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April 27, 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, 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
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Email: comments@osc.gov.on.ca

Me Philippe Lebel, Corporate Secretary and
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Autorité des marchés financiers
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Dear Sirs/Mesdames

**Re: CSA Notice and Request for Comment
Proposed Amendments to National Instruments 41-101 and 81-101 and
Consultation Paper, published for comment on January 27, 2022 (the Proposed
Amendments and the Consultation Paper)
Comments of Borden Ladner Gervais LLP**

We are pleased to provide the members of the Canadian Securities Administrators (CSA) with comments on the above-noted Proposed Amendments and Consultation Paper. Our comments are those of the individual lawyers in the Investment Management practice group of Borden Ladner Gervais LLP listed below, and do not necessarily represent the views of BLG, other BLG lawyers or our clients.

We commend the CSA for moving forward with the Proposed Amendments and for publishing the Consultation Paper for comment. We have long supported the reduced regulatory burden for publicly offered mutual funds and their managers that would arise from a lengthened lapse date of a prospectus, particularly, as recognized by the CSA, now that only the Fund Facts and ETF Facts are provided to investors.

Please note that when we use the phrase “mutual fund” in this letter, we are referring to mutual funds whose securities are qualified by a prospectus and include ETFs. Further, when we use the term “prospectus”, we are referring to the simplified prospectus under NI 81-101 and the investment fund prospectus under NI 41-101 for ETFs.

Comments on the Proposed Amendments

While we agree with the concept behind the Proposed Amendments, we have comments on the drafting, as well as a few of the principles of the CSA behind the Proposed Amendments.

- 1. Regulatory Filing Fees Should be Commensurate with Regulatory Activity** – We note that the CSA state in the accompanying notice that the CSA will be moving forward with the Proposed Amendments in tandem with amending the regulatory filing fees, as appropriate, to “ensure that the Proposed Amendments will not have a negative impact on filing fees” from the perspective of the applicable regulators. Today, regulatory filing fees are different for all provinces and territories – with some being flat fees and others being based on distributions in the jurisdiction. With the above-noted statement, we understand the CSA to be signaling that the Proposed Amendments will not affect the amount of filing fees to be paid in the jurisdictions, with the timing of required payments tied to the annual filing of ETF Facts or Fund Facts.

We have long held that a regulatory filing fee review for mutual funds (including ETFs) is overdue at a CSA level. There is little to no justification for the fees to be so different amongst the different jurisdictions. Our comments are about the fees payable annually and also for prospectus amendment filings. While we understand that public mutual funds are accessing the capital markets in the jurisdictions where they have filed a prospectus and hence some fees should be payable, we note that the fees payable in the jurisdictions are not representative of the regulatory activity necessary to monitor them and to process the various filings in the jurisdiction. This issue will be even more apparent with the Proposed Amendments – it is likely that in the “off-years”, even though ETF Facts or Fund Facts must be filed, there will be little or no regulatory action required in respect of these filings. Therefore, we urge the CSA to amend the various fee rules in conjunction with the Proposed Amendments to reflect the following:

- Lower overall regulatory filing fees to recognize the lesser regulatory activity involved in processing today’s annual prospectus filings that will be inherent in moving to a biennial prospectus renewal system.
- Tie annual regulatory filing fees to a per fund fee payable only if there are “material changes” to an ETF Facts or a Fund Facts document.

