

FASKEN

Fasken Martineau DuMoulin LLP
Barristers and Solicitors
Patent and Trade-mark Agents

333 Bay Street, Suite 2400
P.O. Box 20
Toronto, Ontario M5H 2T6
Canada

T +1 416 366 8381
+1 800 268 8424
F +1 416 364 7813
fasken.com

April 27, 2022

John Kruk
Direct +1 416 868 3512
jkruk@fasken.com

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 Consumers 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 **CSA**)

Dear Canadian Securities Administrators:

Re: Comments on proposals to modernize prospectus filing rules for mutual funds

Thank you for providing us with the opportunity to comment on the recent proposals to modernize prospectus filing rules for mutual funds published on January 27, 2022 (the **Proposals**).¹ Our comments provided below reflect the views of the authors of this letter and certain other individual members of our firm that participated in the preparation of this letter. Our comments do not necessarily reflect the views of our firm or of our clients, and are submitted without prejudice to any position that may in the future be taken by our firm on its own behalf or on behalf of any client.

Background to our comments

Fasken Martineau DuMoulin LLP (**Fasken**) is a leading Canadian law firm that provides advice to investment fund managers, portfolio advisers, dealers and service providers across Canada.

¹ 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 (January 27, 2022).

FASKEN

Currently, eleven partners at Fasken devote a substantial portion of their practice to advising clients on structuring, offering and managing investment fund products and related services, and are supported by further partners with expertise in specific fields including tax, derivatives and financial institution regulation. Fasken 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, exchange-traded funds, alternative mutual funds, closed-end funds, hedge funds, pooled funds, segregated funds, 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.

Our comments below are based mainly on our experience advising clients in the investment funds industry. Prior to submitting this letter, we also consulted with a number of industry participants specifically about the Proposals. Though the comments in this letter are those of Fasken alone, we have taken into consideration the feedback we received from those we consulted.

Technical Issues

There appear to be two technical issues arising from the draft amendments for Stage 1 of the Proposals, which are described below.

1. Under the Proposals, renewal fund facts and ETF facts will need to be filed between the 12th and 13th month (the **refiling window**) preceding the new 24-month prospectus lapse date.² Worded in this way, the refiling window does not appear to permit the renewal fund facts or ETF facts to be filed within 3 business days following their date unless the filing occurs at least 3 business days prior to the end of the refiling window. This loss of potentially 3 filing business days could cause logistical difficulties for some filings as illustrated below (assuming the Proposals were in effect today):

Current final prospectus date	June 30, 2022
Last day to file final prospectus with June 30, 2022 date	July 6, 2022*
Last day to file renewal fund facts or ETF facts with June 30, 2023 date	June 30, 2023
Prospectus lapse date	June 30, 2024
Last day to file renewal prospectus with June 30, 2024 date	July 4, 2024*
Deadline for filing renewal prospectus	July 10, 2024**

* Using 3 business day window.

** Using the 10 day grace periods in current section 17.2(4)(b) of NI 41-101 and current section 2.5(4)(b) of NI 81-101.

² Proposed section 17.3(4)(a) of NI 41-101 and proposed section 2.5(3)(a) of NI 81-101.

FASKEN

Accordingly, we recommend that the renewal window be expanded slightly by adding the words “less 3 business days” after the words “12 months” in proposed section 17.3(4)(a) of NI 41-101 and proposed section 2.5(3)(a) of NI 81-101.

2. The Proposals appear to contemplate that fund facts and ETF facts will be refiled without a prospectus amendment only during the refiling window since the filing would need to use a “Year 2” designation as described in proposed section 5A.6 of CP 41-101 and proposed section 4.1.6 of CP 81-101. If the current features of SEDAR can accommodate refresh filings of fund facts and ETF facts at other times, we suggest that this be described in the changes to the companion policies.
3. It is likely that many renewal filings will include a combination of some fund facts and ETF facts that qualify for Auto Public treatment and others not so qualifying. It is not clear from the Proposals whether all such fund facts or ETF facts ultimately will bear the same date, since the versions submitted as Auto-Public will appear on the public portion of SEDAR immediately while the versions submitted as Private will not become available to the public until a later date. If the dates of all fund facts and ETF facts are the same, it may result in some purchases continuing to be made under the previous version of a document despite a revised version of the document eventually becoming available that will predate the purchase, as illustrated below:

