

## MSC Notice 2002-33

### **Proposed Amendments to National Policy 11-201 Delivery of Documents by Electronic Means**

The Commission, together with other members of the Canadian Securities Administrators (“CSA”), is publishing for comment amendments (the “proposed amendments”) to National Policy 11-201 *Delivery of Documents by Electronic Means* (“NP 11-201”).<sup>1</sup>

#### **Background**

There is a growing consensus that delivering proxy documents electronically and using proxy documents in electronic formats can make the proxy solicitation and voting process more efficient, cost-effective, and user-friendly.

The September 1998 IOSCO report on securities activities on the Internet recommended:

Subject to investor protection and confidentiality concerns, regulators should explore the possibilities under their company laws to enable issuers, transfer agents, depositories and broker-dealers to make full use of the Internet for the dissemination of voting information and in the proxy voting process as one means to facilitate full participation by shareholders in annual and other meetings of shareholders.

There also have been a number of developments in corporate and electronic commerce law that support the use of electronic delivery methods and documents in electronic format in the proxy solicitation and voting process. Attached as Appendix A to this Notice is a summary of some of these developments. Market participants are reminded that they are responsible for ensuring that their particular method of electronic delivery or use of a particular electronic format satisfies any requirements of corporate, electronic commerce or other legislation.

#### **Purpose of the Proposed Amendments**

NP 11-201 sets out general principles on how documents required to be delivered under Canadian securities law can be delivered electronically. However, securities law also contains various provisions relating to the proxy solicitation process that have raised questions as to whether the electronic delivery of proxy documents is permitted, and whether proxy documents can be in electronic format.

The CSA has identified two types of requirements in securities law that affect the electronic delivery of proxy documents and the use of electronic formats:

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<sup>1</sup> In Quebec, NP 11-201 is entitled “Notice 11-201 relating to the delivery of documents by electronic means”.

- requirements that a form of proxy or proxy be in written or printed form, and that a registered owner vote securities in accordance with written voting instructions (the “in writing requirements”); and
- requirements that a proxy be executed (the “proxy execution requirements”).

The purpose of the proposed amendments to NP 11-201 is to provide guidance on these issues.

### **Substance of the Amendments**

Most of the substantive amendments are found in a new Part 4 entitled “Proxy Documents”. Several consequential amendments are found in Part 1.

#### *Proxy Delivery Requirements (section 4.1)*

In most jurisdictions, securities laws no longer prescribe particular methods (such as pre-paid mail) of delivering proxy documents to registered shareholders.<sup>2</sup> With regard to beneficial shareholders, National Instrument 54-101 *Communication with Beneficial Owners of Securities of a Reporting Issuer* (“NI 54-101”), unlike its predecessor National Policy Statement 41 *Shareholder Communication*, does not contain a prepaid mail requirement. The Companion Policy to NI 54-101 states that a beneficial owner of securities may be sent security holder materials in electronic form as provided for by NP 11-201.

#### *In Writing Requirements (section 4.2)*

Securities legislation contain definitions of “form of proxy” and “proxy” that incorporate the concept of a *written or printed form*.<sup>3</sup> In addition, securities legislation also provides that a registrant or custodian may only vote shares that are registered in its name but not beneficially owned by it in accordance with any *written voting instructions* received from the beneficial owner.

The CSA is of the view that these provisions do not impede the use of forms of proxy, proxies and voting instructions in electronic format. Electronic commerce legislation in force in a number of jurisdictions now clarifies that a requirement to provide a document in writing can be satisfied by providing a document in electronic form if specified conditions are met.<sup>4</sup> However, market participants should take reasonable steps to ensure the integrity of the information contained in those electronic documents, and to enable a

<sup>2</sup> In Ontario, see sections 85 and 86 of the Securities Act (Ontario).

<sup>3</sup> Subsection 1(1) of the Securities Act (Ontario). See also for example the securities legislation of Alberta, British Columbia, Manitoba, and Saskatchewan.

<sup>4</sup> See Appendix A for examples of such legislation. In Alberta and Manitoba, similar electronic legislation is awaiting proclamation.

permanent, tangible record of the information to be retained for subsequent reference. Guidance is provided in the proposed section 4.2.

*The Proxy Execution Requirements (section 4.3)*

Securities legislation incorporate execution requirements in the definition of proxy. The CSA is of the view that these requirements do not impede the use of proxies in electronic format. Electronic commerce legislation in force in number of jurisdictions now clarify that electronic signatures are legally valid in those jurisdictions. Commonly accepted legal definitions of “executed” and “signature” all suggest that there is more than one method of signing (and hence executing) a document.

However, market participants should take reasonable steps to ensure that the signature of the security holder used to execute the form of proxy permits authentication of the executing security holder’s identity. Guidance is provided in the proposed section 4.3.

**The Proposed Amendments**

The text of the proposed amendments follows.

**Request for Comments**

You are invited to comment on the proposed amendments. Please submit your comments in writing on or before October 8, 2002 .

