February 2, 2022

Via email

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 of New Brunswick
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island
Nova Scotia Securities Commission
Securities Commission of Newfoundland and Labrador
Registrar of Securities, Northwest Territories
Registrar of Securities, Yukon Territory
Superintendent of Securities, Nunavut

The Secretary
Ontario Securities Commission
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Toronto, Ontario M5H 3S8
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CSA Notice and Request for Comment – Proposed Amendments to National Instrument 41-101 General Prospectus Requirements, National Instrument 81-101 Mutual Fund Prospectus Disclosure, and Related Proposed Consequential Amendments and Changes and Consultation Paper on a Base Shelf Prospectus Filing Model for Investment Funds in Continuous Distribution – Modernization of the Prospectus Filing Model for Investment Funds CSA Notice and Request for Comment – Proposed Amendments to National Instrument 41-101 General Prospectus Requirements, National Instrument 81-101 Mutual Fund Prospectus Disclosure, and Related Proposed Consequential Amendments and Changes and Consultatio | OSC

Kenmar appreciate the opportunity to comment on this consultation. Kenmar Associates is an Ontario-based privately-funded organization focused on investor education via on-line research papers hosted at www.canadianfundwatch.com . Kenmar also publishes ***the Fund OBSERVER*** on a monthly basis discussing consumer protection issues primarily for retail investors. An affiliate, Kenmar Portfolio Analytics, assists, on a no-charge basis, abused consumers and/or their counsel in filing investor complaints and restitution claims

Due to COVID-19, an influx of investor complaints and numerous consultation requests, we are unable to apply the resources to fully respond to this consultation. We offer some high level comments that may be useful.

Frankly, we are surprised to see this consultation on the CSA priority list when so many other investor protection priorities have languished for years in the CSA in-basket. The potential industry savings from these amendments pale by comparison to the hundreds of millions of dollars improperly incurred each year by retail investors due to weak regulations and enforcement. See the OAG report, the Cumming Report (*A Dissection of Mutual Fund Fees, Flows, and Performance)* and other research.

The CSA is proposing to change the prospectus filing frequency from one year to two on the basis the disclosure in the prospectus does not generally change materially from year to year. If that is indeed the case, why not go further and require filing only if the prospectus incurs a material change? This would reduce Fundco costs even more and *potentially* free up regulator staff for much needed investor protection initiatives. *"There is nothing so useless as doing efficiently that which should not be done at all."*- Peter Drucker

The OSC estimate that extending the lapse date from 12 months to 24 months will result in fund industry cost savings of $15,792,030 annually and the repeal of the 90-day rule will result in cost savings of $15,201 annually across all CSA jurisdictions. We do not realistically expect to see investors receive any material benefit from the $2.1 trillion fund industry reflected in lower fund MER's from these very modest savings. We hope that any related CSA fee revenue reductions will not adversely impact investor protection, the OSC Investor Office budget or the proposed implementation of a CSA IAP.

The definition of *material change* is critical. For us, this would include a change in fund category (per CIFSC definitions), portfolio manager, fund strategy, fees, risk rating etc. and of course any merger with another fund or conversion to an ETF. Any significant litigation or threat of litigation regarding an alleged prospectus disclosure deficiency would, in our view, count as a material event.

We are glad to see that the Proposed Amendments would not affect investor rights relating to liability for misrepresentation in a prospectus. It is our understanding. that Fund Facts and ETF Facts will continue to be filed annually and provide robust disclosure that is updated annually.

Since the Prospectus will not be updated as frequently as Fund Facts, there is the possibility that there may be contradictory text. Since FF is the dominant disclosure document, we expect that the order of precedence in the case of conflicting clauses to be that Fund Facts takes precedence over the Simplified Prospectus.

We do not object to the proposed initiative to reduce "regulatory burden" so long as it doesn't impact the currency or accuracy of information available to investors. Retail investors must continue to receive the up-to-date information needed to

make informed mutual fund and ETF investment decisions. In the short to intermediate term, we expect prospectuses will be amended to reflect the ban on DSC funds, the elimination of the D series and the addition of a new fund series applicable to discount brokers.

Kenmar remain concerned about fund industry attempts to sweep all series of a fund into a single Fund Facts document (yet another "regulatory burden" reduction). We expect the CSA will not permit this unless it has strong investor support and is backed up by independent professional testing. It is our hope that the industry will streamline its offering and reduce the number of series and thereby reduce investor burden.

Do-it-yourself investors will soon have to pay fees for mutual fund trades on certain discount brokerage platforms, as companies prepare to recoup" losses" from CSA changes that will no longer allow OEO platforms to sell mutual funds with embedded trailing commissions.(This mis-selling was permitted for over a decade without CSA or IIROC intervention). We expect this will impact Fund Facts and Prospectus disclosures.

While this consultation refers to filing frequency, we are more concerned with the content of filings and quality of disclosure.