Current fund facts / ETF facts	April 15, 2022
Year 2 fund facts / ETF facts when filed	March 15, 2023
Year 2 fund facts / ETF facts filed as Auto-Public released onto public portion of SEDAR	March 15, 2023
Purchase orders received for units described in Year 2 fund facts / ETF facts filed as Private	March 15-25, 2023
Principal regulator review of Year 2 fund facts / ETF facts filed as Private is completed and documents are released onto the public portion of SEDAR	March 25, 2023

It also could trigger complications if, in response to comments on the Private documents, changes are subsequently made to the documents previously submitted as Auto Public that already have been released to the public.

A possible solution is to manage these filings in the same manner that SEDAR currently treats the filing of a combined preliminary and pro forma prospectus: If all the fund facts and ETF facts are filed as Auto-Public, they are immediately released onto the public portion of SEDAR (similar to a preliminary prospectus filing). However, if some of the fund facts or ETF facts are filed as Private, then none are released onto the public portion of SEDAR until the principal regulator’s review has been completed, in which event the date of the fund facts and ETF facts will be brought forward to the public release date.

FASKEN

Amended and restated prospectus amendments

We disagree with the CSA's rationale for proposing that all future prospectus amendments be filed as amended and restated versions of the prospectus, rather than continuing to permit standalone prospectus amendments.

First, the likelihood of investor confusion over prospectus amendments is low given that investors in almost all cases receive only the relevant fund facts or ETF facts.

Second, since blacklined versions of documents are not released onto the public portion of SEDAR, it is easier for an investor to identify the content which has changed by a standalone prospectus amendment rather than in an amended and restated version.

Third, there is some uncertainty regarding which information in the prospectus needs to be updated in an amended and restated version. If the CSA implement this requirement, it should be accompanied by further amendments which have the effect of not requiring that other information be updated, notwithstanding that the prospectus certificate states that the document provides full, true and plain disclosure of all material facts as of the date of the certificate.

Fourth, the CSA's concern with the difficulty of tracking prospectus amendments results mainly from the current operational limitations of SEDAR which, when searching for documents relating to a particular mutual fund, produces all documents relating to that mutual fund family. We recommend that this concern instead be addressed through upcoming enhancements in SEDAR+, rather than imposing a new burden on industry to effect all prospectus amendments through amended and restated documents.

Guidance on "material changes"

We agree with the CSA's proposed guidance whereby changes to fund facts or ETF facts that only impact the disclosures identified in proposed section 5A.6 of CP 41-101 or proposed section 4.1.6 of CP 81-101 are considered not material and therefore may be filed with Auto Public treatment. However, we note that the proposed guidance will conflict with other CSA guidance in section 2.7(2) of Companion Policy 81-101 where the CSA previously suggested (in our view, incorrectly) that any change to a fund's risk rating constitutes a "material change" under securities legislation.³ We therefore recommend that the words "or risk level" be removed from section 2.7(2) of Companion Policy 81-101 and section 5A.3(4) of CP 41-101 as part of the Proposals.

Step 2 Proposals

We agree with the CSA's proposal to explore the adoption of a base shelf prospectus approach to mutual fund prospectuses. However, we are mindful that any such change will impose an initial

³ See the comment letter dated December 11, 2019 from our firm to the CSA on the proposals described in Reducing Regulatory Burden for Investment Fund Issuers - Phase 2, Stage 1 where we explained how the announcement of a backward-looking calculation such as an investment fund's risk rating is not a "material change" according to the views expressed by the Supreme Court of Canada in the *Danier Leather* decision [2007] 3 S.C.R. 331.

FASKEN

regulatory burden on industry to adapt to such change, which may be excessive following recent regulatory burdens to implement the Client Focused Reforms and to implement the amendments to NI 81-101 that came into effect on January 6, 2022. For these reasons, we defer to comments from industry participants on whether this proposed change is desirable at this time from a cost-benefit perspective.

