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May 26, 2014

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Delivered to:

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Dear Sirs/Mesdames:

Re: CSA Notice and Request for Comment

Implementation of Stage 3 Point of Sale Disclosure for Mutual Funds – *Point of Sale Delivery of Fund Facts*

Proposed Amendments to National Instrument 81-101 *Mutual Fund Prospectus Disclosure* (NI 81-101) and Companion Policy 81-101CP to NI 81-101(2nd publication) – published for comment March 26, 2014

We are pleased to provide the members of the Canadian Securities Administrators (CSA) with our comments on the proposed amendments relating to the implementation of "Stage 3" point of sale disclosure for mutual funds (POS 3), which is described in the above-noted CSA Notice. Our comments are those of individual lawyers in the Investment Management practice group of Borden Ladner Gervais LLP and do not necessarily represent the views of BLG, other BLG lawyers or our clients.

Throughout all of the stages of the CSA's point of sale (POS) project, we have provided comments to the CSA, including the last publication of the POS proposals in June 2009. As we pointed out in our October 2009 comment letter, we fully support the aim of the CSA to improve disclosure for mutual fund investors and to make it easier for investors to have an appropriate level of understanding of the potential benefits, risks and costs of investing in a mutual fund and to be able to meaningfully compare one fund with another.

We very much support the CSA's efforts to significantly simplify the June 2009 POS proposals with this most recent publication, although we continue to reserve our judgement on whether or not the Fund Facts regime will help to improve investors' understanding of their investments. We understand that the CSA have resolved to move forward with POS 3, and rather than continuing to raise our concerns with POS 3, we have chosen to focus on comments that we hope will improve the actual rule and Companion Policy and assist industry participants to properly implement and comply with the rules. We continue to have the following concerns with POS 3, all of which were more completely outlined in our October 2009 comment letter:

1. POS 3 does not reflect the important role that advisors (dealing representatives) have in making recommendations to clients about mutual funds that will be suitable for those investors. As we pointed out in our October 2009 letter, mutual funds can only be acquired by investors who work with a registered dealer and its registered representatives, unless a dealer registration exemption is available. We continue to believe that it is very important for the CSA to keep in mind that investors do not generally invest in mutual funds after only reviewing a prospectus or other written information about those funds. In all cases (other than those investors who acquire mutual funds through discount brokers), the investor is relying on the advice of a registered representative, including, in many cases, the recommendations of that registered representative.

2. POS 3 does not give investors a flexible choice on how (or whether) they wish to receive a disclosure document, including a choice on being given the ability to access the document on a website. The restrictive nature of the "investor opt-out" proposed in this most recent version of POS 3 will mean that this option is not available to most investors – including investment-savvy and knowledgeable investors who are relying on their advisors, or "accredited investors" who for other purposes, are entitled to invest in any security with or without a form of written disclosure document.

3. The CSA have not discussed in this most recent publication any timetable for a review of the entire disclosure system. Contrary to our recommendations set out in our comment letters (including our October 2009 letter), the Fund Facts regime is simply layered on top of the existing disclosure regime for mutual funds. The entire disclosure system for mutual funds is well overdue for a complete overhaul in ways that we recommended in our October 2009 letter.

4. We submit that there are technical, cost and practical issues that may be associated with pre-trade delivery of Fund Facts and we do not agree with the CSA that technological advances in the last 5 years have removed most, if not all, of the cost barriers to implementation. There may be substantive costs in retaining the service providers the CSA speak of as being available to the industry and integrating these tools within a dealer's operations, which should not be understated or over-looked, especially in light of the fact that the industry is faced with two substantial implementation projects occurring almost simultaneously (POS 3 and CRM-2 – defined below). It is a significant change to shift the delivery obligation from a dealer back office operation to the front line sales force, and the successful achievement of this change in ways that are meaningful to investors, requires time.

Finally, we note that we have had the opportunity to review the recommendations made by the Investment Funds Institute of Canada to the CSA and wish to provide our general support for those recommendations. IFIC's letter speaks for many in the industry, and while we chose not to specifically repeat IFIC's comments in our comment letter, we agree with its sentiments. We have focused on areas where we felt our legal expertise would be most valuable or where we see necessity for modifications to the CSA's proposed regime.

Our specific comments on the most recent POS 3 proposals are as follows.

