



Ontario
Securities
Commission

Commission des
valeurs mobilières
de l'Ontario

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**IN THE MATTER OF
NATIONAL BANK FINANCIAL INC.
(IN RESPECT OF ITS PREDECESSORS
NATIONAL BANK FINANCIAL LTD. and NBCN INC.)**

STATEMENT OF ALLEGATIONS

(Subsections 127(1) and (2) and Section 127.1 of the *Securities Act*, RSO 1990, c S.5)

A. ORDER SOUGHT:

Staff of the Enforcement Branch of the Ontario Securities Commission ("**Enforcement Staff**") request that the Commission make an order pursuant to subsections 127(1) and (2) and Section 127.1 of the *Securities Act*, RSO 1990, c S.5 (the "Act") to approve the settlement agreement dated January 23, 2018 between Commission Staff and National Bank Financial Inc. ("**NBF**").

B. FACTS:

Enforcement Staff make the following allegations of fact:

a. Overview

1. Disclosure is a cornerstone principle of securities regulation. Investors are entitled to receive appropriate product disclosure outlining the potential benefits, risks and costs of investing in an exchange traded fund ("**ETF**"). This disclosure must be provided in an accessible and timely manner so that investors can make an informed purchase decision.

2. The Ontario NB Dealers acted contrary to the public interest and contrary to their obligations as registered firms by failing to take the necessary steps to provide for timely delivery of summary disclosure documents to investors who purchased ETF securities in accordance with the terms of the applicable exemptive relief decisions (the "**Delivery Issues**"). The Delivery Issues were caused by inadequacies in the Ontario NB Dealers' systems of controls and supervision which formed part of their compliance system.

3. The Delivery Issues affected a total of 128,199 ETF purchase transactions involving 44,857 client accounts from February 5, 2015 until September 26, 2016. Of those ETF purchases, 50,972 transactions were conducted by the Ontario NB Dealers and the remaining 77,227 transactions were conducted by NBF's predecessors, National Bank Financial Inc. and National Bank Direct Brokerage Inc. (collectively, the "**Québec NB Dealers**").

4. The Autorité des marchés financiers (the "**AMF**") acted as principal regulator for the Québec NB Dealers. The AMF is commencing a parallel proceeding against NBF in respect of the Québec NB Dealers. It is anticipated that NBF will concurrently agree with Staff of the AMF to recommend settlement of an AMF enforcement proceeding on the basis of substantially the same facts, conclusion and terms as are set out in the settlement agreement.

b. The Parties

5. NBF is a corporation formed on November 1, 2017 by the amalgamation of the Ontario NB Dealers and the Québec NB Dealers pursuant to the laws of Canada, with its head office in Montreal, Québec. It is registered with the Commission as a futures commission merchant and investment dealer.

6. National Bank Financial Ltd. ("**NBF Ltd.**") was, during the material time, a corporation incorporated pursuant to the laws of Ontario, with its head office in Toronto, Ontario. It was registered with the Commission as a futures commission merchant and investment dealer. The Commission acted as its principal regulator.

7. NBCN Inc. ("**NBCN**") was, during the material time, a corporation incorporated pursuant to the laws of Ontario, with its head office in Toronto, Ontario. It was registered with the Commission as an investment dealer, and it was registered with the AMF as an investment dealer and derivatives dealer. The Commission acted as its principal regulator.

8. National Bank Financial Inc. ("**NBF Inc.**") was, during the material time, a corporation incorporated pursuant to the laws of Québec, with its head office in Montréal, Québec. It was registered with the AMF as a derivatives dealer, investment dealer and in financial planning. It was registered with the Commission as a futures commission merchant and investment dealer. The AMF acted as its principal regulator.

9. National Bank Direct Brokerage Inc. ("**NBDB**") was, during the material time, a corporation incorporated pursuant to the laws of Québec, with its head office in Montréal, Québec. It was registered with the AMF as a derivatives dealer and investment dealer. The AMF acted as its principal regulator.

10. The Ontario NB Dealers and the Québec NB Dealers (collectively, the "**NB Dealers**") acted as designated brokers and/or authorized dealers for ETFs during the material time.

c. Exemptive Relief Decisions

11. In order to deal with prospectus delivery issues arising from the distribution model used in connection with ETF securities, the Commission and the AMF granted the NB Dealers and most other dealers that act as designated brokers and/or authorized dealers for ETFs (collectively, the "**ETF Dealers**") exemptive relief from the prospectus delivery requirement under section 71 of the Act and section 29 of the *Québec Securities Act*, CQLR c. V-1.1. This exemptive relief was initially granted by way of decisions of the Commission and the AMF issued on July 19, 2013. These decisions were subject to a sunset clause and were replaced by decisions issued on August 24, 2015, under which the same exemptive relief was granted subject to very similar conditions (collectively, the "**Decisions**").