We take this opportunity to ask the CSA for a number of actions to reduce the regulatory burden on retail investors and to better protect them.

- ETF Facts should be delivered pre-sale in the same manner as Fund Facts is delivered.
- Fund manufacturers should design their websites such that it is easy for retail investors to locate the Fund Facts for a particular mutual fund.
- The CSA should revisit NI81-107 to confirm that it is providing the governance necessary in today's operating environment. It can be argued that the *double billing* scandal would not have occurred if fund governance was robust.
- Reinstate the CFR restrictions on the products offered to a client (such as only offering proprietary products) from the impacts that must be discussed with clients.
- Fund Facts should be amended to break out trailing commissions in the expense table for greater investor visibility.
- There should be a review of the utility of the controversial fund risk rating methodology and method of presentation. Benchmarking against international standards is also required. Please see our previous submissions on this topic.
- Given the controversy and class actions surrounding trailing commissions, we recommend the FF wording be examined for accuracy and integrity.
- There should be a statement of investment strategy in Fund Facts.
- The CRM3 initiative should be accelerated; it is long overdue. The annual report on fees sent to investors is seriously deficient.

The *Access Equals Delivery* initiative should be shelved if it applies to retail mutual fund or ETF documents. It likely should be discarded altogether.

The CSA is aware that there may be circumstances when multiple affiliated dealers, including a full-service dealer and an OEO dealer, use a single dealer code to place orders for mutual funds with fund managers. In these circumstances, fund managers may not be able to determine whether a mutual fund purchase order originates from the full-service dealer, who was required to make a suitability determination, or from the affiliated OEO dealer, who was not required to make a suitability determination.We once again request the CSA and IIROC ensure that every investor, without exception, entitled to a switch, is notified by the Dealer and Fundco of their rights before the June 1 deadline. Should future Prospectuses contain a provision that trailing commissions must be accurately directed to Dealers?

It was very unfortunate that the CSA proposed CFR requirement that a registered Firm must maintain an offering of securities and services that is consistent with how the firm holds itself out (*holding out* was shifted into guidance relating to misleading communications) was removed to placate industry. Perhaps this could be revisited?

Kenmar expect the CSA to deal effectively with those Firms who have used the KYP provisions to limit their product shelves to proprietary products. At a minimum, we expect CFR disclosure to make the point that Firms with restricted mutual fund shelves may not be acting in the client's best interests and that representatives with prop shelves must use the title ***Salesperson.*** Fund Facts disclosures should refer to salespersons /representatives and not advisors. When applicable, there should be a note in FF's stating that Salespersons/Reps who can only recommend proprietary funds are providing *restricted advice.*

We'd like to see some evidence of CSA enforcement action re DSC fund mis-selling. Note: CFR conflict-of-interest rules came into effect in July 2021. [We never understood why the CSA gave the fund industry such a long time to move away from toxic DSC funds. Was it another case of reducing "regulatory burden" for industry?]

We recommend that the CSA publicly report how discount brokers are handling the elimination of improper trailing commissions leading up to their ban in June 2022. [We consider the collection of these fees immoral and unethical even if the CSA feels there is no need to immediately intervene to stop the charging for advisory services not provided .Hundreds of millions of dollars of investor retirement savings have gone down the drain due to CSA inaction.] The Ontario Auditor General Report is very clear on this point. Hopefully, there are some lessons learned by the OSC and other CSA jurisdictions.

We recommend that those regulators that also regulate insurance should be taking decisive action to ban the sale of DSC segregated funds to eliminate regulatory arbitrage.

We urge the CSA to provide a 21st century complaint handling rule for Dealers and give OBSI the mandate to provide binding decisions and investigate systemic issues. A high priority should be given to creating an effective New SRO. The burden. financial toll and emotional distress on retail investors has been intolerable. The determined opposition to reform by the CSA has to come to an end. Further procrastination borders on regulatory malpractice.

After a year or so of CFR, we expect the CSA to review data to validate the presumption that improved CFR disclosure, KYC and suitability processes were able to counter the power of trailing commissions to skew salesperson recommendations. If not, we expect the CSA to revisit the whole issue of embedded commissions and Best interests that have caused retail investors so much harm and misery.

Conclusion

We are amazed at the velocity of, and capacity for, change the CSA has demonstrated in reducing "regulatory burden" for industry participants. It almost appears that regulatory burden reduction is now part of the CSA mandate, competing with investor protection. Investor protection must get back on the CSA's to-do priority list.

As regards this consultation, on the surface, it appears that despite the numerous text changes, that there is no adverse investor protection impact. We trust the CSA analysis that such is the case. However, if the CSA acts on the issues we have put forward, there could be a material positive impact on the retirement savings of Canadians.

Kenmar agree to public posting of this letter.

We sincerely hope this feedback proves useful to policy and decision makers.

Do not hesitate to contact us if there any questions or clarifications needed.

Ken Kivenko, President
Kenmar Associates

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