1. Recognition of Significant Changes in Regulatory Landscape

As the CSA themselves note, much has changed in the five years since the CSA published the POS delivery proposals in 2009. The significant simplification and streamlining of the proposed requirements for POS delivery of Fund Facts (perhaps in implicit recognition of these changes, but also in response to comments) are commendable. However, we consider that the CSA continue to inappropriately discount the wide-spread availability and accessibility of Fund Facts to Canadian investors and still have failed to properly link POS 3 to the "client relationship model – stage 2" changes (CRM-2) coming into force over the next couple of years.

(a) Since January 2011, fund managers have been preparing and posting on their websites and on SEDAR, a Fund Facts for each series of each mutual fund. We consider that Fund Facts are widely available and easy to access on all fund managers' websites. As a result, we consider it important that the CSA consider

that dealers and their representatives should be able to use this "infrastructure of public availability" in delivering the Fund Facts to clients through sending clients electronic links to the applicable Fund Facts and in certain circumstances directing clients to the applicable website to access the Fund Facts. Physical or even electronic delivery of Fund Facts should not be the only alternative for delivery.

The CSA have been steadfast in their refusal to accept the concept of "access equals delivery" in connection with POS 3. While we may not agree with the policy rationale for this refusal, we urge the CSA, at the very least, to acknowledge in the Companion Policy, that an advisor speaking with his or her client, may appropriately tell the client where to click on a specific website to access the Fund Facts, as part of the CRM-2 "pre-trade" discussions. We also encourage the CSA to clarify in the Companion Policy, the ability of an advisor to email the client a website link to a specific Fund Facts document, given that questions on this method of delivery are not clearly answered in the CSA proposals. Both of these delivery methods will reflect, in our view, practical reality and will not unduly disrupt the "flow" of advisor/client conversations on investing.

We feel particularly strongly about permitting this form of delivery when advisors are dealing with "accredited investors", including *individuals* who would fall within this class of investor.

Therefore, we would urge the CSA to further refine their position on how the Fund Facts are to be delivered or sent. We suggest that the CSA modify their position to state that any conceivable method of actual delivery or electronic sending will be acceptable (i.e., by mail, courier, email, fax or in-person delivery) and verbal instructions on how to access the Fund Facts would be permissible. We would also like the CSA to clarify that "access" by, for example, an actual website link directing the investor to the mutual fund's website for a copy of the most currently filed and posted Fund Facts of a particular series of a fund, is acceptable.

(b) Implementation of the CRM-2 requirements is being phased-in from July 2013 to July 2016 and overlap with the implementation of POS 3. Dealers should be able, and encouraged, to use their pre-trade disclosure platform under CRM-2 as an effective and efficient means to satisfy the new delivery requirement under POS 3. We anticipate that without regulatory integration, the smooth implementation and transition of the industry to the POS 3 regime will be a challenge. We submit that in order to mitigate this, the CSA must carefully consider the links between the two initiatives, as well as the appropriate transition period for POS 3 (we discuss the transition period issue further below) and document their views in this regard.

2. Transition Period for POS 3

We believe that an appropriate and reasonable transition period for the implementation of POS 3 is critical in light of the industry's current focus on implementing CRM-2 and the major operational changes and systems that registrants will need to develop, test and implement in order to ensure concurrent compliance with the new CRM-2 framework and the POS 3 delivery framework. We consider the CSA's suggestion of an implementation date sometime in 2015 to be aggressive. In our view, it will be challenging for the industry to implement POS 3 within a 12 month period and we do not recommend anything shorter (we note that in parts of the POS 3 publication, the CSA appear to suggest a three month transition period, which we believe is inappropriate). We acknowledge that some dealers may simply purchase one of the available appropriate technological solutions to comply with the suggested 12-month transition period. However, we point out that many dealers will want to integrate any technological solutions available on the market with their own systems, as well as operationalize, train and test the whole process in order to provide a seamless client experience. Therefore, to account for the desirability of a smooth transition in the midst of CRM-2 implementation, we strongly recommend a minimum of 18 to 24 months from the date any POS 3 rule becomes effective, for the transition period.