12. The Decisions were granted on the basis of representations made by the ETF Dealers, including the NB Dealers, that it was not practicable to know whether any particular purchase of ETF securities would constitute a trade in newly issued securities of an ETF (generally called "creation units") which would trigger a prospectus delivery requirement. In response to these representations, the Decisions created an alternative disclosure delivery system for the ETF industry by introducing a new summary disclosure document for ETFs (the "**Summary Document**"), and by shifting the delivery obligation to dealers acting as agent of the purchaser in an ETF transaction. The ETF Dealers were heavily involved with the creation of this regime, with the aim of ensuring that compliance with the terms and conditions of the Decisions would be practicable.

13. Pursuant to the Decisions, the ETF Dealers accepted certain conditions, including:

- (a) undertaking to deliver or send the latest Summary Document filed in respect of an ETF security by not later than midnight on the second day after the purchase of the ETF security, excluding weekends and holidays, unless the ETF Dealer had previously done so. This delivery obligation applied to each

purchaser of an ETF security who was a customer and to whom a trade confirmation was required to be sent or delivered by the ETF Dealer in connection with the purchase;

- (b) having in place written policies and procedures to ensure compliance with the Decisions; and
- (c) filing a certificate on an annual basis whereby an ultimate designated person at the respective ETF Dealer would certify, to the best of the person's knowledge after making due enquiry, compliance with the terms and conditions of the applicable Decision (the "**Certification**").

14. The disclosure framework contemplated by the Decisions was codified by way of amendments to National Instrument 41-101 *General Prospectus Requirements* on December 8, 2016. As a result of these amendments, effective December 10, 2018, all dealers who act as agent of a purchaser of an ETF security will be required to deliver a Summary Document to the purchaser.

d. Delivery of Summary Documents by the NB Dealers

15. During the material time, the NB Dealers used a common back office called the Mutual Fund Dealer Operations group (the "**MFDO**") to administer delivery of the Summary Documents to purchasers of ETF securities in accordance with the Decisions. The delivery of the Summary Documents was outsourced by the NB Dealers to a third party service provider (the "**Service Provider**"). The MFDO sent instructions to the Service Provider relating to the delivery of Summary Documents (the "**Delivery Instructions**").

16. In September 2013, the NB Dealers began delivering Summary Documents to purchasers of ETF securities in accordance with the Decisions. Beginning at that time, the Delivery Instructions the MFDO provided to the Service Provider resulted in the initiation of delivery of Summary Documents to every first time purchaser of an ETF security, regardless of whether or not delivery was required by the Decisions on the basis that a trade confirmation was required to be delivered to the purchaser.

17. In late 2014, the over-delivery of Summary Documents was raised as an issue through client inquiries to the MFDO. As a result, the MFDO initiated a technical change request with the Service Provider to provide for suppression of delivery of Summary

Documents where trade confirmations were not required to be delivered to the purchaser. The revised Delivery Instructions were intended to suppress the delivery of Summary Documents that were not required under the terms of the Decisions, and to direct the delivery of only those Summary Documents required by the Decisions.

18. This change request was tested to ensure that the Service Provider was capable of properly interpreting the revised Delivery Instructions from the MFDO. The revised Delivery Instructions became operational on February 5, 2015.

e. Initial Delivery Issue

19. Although the goal of the revised Delivery Instructions was to suppress the delivery of Summary Documents for certain trades where delivery was not required, it resulted in delivery of Summary Documents being suppressed for all trades. A Summary Document was not sent or delivered as required to any customer of the NB Dealers who purchased an ETF security and received a trade confirmation in respect of that purchase from February 5, 2015 until the matter was remedied on December 22, 2015. As a result, no Summary Document was delivered as required for 120,882 ETF purchases by 41,444 separate customer accounts (the "**Initial Delivery Issue**"). Of these transactions, 49,954 purchases were made by 17,254 customer accounts of the Ontario NB Dealers.

20. The MFDO first became aware of the Initial Delivery Issue in mid-April 2015 when the Service Provider's monthly invoice showed no charge for the delivery of Summary Documents. The MFDO treated the matter as a billing issue at the outset and not as an operational issue affecting delivery of the Summary Documents, or as a regulatory compliance issue. Given its perception of the nature of the issue, the MFDO did not prioritize investigation of this Initial Delivery Issue and the situation continued over the following months.

21. In July 2015, the NB Dealers received validation from personnel at the MFDO that the controls in place for Summary Documents were running well. However, the NB Dealers were subsequently unable to locate any records in support of that validation.

22. In mid-October 2015, a personnel restructuring occurred at the MFDO and a new MFDO Interim Senior Manager was appointed. In late October, the MFDO Interim Senior Manager became aware of the Initial Delivery Issue regarding the Service Provider's invoices and initiated an investigation into the matter.

23. Senior management of the NB Dealers were apprised of the delivery problem in the second week of November 2015. The problem was investigated and a technology fix was pursued. Following internal and external testing with the Service Provider, a technology fix was implemented on December 22, 2015.

24. The NB Dealers recommenced delivery of Summary Documents to ETF purchasers on December 22, 2015. In order to remedy the Initial Delivery Issue, the NB Dealers began to identify the ETF purchasers who should have received a Summary Document. Work on remediation was undertaken with the Service Provider between December 22 and December 30, 2015. The NB Dealers provided all data files required to effect remediation to the Service Provider by December 30, 2015. The Service Provider completed all of the required remedial mailings to the affected ETF purchasers on or before January 6, 2016. Customers who received the remedial mailing were advised of the Initial Delivery Issue and were provided with a copy of the applicable Summary Document.