In the event the CSA proceeds with this aspect of the Proposals, our comments thereon are provided below.

Comparison of key features of the base shelf prospectus regime and mutual fund prospectus regime

A base shelf prospectus is a variation of a short-form prospectus regulated by NI 41-101. The fundamental difference between a short-form prospectus and a traditional long form prospectus of a non-investment fund issuer is that, generally, the former only includes information relating to the securities being offered. Background information relating to the issuer is incorporated by reference into the short-form prospectus from continuous disclosure documents, such as the issuer's annual information form, annual and interim financial statements and related management discussion & analysis, and a portion of the issuer's annual management information circular. Changes to that background information are captured in material change reports which also are incorporated by reference into the short-form prospectus – there generally is no incorporation by reference.

In a long form prospectus of a non-investment fund issuer, all background information regarding the issuer is contained directly in the prospectus.

As a result, a short-form prospectus is much shorter in length than a long form prospectus, and requires less regulatory review at the time of filing: As per section 5.5(1) of National Policy 11-202, the first comments of the principal regulator on a preliminary short-form prospectus usually are provided within 3 business days, and the final short-form prospectus typically can be filed within 10 days following the preliminary short-form prospectus filing.

Structurally, a mutual fund's prospectus falls in between a traditional long form prospectus and a short-form prospectus:

- Like a short-form prospectus, a mutual fund prospectus incorporates by reference most of its financial disclosure from its financial statements and management reports of fund performance.
- Like a long form prospectus, a mutual fund prospectus still directly contains non-financial background information about the mutual fund.

A base shelf prospectus is essentially a short-form prospectus which describes generically the securities that will be offered in the future, with the details of the specific offering provided at a later date in a prospectus supplement. The CSA generally do not review prospectus supplements, and no receipt is required to be issued by the CSA for a prospectus supplement.

FASKEN

Unlike a long form or short-form prospectus of a non-investment fund issuer, a mutual fund prospectus is not delivered to the prospective investor unless requested. Instead, through extensive research and modernization, the CSA have developed alternate point-of-sale disclosure rules for mutual funds which require the delivery of fund facts or ETF facts to the investor. The benefits of this prospectus disclosure regime for investors in mutual funds was recently confirmed in exemptive relief granted by the CSA to permit a non-redeemable investment fund to utilize a mutual fund prospectus format.⁴

Application of the base shelf prospectus principles to mutual funds

We believe that extending to mutual funds the same efficiencies that are available to non-investment fund issuers using a base shelf prospectus involves the following changes:

1. Shorten the simplified prospectus to contain only information relating to the offering (which we refer to as a **base simplified prospectus**). The resulting base shelf prospectus would most closely resemble current Part A of a simplified prospectus. Background information about each mutual fund would be contained in its continuous disclosure documents and would be incorporated by reference into the base simplified prospectus. Background information potentially includes the mutual fund's investment objectives, investment strategies and portfolio adviser, which would be relocated to the annual information. With these changes, the annual information form would be treated as a continuous disclosure document, and the prospectus certificate would be moved to the base simplified prospectus. We note that these changes would reverse the most recent amendments to NI 81-101 requiring that each mutual fund consolidate its simplified prospectus and annual information form into a single document resembling a long form prospectus (a change with which Fasken disagreed when it was first proposed).
2. Accompanying each base simplified prospectus (either at the time of filing or subsequently during the lifespan of the base simplified prospectus) would be prospectus supplements that contain any remaining information currently in Part B of a simplified prospectus and not relocated to the annual information form. Like the base shelf prospectus of a non-investment fund issuer, prospectus supplements filed by a mutual fund after the date of its base shelf prospectus would not be subject to review by the principal regulator (unless novel in nature) and would not require the issuance of a receipt. This would enable a mutual fund to offer a new class or series of securities at a later date by filing a prospectus supplement, provided the general description of the securities was contained in the base simplified prospectus.
3. Consistent with section 5.5(1) of National Policy 11-202, the CSA should target providing first comments on a base shelf prospectus within 3 business days of filing, with the target for the final prospectus filing being ten days. Should the CSA wish to review continuous disclosure documents of mutual funds, such reviews would take place outside the base simplified prospectus filing process.

