder) of the Designated Documents at no cost to Securityholders either upon receipt of a request from the Securityholder for the Designated Document(s) or in accordance with any Standing Instructions provided by them;
4. send a Designated Document requested by a Securityholder or pursuant to Standing Instructions provided by the Securityholder by the later of:
 - (a) the filing deadline for the Designated Document; and
 - (b) 10 calendar days from receipt of the request or instructions in the case of paper copies or 5 calendar days in the case of electronic copies.
5. alert investors on the date that a Designated Document is filed on SEDAR by issuing a news release (a copy

of which must also be filed on SEDAR and posted on the Fund's designated website) which:

- (a) states (in the title) that the Designated Document is available;
- (b) states that the Designated Document is available on SEDAR and on the Fund's designated website;
- (c) provides the address of the Fund's designated website;
- (d) contains instructions, using the specific wording provided in the Proposed Amendments, as to how Securityholders may obtain paper or electronic copies of the Designated Documents pursuant to a request to the Fund or Standing Instructions; and
- (e) provides the contact information for the manager of the Fund.

Delivery Requirements for Investment Funds that are not Reporting Issuers Unchanged

The requirements for an investment fund that is not a reporting issuer remain unchanged; these issuers continue to be subject to requirements substantially identical to the existing requirements summarized above and currently set out in Part 5 of NI 81-106.

Analysis

The CSA's Proposed Amendments to NI 81-106 and related instruments are definitely a step in the right direction. The shift to a predominantly digital, access-based model, which requires Securityholders to "opt in" to receive paper or electronic copies of the Designated Documents will help reduce: (i) the regulatory compliance costs for IFRIs; (ii) the negative environmental impact associated with the delivery of paper copies of Designated Documents; and (iii) the human resources required to be expended in connection with solicitation of Annual Instructions, Standing Instructions and the sending of Annual Notices.

However, we would encourage the CSA to consider other, potentially more effective, alternatives to the proposed requirement for IFRIs to issue and file a news release upon the filing of Designated Documents on SEDAR. A staff review conducted by the Ontario Securities Commission, relating to 30 IFRIs, revealed that none of their currently issued news releases related to publication of the Designated Documents. With approximately 3600 IFRIs and a cost of approximately \$1500 per news release, the imposition of the press release requirement would result in an aggregate of approximately \$10.8 million in incremental costs for IFRIs.^[5]

Commentators on the CSA Consultation Papers on access-based delivery models that preceded the publication of the Proposed Amendments have noted that the Designated Documents are passive in nature (as opposed to action-oriented) and do not require a time-sensitive response from Securityholders, thereby

negating one of the principal reasons for the issuance of a news release. Disclosure documents are also typically filed at predictable intervals (generally 90 days after each calendar year end and 60 days after each interim period).^[6] Few investors under the current delivery model actually “opt in” to receive the Designated Documents and thus there is no demonstrated need to notify investors by way of a news release. Finally, even if a news release is issued and filed, there is no guarantee that it will come to the attention of Securityholders, especially considering that the news release would likely be buried in a virtual “tsunami” of similar news releases issued by other IFRIs at the same time.

Instead of mandating that IFRIs incur the added costs of issuing news releases of questionable value, we suggest that Securityholders be given the ability to “opt in” to receive alerts from the Fund, in the same way that they are able to “opt in” for the delivery of Designated Documents under the Proposed Amendments. If a Securityholder has elected to receive Designated Documents (either in paper or electronic format), then the IFRI would be required to notify them via email when Designated Documents are posted on the Fund’s designated website. For Securityholders who have not elected to receive Designated Documents, prominent disclosure of the posting of new Designated Documents on the Fund’s designated website would accomplish the same objective as a news release (at little or no cost).

We would encourage the CSA to also explore other options reasonably calculated to notify Securityholders of the filing of new Designated Documents such as web alerts linked to IFRIs’ designated websites, social media notifications, mobile applications and other types of “push” notifications.

Additional Questions and Closing of Comment Period

For anyone providing comments on the Proposed Amendments, the CSA have also requested feedback on certain specific questions. Written comments relating to the Proposed Amendments and feedback on the specific questions posed in the request for comments must be submitted by no later than **December 26, 2022**.

If you have any questions about the Proposed Amendments, please contact us.

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[1][ps2id id='1' target=''] [CSA Notice and Request for Comment](#).

[2][ps2id id='2' target=''] [NI 81-106](#) s. 5.1(1) and s. 5.1(2).

[3][ps2id id='3' target=''] [NI 81-106](#) s. 5.2(1).

[4][ps2id id='4' target=''] [NI 81-106](#) s. 5.2(5).

[5][ps2id id='5' target=''] [CSA Notice and Request for Comment s. 6\(a\)](#) (Count of IFRI current as of December 31, 2020).

[6][ps2id id='6' target=''] [NI 81-106](#) s. 2.2 and s. 2.4.

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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