25. The NB Dealers first advised Staff of the Commission and the AMF of the Initial Delivery Issue on January 29, 2016, when they delivered their Certifications for 2015 as required by the Decisions. The Certifications delivered to the Commission stated that the Ontario NB Dealers “had complied with the terms and conditions of the Decisions, as applicable, during the calendar year ended December 31, 2015, except for the matters described in Appendix A attached hereto.” The appendices attached to the Certifications disclosed that the Ontario NB Dealers had failed to deliver Summary Documents on a timely basis to all clients purchasing ETF securities to whom trade confirmations were required to be provided between February 5, 2015 and December 22, 2015 and who had not previously received the latest Summary Document for the purchased ETF security.

f. Subsequent Delivery Issue

26. During the course of Staff’s investigation into the Initial Delivery Issue, the NB Dealers disclosed on January 13, 2017 that Summary Documents were not delivered on a timely basis for an additional 7,317 ETF purchases by 3,413 separate customer accounts between February 5, 2015 and September 26, 2016 (the “**Subsequent Delivery Issue**”). Of these transactions, 1,018 purchases were made by 552 customer accounts of the Ontario NB Dealers.

27. As a result of the Initial Delivery Issue, the NB Dealers initiated a general review of the Summary Document delivery process and a related risk control assessment, with the

aim of continuing to monitor and improve the process for delivery of Summary Documents. In September 2016, the NB Dealers identified two further issues with the Summary Document delivery process:

- (a) five ETF securities were inadvertently missing from the master list used to identify relevant ETF securities for the Summary Document delivery process, which resulted in 494 of the 7,317 instances of Summary Documents not being sent or delivered as required; and
- (b) 35 other ETF securities were identified in the master list as being ETF securities but were then inadvertently excluded from the Summary Document delivery process, which resulted in 6,823 of the 7,317 instances of Summary Documents not being sent or delivered as required.

28. In December 2016, an additional remedial mailing was made to the affected ETF purchasers. Customers who received the remedial mailing were advised of the Subsequent Delivery Issue and were provided with a copy of the applicable Summary Document.

29. On January 31, 2017, the NB Dealers delivered their Certifications for 2016 to Staff of the Commission and the AMF as required by the Decisions. In the Certifications, the NB Dealers disclosed the Subsequent Delivery Issue and advised that Summary Documents had been sent or delivered to all of the affected purchasers.

g. Impact of Delivery Issues

30. The NB Dealers failed to ensure timely delivery of Summary Documents in accordance with the terms of the Decisions for a total of 128,199 ETF purchase transactions over a nearly 19-month period, as detailed below:

Ontario NB Dealers	Transactions	Client Accounts
NBF Ltd.	36,960	10,405
NBCN	14,012	7,401
Subtotal	50,972	17,806

Québec NB Dealers	Transactions	Client Accounts
NBF Inc.	46,456	14,043
NBDB	30,771	13,008
Subtotal	77,227	27,051
Total	128,199	44,857

31. The aggregate market value of these transactions at the time of purchase was over \$2 billion. The NB Dealers earned commissions and fees of over \$2.6 million in respect of these transactions as detailed below:

Ontario NB Dealers	Market Value of Purchases	Commissions
NBF Ltd.	\$294,136,985.81	\$917,909.92
NBCN	\$376,393,269.45	\$236,779.72
Subtotal	\$670,530,255.26	\$1,154,689.64

Québec NB Dealers	Market Value of Purchases	Commissions
NBF Inc.	\$1,881,369,680.45	\$1,257,982.65
NBDB	\$297,085,334.15	\$214,730.55
Subtotal	\$2,178,455,014.60	\$1,472,713.20

Total	\$2,848,985,269.86	\$2,627,402.84
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32. As set out above, the number and value of transactions attributable to the Québec NB Dealers is proportionally higher than those attributable to the Ontario NB Dealers.

33. As a result of the Delivery Issues, investors did not receive the required product disclosure from the NB Dealers in a timely manner.

C. NON-COMPLIANCE WITH ONTARIO SECURITIES LAW AND CONDUCT CONTRARY TO THE PUBLIC INTEREST:

Enforcement Staff allege the following non-compliance with Ontario securities law and conduct contrary to the public interest:

34. By engaging in the conduct described above, the Ontario NB Dealers failed to establish, maintain and apply policies and procedures that establish systems of controls and supervision:

- (a) sufficient to provide reasonable assurance that the Ontario NB Dealers, and the individuals acting on behalf of the Ontario NB Dealers, were in a position to provide timely delivery of Summary Documents during the material time; and
- (b) that were reasonably likely to identify and correct the Delivery Issues in a timely manner.

35. As a result, the Ontario NB Dealers did not comply with section 11.1 of National Instrument 31-103 – *Registration Requirements, Exemptions and Ongoing Registrant Obligations*. In addition, the failures in the Ontario NB Dealers' systems of controls and supervision associated with the Delivery Issues were contrary to the public interest.

DATED this 24th day of January 2018.

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