3. Pre-Authorized Purchase Plans (PAC Plans)

We agree with the inclusion in the proposed amendments of an exception for PAC Plans (the Proposed Exception) and emphasize the importance of providing industry participants with the ability to access such an exception. We agree with the proposed definition for "pre-authorized purchase plan" as currently drafted, as it is sufficiently broad and appropriately captures the concept of PAC Plans. Our main concerns with the Proposed Exception deal with the following four issues, which we urge the CSA to carefully consider and to fine-tune the Proposed Exception accordingly.

(a) *Fund Facts Delivery for New Participants Only*

We agree that any new participant in a PAC Plan should receive the Fund Facts upon the initial purchase under the PAC Plan. However, for participants who are currently in a PAC Plan where there exists exemptive relief from sending the disclosure document for every subsequent purchase under the PAC Plan, POS 3 should not require dealers to provide such existing participants with the Fund Facts if they did not previously request to receive the disclosure documents. In addition, even if no relief currently exists for a particular PAC Plan, dealers should not be required to provide existing PAC Plan participants with Fund Facts once the rules become effective because these participants have already made their decision about whether or not they wish to receive a disclosure document. Therefore, we urge the CSA to modify the Proposed Exception to reflect the fact that only new participants in a PAC Plan should receive the Fund Facts and that there should be no requirement to send the Fund Facts to existing participants in PAC Plans. We

note that existing PAC Plan participants will be advised annually of their ability to request the disclosure document.

(b) *Annual Reminder Notice*

We agree with the concept of including an annual reminder notice requirement in the Proposed Exception as this is consistent with the current PAC Plan relief that exists in the industry and it is appropriate to remind existing participants annually that they can request the Fund Facts, although we would encourage the CSA to allow dealers to give investors information on how they can access the most recent Fund Facts (consistent with our comments above). However, we urge the CSA to revise the Proposed Exception because, as it is currently drafted, the annual notice is required for all participants in a PAC Plan, and not just existing participants, which is problematic, as we note above. We suggest that the Proposed Exception be modified to reflect that the annual notice (and Fund Facts – as noted above in (a)) needs to be sent to new participants only at the time of the initial PAC Plan set-up.

(c) *No Reply Form*

We do not support the inclusion of a reply form in the notice package to be sent to PAC Plan participants and strongly urge the CSA to remove this from the Proposed Exception as currently drafted. The original relief that widely exists for the industry only required a reply form when the "no simplified prospectus" regime was first implemented for PAC Plans. Since this date, current PAC Plan participants have simply been receiving the annual notice. We submit that the reply form should not be imposed for any PAC Plan participants (whether existing or new) as these participants have either already provided instructions as to whether or not they wish to receive a disclosure document (in the case of existing participants) or they will have a more cost-efficient means of providing instructions – for example – by noting the instruction at the time of PAC Plan set-up or by way of contacting a specified telephone number or by accessing the Fund Facts on websites. There are new technologies, methods and options available that participants can use to ask for and access the Fund Facts, which are much more cost-efficient than a hardcopy, pre-paid postage reply card. It would make more sense to simply include the request for instructions (and not a reply form) with the PAC Plan set-up package. We understand that if a reply form is required, then the associated costs are significantly increased for many such that it would be cheaper to simply mail (or electronically deliver) the Fund Facts each time they are amended. Therefore, we strongly recommend the CSA delete this requirement from the Proposed Exception.

(d) *Transition and Grandfathering for Existing PAC Plan Relief*

The Proposed Exception, as currently drafted, suggests that a Fund Facts will be required to be delivered for the first trade made under the PAC Plan after the proposals come into force, notwithstanding that PAC Plan arrangements for many participants have been in place for many years. As a result, this would trigger the requirement to mail an "initial" notice (and reply form – please see (c) above) to existing PAC Plan participants rather than allowing the annual notice to be sent or delivered at the regularly scheduled time during the year. We find this problematic because we do not believe that it is appropriate to consider such a *subsequent* trade made under an existing PAC Plan as a "first purchase under the plan" (as the CSA note in the Notice). The Proposed Exception, as currently drafted, is onerous for those who are currently able to simply send an annual reminder notice to existing PAC Plan participants. Industry participants should be able to simply continue with the annual notice regime under which they are currently operating because this makes the most sense from both a logical standpoint (i.e., existing PAC Plan holders are not "new" participants in PAC Plans and therefore should not be treated as such) and an efficiency standpoint (i.e., it would be very costly to adjust timing of sending notices ad hoc in response to when the next PAC Plan runs after the effective date of the new rules). At the very least, the POS 3 regime should allow dealers to send the first Fund Facts after the coming into force of the rules at the next scheduled mailing to clients.

