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SUBMITTED BY E-MAIL

British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
Financial and Consumer Services Commission (New Brunswick)
Office of the Superintendent of Securities, Prince Edward Island
Nova Scotia Securities Commission
Office of the Superintendent of Securities, Newfoundland and Labrador
Office of the Superintendent of Securities, Northwest Territories
Office of the Yukon Superintendent of Securities
Office of the Superintendent of Securities, Nunavut
(collectively, the "**CSA**")

Attention:

The Secretary
Ontario Securities Commission
20 Queen Street West
19th Floor, Box 55
Toronto, ON M5H 3S8

Me Anne-Marie Beaudoin
Corporate Secretary
Autorité des marchés financiers
800, square Victoria, 22e étage
C.P. 246, Tour de la Bourse
Montréal (Quebec) H4Z 1G3

Dear Ladies and Gentlemen:

Re: Implementation of Stage 3 (Pre-Delivery) of Point of Sale Disclosure for Mutual Funds – Proposed Amendments to National Instrument 81-101 *Mutual Fund Prospectus Disclosure* ("NI 81-101") and Related Consequential Amendments (the "Proposed Amendments")

Thank you for providing us with the opportunity to comment on the Proposed Amendments.

About Faskens

Fasken Martineau DuMoulin LLP ("**Faskens**") is a leading Canadian law firm which provides advice to investment fund managers, dealers and service providers primarily through our offices in Toronto, Montréal, Vancouver, Calgary and Paris. Currently,

eleven partners at Faskens devote a substantial portion of their practice to advising clients on structuring, offering and managing investment fund products and services, and are supported by further partners with expertise in specific fields including tax, derivatives and financial institution regulation. Accordingly, Faskens is one of the largest Canadian legal practices in the investment products and wealth management area. Our client base includes managers of retail mutual funds, closed-end funds, exchange-traded funds, commodity pools, hedge funds, pooled funds, segregated funds, mortgage investment entities, linked note issuers, private equity funds and separately managed account services. We regularly assist clients with developing innovative investment products including, where necessary, obtaining novel discretionary relief under Canadian securities legislation and advance tax rulings to accommodate those products. In providing our comments below, we have drawn from our experience assisting clients with adapting to the new point of sale disclosure regime for public mutual funds ("**POS**").

Cost-benefit

The Proposed Amendments were not accompanied by a meaningful cost-benefit analysis. In fact, the CSA expressly acknowledged that the costs and benefits of the Proposed Amendments are "difficult to quantify". Accordingly, we do not see a basis for the CSA's conclusion that the "…potential benefits of the changes to the disclosure regime…are proportionate to the costs of making them".

A meaningful cost-benefit analysis is a critical requirement of the rule-making powers of the CSA. Without it, there is a reduction of both the ability of market participants to comment on the merits of proposed new securities legislation, as well as the accountability of the CSA in making such proposals. The Proposed Amendments have instead reversed the onus of the cost-benefit considerations by inviting commentators to provide specific data concerning anticipated costs. In our view, this "reverse onus" does not fulfill the requirements of Canadian securities legislation for the CSA to provide a meaningful description of the anticipated costs and benefits of the Proposed Amendments.

Accordingly, we believe that the CSA should create a more detailed description of the anticipated costs and benefits of the Proposed Amendments and submit that analysis for public consultation before proceeding further with the Proposed Amendments.

Timing of pre-delivery of fund facts

The Proposed Amendments will require that a dealer deliver the relevant fund facts to the investor before the dealer accepts an instruction from the investor to purchase the securities. The term "accept" is relatively new in Canadian securities legislation and it is

unclear at what point in the purchasing timeline that "accept" is considered to occur. Some interpretation possibilities are:

- A point in time prior to when the investor provides his or her purchase instruction to the dealer in order that the fund facts can be received and reviewed by the investor before making the purchase decision. This appears consistent with the related companion policy amendments which state that pre-delivery must occur within a reasonable timeframe "…before the investor's instruction to purchase".

- When the investor provides his or her purchase instruction to the dealer. This would be a bright-line test that would enable dealers to create appropriate compliance procedures.

- After the investor has provided his or her purchase instruction, but a reasonable time prior to order execution in order to allow the investor to review the fund facts before the purchase order is completed.

- When the dealer executes the purchase order, which also would be a bright-line test that would enable dealers to create appropriate compliance procedures.