⁴ See *Re Mackenzie Financial Corporation et al* (January 24, 2022).

FASKEN

4. Material changes to a mutual fund would continue to trigger a requirement to file a prospectus amendment and amended and restated fund facts or ETF facts. In our view, the “materiality” threshold articulated by the CSA when refiling fund facts and ETF facts as either Auto Public or Private should become the general standard triggering a prospectus amendment for any mutual fund: If the change does not impact disclosure in the fund facts or ETF facts beyond those matters identified in proposed section 5A.6 of CP 41-101 or proposed section 4.1.6 of CP 81-101, the change is not material to the investor’s decision and should not trigger a prospectus amendment.

Despite the adoption of base shelf prospectus principles, we believe that investors in mutual funds should continue to receive the fund facts or ETF facts in the first instance, with the base simplified prospectus to be available upon request.

Responses to specific consultation questions

Please find below our responses to the specific questions contained in Annex F to the Proposals.

1. **Would the Lapse Date Extension result in reducing unnecessary regulatory burden of the current prospectus filing requirements under securities legislation? Please identify the cost savings on an itemized basis and provide data to support your views.**

Yes, we believe the Lapse Date Extension would reduce some unnecessary regulatory burden by requiring that resources be devoted to the prospectus renewal process only once every two years, rather than annually. Those costs include the fees of external advisers and service providers. We defer to information provided by industry participants regarding the magnitude of those cost savings.

2. **Would cost savings from the Lapse Date Extension be passed onto investors so they would benefit from lower fund expenses as a result? Please provide an estimate of the potential benefit to investors.**

For mutual funds that bear the expenses associated with their prospectus filings, we expect that the cost savings would be directly realized by those mutual funds. For mutual funds where the expenses associated with their prospectus filings are borne by the mutual fund’s manager in return for an administration fee, we expect that the cost savings could be passed on to the mutual fund through a reduction to the administration fee. However, in both cases, the availability of a reduction would depend on whether there are other offsetting new regulatory expenses. We defer to the information provided by industry participants regarding the likelihood of there being net cost savings that would be passed on to investors.

3. **Would the Lapse Date Extension affect the currency or accuracy of the information available to investors to make an informed investment decision? Please identify any adverse impacts the Lapse Date Extension may have on the disclosure investors need to make informed investment decisions.**

FASKEN

We do not believe the Lapse Date Extension would affect the currency or accuracy of any material information provided to investors. Currently, almost all investors choose to receive only the fund facts or ETF facts in connection with making their investment decision. The currency and accuracy of this information will not change as a result of the Lapse Date Extension. Further, the information contained in a simplified prospectus or annual information that is not summarized in fund facts or ETF facts is generic in nature and tends not to change during the lifespan of a simplified prospectus.

4. **Prospectus amendments would increase over a 2-year period relative to a 1-year period. Would requiring every prospectus amendment to be filed as an amended and restated prospectus instead of “slip sheet” amendments make it easier for investors to trace through how disclosure pertaining to a particular fund has been modified since the most recently filed prospectus? In the initial stakeholder feedback received on the Project RID amendments, some commenters indicated that such a requirement would be difficult and increase the regulatory burden for investment funds. Please explain and identify any cost implications on an itemized basis and provide data to support your views.**

We disagree with this aspect of the Proposal. Please see our comments above under “Amended and restated prospectus amendments”.

* * * * *

Thank you in advance for your consideration of the above commentary. Should you have any questions or wish to discuss the above commentary, please contact the undersigned.

Yours truly,

(signed) “Anil Aggarwal”
Anil Aggarwal, Partner
416-865-5169
aaggarwal@fasken.com

(signed) “Garth Foster”
Garth Foster, Partner
416-868-3422
gfoster@fasken.com

(signed) “John Kruk”
John Kruk, Partner
416-868-3512
jkruk@fasken.com