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July 27, 2022

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

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Dear Sirs/Mesdames:

Re: CSA Notice and Request for Comment
Proposed Amendments to National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* and to Companion Policy 31-103CP – Total Cost Reporting for Investment Funds and Segregated Funds published for comment on April 28, 2022 (the Proposed Amendments and Total Cost Reporting)
Comments of Borden Ladner Gervais LLP and AUM Law Professional Corporation

We are pleased to provide the members of the Canadian Securities Administrators (**CSA**) with comments on the above-noted Proposed Amendments. Our comments are those of the individual lawyers in the Investment Management practice group of Borden Ladner Gervais LLP as well as the lawyers with AUM Law Professional Corporation (**AUM Law**) listed below, and do not

necessarily represent the views of BLG, AUM Law, other BLG or AUM Law lawyers or our respective clients.

In preparing this comment letter, we have reviewed the draft comment letters prepared by the Investment Funds Institute of Canada (IFIC) and the Portfolio Management Association of Canada, as well as other industry participants. As long-time legal advisers to industry participants, we are providing our comments on the Proposed Amendments not only to provide our own thoughts, but also to support the commentary provided in the above-noted comment letters. As with the other commentators, we do not necessarily disagree with the underlying objective of the CSA with the Proposed Amendments - that is, to further investors understanding of the costs of their investments in investment funds, but we consider it imperative that the CSA take seriously the comments provided, including: i) a need for further direct consultation by the CSA on the operational challenges inherent with the Proposed Amendments; and ii) a need for a realistic transition period, assuming the CSA decides to move forward.

Need for Continued Consultation on the Proposed Amendments and a Realistic Transition Period

1. As noted in the various draft comment letters we have reviewed, we strongly recommend that further direct consultation by the CSA is necessary with a committee of industry participants, including Fundserv and the various trade associations. In this way, the CSA will not only understand the operational and other challenges inherent with the Proposed Amendments, but it may be possible to develop a *realistic* way to provide investors with information that will be meaningful for them. In our view, the Proposed Amendments propose a *theoretical* way to achieve "total cost reporting", but in ways that are not practical or possible using the existing systems in place in the industry. It is not currently practical or appropriate for the CSA to expect the necessary information to be provided through manual "sharing" of information, which is how the Proposed Amendments have been drafted. Some systematic approach must be developed, given that one does not exist at present. This will take time to develop.

2. As the trade associations have previously explained, including with the Proposed Amendments, given the costs associated with developing new systems and approaches and competing priorities, industry participants cannot develop new systems until they know final rules. As such, it is not appropriate for the CSA to suggest that industry participants begin now to develop the necessary systems to implement the *Proposed* Amendments. The Proposed Amendments are merely "proposed" rule changes – they are not final rules and are subject to change, even though the CSA may be determined to make the Proposed Amendments final as soon as possible. It is incumbent on the CSA to review carefully the comments on the Proposed Amendments and consider whether the costs of the Proposed Amendments are proportionate to their perceived benefits and consider whether changes should be made to the Proposed Amendments. We do not consider that the CSA has done enough consultation to be able to make that determination at this time.

3. A realistic transition period is critical. In addition to our above-noted comments, we urge the CSA to take into account the various regulatory priorities facing the industry before moving forward so quickly with the Proposed Amendments. We note that industry

participants are still working to ensure that the Client Focused Reforms are appropriately implemented, including responding to regulatory compliance reviews on this implementation. The various dealers will also be required to consider the SRO consolidation being implemented in 2023, as well as industry participants tackling the challenges inherent in moving to T + 1 and even if Canada does not make this change, industry will need to deal with the US moving to T+1. In our view, we do not consider that the CSA has made enough of a case for aggressively moving forward with the Proposed Amendments, particularly in light of the other priorities listed in the CSA 2022-2025 business plan, which will also take time to review and consider implementation.