We note that the term "accept" also is used in recent amendments to National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* relating to pre-delivery of certain cost disclosure under the CSA's client relationship model[1]. However, that Instrument and its related companion policy do not provide any explanation of the term "accept".

Accordingly, we suggest that the CSA revise the Proposed Amendments to include a clear indication of when "accept" will be considered to occur.

Pre-authorized trades

The Proposed Amendments include an exception from delivering fund facts for purchases under a pre-authorized purchase plan ("**PAC**"). This exception is equivalent to current prospectus delivery exemptive relief previously granted by the CSA for PAC purchases.

However, no equivalent exception is included in the Proposed Amendments for other types of pre-authorized trades, such as automatic rebalancing services. An automatic rebalancing service might not qualify as a PAC since the amounts and dates of each purchase vary based on the parameters rebalancing service. However, despite that variability, standing instructions from investors for rebalancing trades are functionally

[1] Section 14.2.1 of that Instrument.

the same as a PAC (e.g., the investor has pre-determined the mutual funds he or she wishes to own and the quantity of those investments) and rebalancing trades are executed without obtaining further instructions from the investor. If rebalancing trades and other types of pre-authorized purchases do not qualify for the PAC exception, it is not apparent how fund facts can be pre-delivered in these circumstances since pre-authorized trades typically are executed as soon as the criteria from the investor's standing instructions are satisfied.

Accordingly, we suggest that the CSA expressly confirm in the companion policy that any purchases of mutual fund securities effected under standing instructions from the investor will qualify for the PAC exception. Alternatively, the definition of "pre-authorized purchase plan" can be clarified as follows:

> "pre-authorized purchase plan" means a contract or arrangement, that can be terminated at any time by the purchaser, for the purchase of securities of a mutual fund by either payments in a specified amount on a regularly scheduled basis or on dates and in amounts determined under other standing instructions from the purchaser.

Transition for existing PACs

The Proposed Amendments state that the first purchase under an existing PAC after a date to be determined will be considered to be the first purchase under the PAC for purposes of new section 3.2.1.1(5) of NI 81-101, there triggering the requirement to deliver fund facts and the prescribed disclosure before such PAC purchase is executed. This means that fund managers which currently offer PACs will need to ensure the fund facts and required disclosure are provided to existing PAC participants during the transition period as if the participants are being newly enrolled in the PAC. No policy rationale for this requirement was contained in the Proposed Amendments.

Existing PAC participants who are not currently receiving fund facts due to exemptive relief will have received substantially the same disclosure under the terms of such relief. The mere fact that, under Stage 3, the fund facts will delivered to investors prior to purchase rather than within two business days following purchase does not, by itself, warrant any addition disclosure to existing PAC participants nor a one-time delivery of fund facts. Under the terms of existing relief, existing PAC participants were advised that no fund facts would be delivered to them in the future unless requested. Whether those fund facts otherwise would have been delivered pre-purchase rather than post-purchase is immaterial.

Accordingly, unless the CSA publishes their policy rationale for this requirement for public comment, we believe that section 7 of the Proposed Amendments should be deleted.

Urgent purchases

The Proposed Amendments include a new pre-delivery exception for a trade where the investor has stipulated an execution deadline too short to include pre-delivery of fund facts. Instead, the dealer would be obligated to make post-delivery of the fund facts within two business days after the purchase. This "urgent purchase" exception would be available only if the conditions contained in new section 3.2.1.1(3) of NI 81-101 are satisfied.

While new section 3.2.1.1(3)(a) states that the condition therein must be satisfied before a dealer accepts the investor's purchase instruction, there is no equivalent requirement for the other conditions specified in new section 3.2.1.1(3) to be satisfied before the dealer accepts the investor's purchase instruction. If this was a drafting oversight by the CSA, we suggest that section 3.2.1.1(3) be revised to expressly state that all of the conditions therein must be satisfied before the dealer accepts the investor's purchase instruction.

Similarly, while new section 3.2.1.1(3)(e) expressly states that the condition therein must be satisfied verbally, there is no equivalent acknowledgement that the other conditions in new section 3.2.1.1(3) can be satisfied verbally. If this was a drafting oversight by the CSA, we suggest that section 3.2.1.1(3) be revised to expressly acknowledge that all of the conditions therein can be satisfied verbally.

Multiple mailings for each mutual fund purchase

Stage 3 will result in investors receiving two mailings (rather than one) for each mutual fund purchase: pre-delivery of the fund facts and post-delivery of a trade confirmation. This will double the mailing costs associated with each mutual fund purchase.