Please send to the address below two copies of your comments, addressed as follows:

British Columbia Securities Commission  
 Alberta Securities Commission  
 Saskatchewan Securities Commission  
 The Manitoba Securities Commission  
 Ontario Securities Commission  
 Office of the Administrator, New Brunswick  
 Office of the Attorney General, Prince Edward Island  
 Nova Scotia Securities Commission  
 Securities Commission of Newfoundland and Labrador  
 Registrar of Securities, Government of the Northwest Territories  
 Registrar of Securities, Government of the Yukon Territory  
 Registrar of Securities, Government of Nunavut

c/o John Stevenson, Secretary  
 Ontario Securities Commission  
 20 Queen Street West  
 Suite 800, Box 55  
 Toronto, Ontario M5H 3S8  
 Jstevenson@osc.gov.on.ca

Please also send your comments to the Commission des valeurs mobilières du Québec as follows:

Denise Brosseau, Secretary  
Commission des valeurs mobilières du Québec  
Stock Exchange Tower  
800 Victoria Square  
P.O. Box 246, 22nd Floor  
Montréal, Québec H4Z 1G3

If you are not sending your comments by email, please send a diskette containing the submissions (in DOS or Windows format, preferably Word).

Questions may be referred to any of:

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## Appendix A

### Some Recent Developments in Corporate and Electronic Commerce Law

Note: This Appendix is provided for convenience only, and is not intended to be exhaustive. It should not be regarded or relied upon as legal opinion or advice.

	<b>Corporate Legislation</b>	<b>Electronic Commerce Legislation</b>
<b>Alberta</b>	<p><i>Business Corporations Act</i> Use of electronic signatures and telephonic or electronic means will be permitted under the ABCA once the Electronic Transactions Act is proclaimed. Until then, see:</p> <ul style="list-style-type: none"> <li>• section 147 for definitions of "form of proxy" and "proxy"</li> <li>• section 131(3) which permits shareholder meetings by telephonic means</li> <li>• section 148(2) which requires a proxy be executed by the shareholder</li> <li>• section 148(4) which permits a shareholder to revoke a proxy in writing or "in any other manner permitted by law". Clause (b) will accommodate the use of electronic signatures and telephonic or electronic means of transmission to sign and revoke proxies when the Electronic Transactions Act is proclaimed</li> <li>• section 255 which requires that notices and documents to shareholders and directors be sent personally or by pre-paid mail. Electronic delivery cannot be accommodated until this provision is amended to specifically permit delivery by electronic means.</li> </ul>	<p><i>Electronic Transactions Act</i> (awaiting proclamation)</p> <ul style="list-style-type: none"> <li>• section 1 – definition of "electronic signature" and "record"</li> <li>• section 10 – information or a record to which this Act applies cannot be denied legal effect or enforceability solely by reason that it is in electronic form</li> <li>• section 11 – a legal requirement that information or a record be in writing is satisfied if the information or record is in electronic form and is accessible</li> <li>• section 12 – a legal requirement that a person provide information or a document in writing to another person is satisfied by the provision of the information or document in an electronic form subject to certain conditions</li> <li>• section 16 – a legal requirement for a signature is satisfied by an electronic signature, subject to additional requirements prescribed by legislation</li> </ul>
<b>British Columbia</b>	<p>The <i>Company Act (BC)</i> requires proxy materials to be sent by prepaid mail. The proposed Business Corporations Bill (which would replace the <i>Company Act</i>) has been tabled in the Legislature. The Bill indirectly accommodates electronic proxies and the proposed regulations under the Bill would allow electronic delivery.</p>	<p><i>Electronic Transactions Act</i></p> <ul style="list-style-type: none"> <li>• section 5 – a legal requirement that information or a document be in writing is satisfied by information or a document that is in electronic form, subject to certain conditions</li> <li>• section 6 – a legal requirement that a person provide information or a document in writing to another person is satisfied by the provision of the information or document in an electronic form subject to certain conditions</li> <li>• section 11 – a legal requirement for a signature is satisfied by an electronic</li> </ul>

	<b>Corporate Legislation</b>	<b>Electronic Commerce Legislation</b>
		signature, subject to additional requirements prescribed by legislation
<b>Ontario</b>	<p><i>Business Corporations Act</i></p> <ul style="list-style-type: none"> <li>• section 1 – definitions of “electronic signature” and “telephonic or electronic means”</li> <li>• section 109 – definitions of “form of proxy” and “proxy”</li> <li>• section 94 – shareholder meetings by telephonic or electronic means</li> <li>• section 110 – use of electronic signatures and telephonic or electronic means of transmission to sign and revoke proxies</li> </ul>	<p><i>Electronic Commerce Act</i></p> <ul style="list-style-type: none"> <li>• section 5 – a legal requirement that information or a document be in writing is satisfied by information or a document that is in electronic form, subject to certain conditions</li> <li>• section 6 – a legal requirement that a person provide information or a document in writing to another person is satisfied by the provision of the information or document in an electronic form subject to certain conditions</li> <li>• section 11 – a legal requirement for a signature is satisfied by an electronic signature, subject to additional requirements prescribed by legislation</li> </ul>
<b>Saskatchewan</b>	No amendments regarding electronic documents to <i>The Business Corporations Act</i>	<p><i>The Electronic Information and Documents Act, 2000</i></p> <ul style="list-style-type: none"> <li>• section 8 – a legal requirement that information or a document be in writing is satisfied by information or a document that is in electronic form, subject to certain conditions</li> <li>• section 9 – a legal requirement that a person provide information or a document in writing to another person is satisfied by the provision of the information or document in an electronic form subject to certain conditions</li> <li>• section 14 – a legal requirement for a signature is satisfied by an electronic signature, subject to additional requirements prescribed by legislation</li> </ul>