We note that transition for existing PAC Plan relief holders is currently under discussion with the CSA in a current application to amend existing PAC Plan relief. However, if this issue is not addressed in that amended relief, then it will need to be addressed under the current rule making process for POS 3.

4. Delivery of Fund Facts for Multiple Alternatives of Suitable Mutual Funds

We consider misguided the CSA's proposed guidance limiting advisors from mailing out bundles of Fund Facts for various alternatives of suitable mutual funds, in advance of meeting with the client to make recommendations and take instructions. In our view, this form of delivery will allow investors to have an opportunity to read the material, compare the various mutual funds and series available to them, have an educated conversation with their advisors and then be able to have the trade proceed immediately on making an investment decision after their meeting (in person or by telephone) with the advisor. We see this approach as being in the best interest of clients, as well as a common sense, practical and efficient way of achieving the CSA's objectives. We wish to remind you that the CSA imposed the strict form requirements for the Fund Facts to allow for the easy comparison between mutual funds. Providing clients with bundles of Fund Facts for various alternatives of suitable mutual funds allows the possibility of easy comparison

while educating the clients about the various options available to them. We urge the CSA to reconsider their restrictive approach in light of the policy rationale and objectives behind POS 3.

5. Missing from the Proposed Amendments

(a) *Withdrawal and Rescission Rights* – We understand that the CSA are not currently proposing amendments to withdrawal and rescission rights applicable to mutual fund trades, without acknowledging the various industry submissions made over the past decade underscoring the need for rationalization and harmonization of these provisions, as well as for additional clarity on their interpretation and application.

The revised proposals bring the need of the CSA to respond to these submissions into sharper focus. For example, the "withdrawal rights" for investors are tied to receipt of the "prospectus", which could mean that these rights will be non-existent if the Fund Facts is provided to investors at least 2 days before the trade and the timing of this two day period differs among CSA jurisdictions. We also query why a right of rescission with the delivery of a trade confirm should still exist (in some jurisdictions). In addition, the CSA should be cognizant that if the Fund Facts is not delivered (and the investor seeks a right to damages or rescind the purchase), it is the fund and other investors in the fund that are impacted even though it is the dealer's failure to deliver.

At the very least, we urge the CSA to consider that the currently mandated disclosure of these investor rights for Fund Facts will need to be amended to reflect the new proposals, so as to provide a more realistic explanation of the rights.

(b) *Mutual Fund Disclosure Reform* – As noted above, the CSA do not reference any next steps in mutual fund disclosure reform, other than to signal that there will be proposed rule amendments published in the fall 2014, which will be designed to require exchange-traded funds (ETFs) to prepare summary documents akin to Fund Facts and require their delivery by dealers in advance of any trade.

We continue to urge the CSA to move to review the simplified prospectus and annual information form requirements for mutual funds as we believe that both documents are in need of rationalization and reform, particularly now that these documents will be read only very rarely by investors in light of the focus on Fund Facts.

(c) *Misrepresentation of Material Facts* – In our previous comment letters, we have voiced our concerns about the liability of funds and fund managers for the

disclosure in the Fund Facts and the other prospectus and continuous disclosure documents. Our complete analysis is set out in our October 2009 comment letter (comment 8) and we continue to have the same concerns we outlined for the reasons stated in that letter. We continue to urge the CSA to conduct further analysis of this issue, notwithstanding the CSA's views that they do not agree with our analysis, or at the very least to outline a more complete explanation of the CSA's views in the Companion Policy so that industry participants will have the benefit of the CSA's views in the future.

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We thank you for allowing us the opportunity to comment on the proposals set out in the CSA Notice. Please contact any of the following lawyers at the contact details provided below if the CSA members would like further elaboration of our comments. We, together with other BLG lawyers who have considered the proposals, would be pleased to meet with you at your convenience.

- Rebecca Cowdery at 416.367.6340 and rcowdery@blg.com
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Yours very truly,

BORDEN LADNER GERVAIS LLP

(signed) "Borden Ladner Gervais LLP"

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