Trade confirmations were originally intended to provide investors with a record of their securities transactions when none otherwise would exist. With the implementation of pre-delivery of fund facts together with other disclosure and reporting by dealers under the client relationship model, there would seem to be little benefit, if any, from continuing to deliver trade confirmations.

Accordingly, we suggest that the CSA introduce an exemption from the requirement to deliver trade confirmations in connection with any purchase of mutual fund securities to which NI 81-101 applies.

Electronic delivery

While the CSA have indicated that pre-delivery can be achieved through electronic means, no attempt was made in the Proposed Amendments to modernize the requirements for electronic delivery of documents since the CSA's views on electronic

delivery were articulated almost 15 years ago[2]. The CSA reiterated in the notice accompanying the Proposed Amendments the CSA's position that "access" (e.g., mere website posting) does not equal "delivery", nor is referral to a website sufficient. In our view, this position is significantly out-of-date with current internet usage by average Canadians. An overhaul of the CSA's position on electronic delivery is long overdue, particularly in light of the operational pressures created by pre-delivery of fund facts.

Accordingly, we believe that the CSA should confirm that it will be their priority to modernize their position on the electronic delivery of documents concurrently with, or as soon as possible following, implementation of Proposed Amendments.

Harmonization with point of sale for segregated funds

Despite POS being an effort of the Joint Forum of Financial Market Regulators (the "**Joint Forum**") to achieve a stated goal of greater harmonization between the regulation of mutual funds and segregated funds, significant differences between the two regimes have not been addressed and persist:

- Securities laws require that a mutual fund's fund facts be delivered to an investor with each purchase of mutual fund securities by the investor (unless the investor already has received the most current version of such document). By comparison, the information folder or fund facts of a segregated fund are required to be delivered to an investor only when the investor makes his or her first investment in the segregated fund family.

- An insurance company (or its agent) is permitted to deliver to an investor all fund facts for all segregated funds, classes and series at the time the investor makes his or her first investment in the segregated fund family. The insurance company also is permitted to bind all fund facts together in a single booklet and disclose all repetitive information once in an introductory section to the booklet. By comparison, a mutual fund is permitted to deliver to an investor only the fund facts relevant to the mutual fund securities then being purchased by the investor and cannot utilize a similar introductory section approach.

- A segregated fund may include information for all its classes and series in the fund facts, even though the differences between classes and series of a segregated fund often relate to differing levels of capital guarantees provided by the class or series. For a mutual fund, each class or series must have its own fund facts, even though the differences between classes or series typically are limited to fees and purchase options.

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[2] National Policy 11-201 *Electronic Delivery of Documents*

The differences summarized above greatly reduce costs and simplify the dissemination of fund facts in the segregated funds industry by streamlining the preparation and delivery of fund facts.

Accordingly, we suggest that the CSA should renew its commitment to harmonizing the regulation of mutual funds and segregated funds by either (i) obtaining a commitment from the Canadian Council of Insurance Regulators to change the point of sale regime for segregated funds to match that of mutual funds, or (ii) extending to mutual funds the same streamlining advantages as are currently available to segregated funds.

Streamlining the mutual fund disclosure regime

Public mutual funds, dealers and independent review committees currently are required to prepare and deliver (or make available) to investors the following disclosure documents (among others):

- simplified prospectus
- annual information form
- fund facts for each class or series
- annual and semi-annual financial statements
- annual and semi-annual management reports of fund performance
- quarterly portfolio disclosure
- annual disclosure of redemption procedures
- proxy voting procedures
- risk assessment methodology
- reports concerning the use of "soft dollars"
- independent review committee annual report
- account statements
- trade confirmations
- equity interest disclosure
- commission rebate disclosure

Much of this information is duplicative and the cost of preparing the information typically is charged back to the mutual fund, thereby increasing the mutual fund's management expense ratio.

As part of POS, the CSA have emphasized the importance of fund facts as the central document upon which investors are expected to base their investment decisions. In the past, the CSA also have stated their willingness to consider changes to reduce duplication in the overall mutual fund disclosure regime. However, this willingness has not been mentioned in recent CSA publications.

Accordingly, we request that the CSA confirm that it will be their priority to revisit the current disclosure regime in order to identify and eliminate disclosures (and related costs) that no longer are meaningful to investors in light of the POS regime.

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We trust that the foregoing comments will be of assistance to the CSA. We would be pleased to elaborate upon our comments at your request.

Yours very truly,

Fasken Martineau DuMoulin LLP