- Amend filing fees payable on an amendment to a prospectus, including ETF Facts or Fund Facts so that the fees are commensurate with the work involved in reviewing them (ideally a lower flat fee per jurisdiction that is consistent across Canada).
 - Principal jurisdictions for a mutual fund may charge additional fees in respect of mutual fund filings, while all other jurisdictions should charge less in recognition of the lesser regulatory activity associated with the filing.
 - Clarify that amendment fees are payable only for the fund or funds being amended, if a prospectus of the fund family is amended, as is currently the case.
 - Clarify when regulatory fees will be paid - on each filing of an amendment or the ETF Facts or Fund Facts, would be our recommendation – and not simply on each biennial prospectus filing.
2. **Consider Transition to the Proposed Amendments** – We urge the CSA to consider transition and the coming into force of the Proposed Amendments. If the Proposed Amendments are to come into force in 2023, for example, we urge the CSA to allow mutual funds the option of waiting until their next renewal to implement the new system. This will be consistent with past transition dates. We question whether the CSA intend all mutual funds to commence the biennial filings at the same time – that is, 2025 for the first biennial filing of the prospectus for all mutual funds? Some clarity on this point would be appreciated.
3. **Clarity on Filings to Qualify a New Mutual Fund** – It should be clarified in the Proposed Amendments (preferably in the Companion Policy to both NI 41-101 and NI 81-101) how a fund manager can qualify a new mutual fund or new fund series in a specific fund family. Most mutual funds are included in a single prospectus for the fund family. Is it intended that the prospectus would be amended to include a preliminary prospectus for the new fund and to include a new series? Many fund managers time their launches of new funds and/or new series to the annual prospectus renewals. We anticipate this will continue to be the case, such that annually, as appropriate, new funds will be launched. Please see our comment below about the need for the continued ability to amend prospectuses as permitted today – this comment is particularly important to allow for launches of new funds or series.
4. **Ability to Continue to File Prospectus Amendments** – We strongly consider that the CSA should continue to allow the option of amendments to prospectuses, rather than requiring all prospectus amendments to be filed as an “amended and restated prospectus”. We consider the CSA concerns about an investor’s ability to determine the “prospectus” of a mutual fund, when it has been amended, to be overstated. This is particularly so, in light of the fact that investors generally only review the Fund Facts or ETF Facts of a mutual fund. In general, amendments can more clearly delineate which funds they cover and the disclosure being amended and are generally only filed when there is a material change to a fund or to qualify a new series of a mutual fund. Thus we expect that amendments will be easier for an investor to follow, compared to an amended and restated document, which does not highlight the funds nor the disclosure being amended, making it more challenging for investors to easily spot the changes. The phrase used by the CSA is “slip sheet”, which we consider a term that confuses what an amendment is about – all amendments should clearly

state which funds they include and the disclosure being amended. In addition, the use of the phrase “amended and restated” in subsection 2.7(2.1) of NI 81-101CP, which provides that the fund facts data is required to be updated, has created confusion about what the CSA means by this phrase in the current instance. As you know, amendments generally do not update all data points in the prospectus.

5. We also consider that the CSA need to set service standards for their review of these amendments. Specifically, will a receipt be issued? Will a formal comment letter be issued? How long will this review take? These are important details, given the need to make sure information about material changes to a fund are disseminated promptly to new investors.
6. **Support for the Repeal of the “90-day” rule** – We fully support of the proposed repeal of the “90-day” rule for filing of final prospectuses after the filing of a preliminary prospectus.
7. **Support for the concept of “Auto-Public Filings”** – We understand the need for Fund Facts and ETF Facts to be updated annually and commend the CSA for the concept of “auto-public filings” where there are no material changes to these documents. We urge the CSA to clarify whether a receipt will be issued for these documents. Presumably not, since they will be public documents on filing. This is an important issue given the need to use the updated filed documents as soon as possible after filing. The Companion Policy discussion about this point should also include clarity on this point and our comments below.
8. **Additional Clarity when Fund Facts/ETF Facts are amended on the annual filing** – We consider additional clarity must be provided on service standards on the part of the CSA on reviewing (or not reviewing) the annual Fund Facts and ETF Facts where these documents are amended in ways that make them not “auto-public filings”. Similar to our comment above, will receipts be issued for these documents and, even if no receipts will be issued, how long will any review take, given the need for investors to be provided these documents as soon as possible?

Comments on the Consultation Paper

The questions posed by the CSA are important questions, albeit very difficult to answer in a vacuum and particularly during this comment period and a continued very busy regulatory period. We wanted to ensure we provided comments on the Proposed Amendments as a priority matter.

While we agree with the *concept* of an evergreen document (base prospectus) for a fund, we consider that additional thought should be given by the CSA to determine the base facts about a mutual fund that could be provided in an evergreen document. Ideally, this would be a “back to first principles” review and not be simply a modification of the existing prospectus document, given the fact that further analysis will be necessary about each item of disclosure. It would be useful to understand if this will apply to all publicly offered investment funds in continuous distribution.

We recommend a regulatory/industry working group be established to kick this project off. Legal counsel should be included in this working group and we would be very pleased to be part of this working group, given our long and extensive experience in working with fund managers to prepare prospectus documents.

Thank you for considering our comments. Please contact any of the authors of this letter if you require any clarification of our comments.

Yours very truly,

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