Determine what Information is Relevant to Total Cost Reporting

4. We agree with the various industry submissions that including a new metric “fund expense ratio”, being the combined MER and TER, to the monthly/quarterly account statements for each fund in which the accountholder invests, will be problematic and confusing to investors. We do not consider that the CSA has made a supportable case for providing this information on account statements, which will be the only investment “cost” information provided on these statements and so may be confusing to investors. For investment funds subject to National Instrument 81-106, this information is already publicly available, and the Proposed Amendments suggest a new metric, so that the information will not line up with the information available to investors as required by NI 81-106. In short, multiple, and possibly conflicting, cost reporting delivery channels may serve to increase client confusion rather than reduce it. We recommend that further consultation be undertaken by the CSA in conjunction with the long-promised review of NI 81-106. We do not consider the mandatory disclosure of this information on account statements is the answer to the perception that investors do not access the information already provided to them via the NI 81-106 statements.

5. If the CSA wishes to proceed with total cost reporting on the annual statements, we consider it critical that the CSA allow fund managers to provide cost information about their funds in ways that are realistic and systematic for all industry participants. It may be necessary for the CSA to accept that this information can be provided for some funds (public investment funds for instance) at an earlier stage that others (ETFs and investment funds offered via private placements). More consultation is required in order to land on an appropriate systematic way for fund managers to make this information available to dealers and advisers, and as noted it may be possible for this information to be disseminated via existing systems in place within Fundserv, which will not catch all investment funds for the reasons set out in the various trade association comment letters.

6. Subject to the above comment, we agree that this information would fit with the information already provided in the annual CRM2 costs/performance reports.

Remove Liability on Dealers/Advisers in Relying on Information Provided Systematically

7. The Proposed Amendments put a responsibility on dealers and advisers to consider whether the information about the costs of investing in investment funds provided by fund managers is reasonable and reliable. Cost information from an investment fund would likely be seen as a “material fact” under existing securities laws and as recently reinforced

by the client focused reforms initiative, requiring a dealer or adviser to consider and potentially override material fact disclosure of an investment fund may create a whole host of legal and regulatory difficulties. This obligation should be removed from the Proposed Amendments. If the industry, with the CSA, land on a way for fund managers to systematically provide information that can be used by dealers and advisers, other than ensuring that the statements include the correct information, it should not be up to these registrants to undertake any form of additional due diligence to determine whether this information is reasonable and/or correct. This should not be necessary and would otherwise put an undue burden on dealers and advisers.

Realistic to Move Forward with Public Investment Funds at This Time and Conduct Further Consultation on other Investment Funds

8. The Proposed Amendments would require total cost reporting for privately placed investment funds, "foreign" investment funds, and publicly offered investment funds. The CSA should undertake specific consultation on the realistic ability for managers of private investment funds, including non-Canadian investment funds, to provide such reporting. Final rule amendments should not be put in place for non-public investment funds, if it is found, through such specific consultation that this information would be unduly burdensome to obtain or be provided by these fund managers. Indeed, to apply these requirements to non-Canadian fund managers will give rise to an extra-territoriality application of Canadian regulation, which, when coupled with difficulties in ensuring compliance, is a problem. Given that the investors in non-Canadian managed funds are generally accredited/institutional investors and have a different relationship with their funds than retail investors in public funds, we consider the burdens of providing this information to be disproportionate to the perceived benefits.

9. We also query whether the Proposed Amendments have taken into account scenarios where investment funds are part of managed accounts (and "all-in" fees are paid by investors) vs direct investments in investment funds. We wonder if the objectives of the CSA will be achieved – that is, will investors be able to understand the different disclosures provided to them, which will differ depending on the type of account they hold.

Consider Unintended Consequences

10. As part of the above-noted consultation, we consider it very important for the CSA to consider whether the Proposed Amendments in their current form will push dealers and advisers to further reduce the diversity of investment funds they offer to investors, given the burdens of obtaining the data to provide total cost reporting. This returns us to our central proposition that it is critical that the CSA consult with industry and seek to understand the operational requirements required to underpin the Proposed Amendments and to work with industry to develop a realistic and systematic approach to providing investors with relevant and useful information, before the Proposed Amendments are made final.

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We hope that the CSA consider our comments as positive and helpful to advance the CSA's considerations of the important matters outlined in the Proposed Amendments.

Please contact Rebecca Cowdery at rcowdery@blg.com and 416-367-6340 if you have any questions on our comments or wish to meet with us to discuss any or all of our comments.

Yours very truly,

Borden Ladner Gervais LLP

Rebecca Cowdery   Donna Spagnolo   Michael Taylor

AUM Law Professional Corporation

Kimberly Poster   Richard Roskies