

# FASKEN

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December 23, 2022

## 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

Dear Canadian Securities Administrators:

### **Re: Comments on proposed access-based delivery of designated documents by investment fund reporting issuers**

Thank you for providing us with the opportunity to comment on the proposed amendments (the **Proposed Amendments**) to National Instrument 81-106 *Investment Fund Continuous Disclosure (NI 81-106)* and Companion Policy 81-106 *Continuous Disclosure Obligations*, including related proposed amendments to National Instrument 41-101 *General Prospectus Requirements* and National Instrument 81-101 *Mutual Fund Prospectus Disclosure*, published by the Canadian Securities Administrators (the **CSA**) on September 27, 2022 to implement an access-based model for delivery of interim and annual financial statements and management reports of fund performance (**MFRPs**) by investment fund reporting issuers (the **Proposed Model**).

Our comments 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.



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## Executive summary

- We do not support the Proposed Model for the reasons set out below which, in our view, introduces new operational costs, regulatory burdens and compliance risks without materially decreasing current paper-based regulatory requirements.
- We recommend that the CSA use its resources to review the benefits to investors of receiving financial statements and MRFPs.

## 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. Currently, thirteen 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 of advising clients in the investment funds industry. Prior to submitting this letter, we also consulted with a number of industry participants specifically about the Proposed Model. Though the comments in this letter are those of Fasken alone, we have taken into consideration the feedback we received from those we consulted.

## General comments

1. ***The Proposed Model should do more to reduce the current reliance on paper-based delivery to investors.***

The combined effect of subsection 5.3(2) of the Proposed Amendments and section 5 of the transition provisions will be that every securityholder that previously delivered standing instructions to receive paper copies of designated documents will continue to receive them under the Proposed Model. This does not reflect the current modern trend for the general public (including retail investors in investment funds) to seek information from the internet rather than through paper-based communications.

It also appears that the Proposed Amendments may increase the delivery of paper copies of designated documents since investors currently receiving those documents based on an annual instruction will be recharacterized as having given standing instructions and therefore cannot be



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negative optioned out of receiving such documents through a subsequent solicitation of annual instructions.

In our view, it is reasonable for the CSA to presume that investors will use the internet for their research, and that paper versions of documents should be regarded as exceptional and accommodated only on a request-by-request basis. To implement this change, the CSA can draw upon their precedent for implementing automatic switch programs whereby investors cease to receive fund facts automatically following notice of the implementation of the automatic switch program. Instead, such fund facts are delivered only on a request-by-request basis.

2. ***The Proposed Model introduce new material costs without materially reducing existing costs***

The Proposed Model appears to presume that the new cost of issuing press releases twice annually will be offset by eliminating the cost of mailing an annual notice to securityholders under current subsection 5.2(5) of NI 81-106 or soliciting an annual instruction under current section 5.3 of NI 81-106. However, mutual funds are subject to further requirements that trigger an annual mailing securityholders.<sup>1</sup> Consequently, the Proposed Model will not materially reduce existing annual mailing costs for regulatory requirements, and will introduce a new semi-annual press release cost.

In our view, if the CSA proceeds with the Proposed Model, it should be available as an alternative to – not a substitute for – the existing regulatory requirements. In this manner, investment funds and their managers will be able to choose whether the existing regime or the Proposed Model is a better, more cost-efficient approach for the securityholders of their funds.

3. ***Notice of availability of designated documents should be made through a website tool rather than a press release.***

We disagree with the concern expressed by the CSA that investors must receive notice by way of a press release when designated documents become available. We acknowledge that this concern is based on an assumption that investment funds should follow an approach equivalent to that of non-investment fund reporting issuers (**public companies**). However, in our view, that assumption does not acknowledge the fundamental differences between investment funds and public companies. In particular:

- Unlike public companies, the release of financial statements and MRFPs by an investment fund rarely (if ever) discloses new material information that would constitute a “material change” for the investment fund. For this reason, investment funds typically do not issue a press release when issuing their semi-annual and annual financial results, nor do they implement “black-out periods” prior to the release of that financial information, nor halt the issue and redemption of securities around the time of the release of such financial information.

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<sup>1</sup> See, for example, section 10.1(3) of National Instrument 81-102 *Investment Funds* which requires an annual mailing to securityholders of a statement describing redemption rights.



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- Unlike public companies, the financial statements and MRFPs of investment funds are not followed by research analysts at registered dealers, nor are conference calls arranged between investment fund managers and research analysts to explain the financial information. It is not urgent that research analysts understand the most recent financial information.
- Unlike public companies, almost all investment funds calculate and publish their net asset value per security daily, which is far more accurate information for investors to value their investments than is available from public companies. The release of financial statements by an investment fund does not change its intrinsic value or net asset value.
- Unlike public companies, the vast majority of securityholders of mutual funds are retail investors. Retail investors typically do not have access to, nor follow, press releases since they do not have subscriptions to services such as Bloomberg. In our view, issuing press releases will be of little, if any, value to retail investors.

Consistent with our earlier view that the Proposed Amendments should better reflect the modern reality that retail investors are most likely to conduct their research on the internet, we believe effective notice to investors can be given through prominent disclosure (such as a banner or pop-up box) on the homepage of each designated website. Alternatively, each designated website can contain a tool that identifies for each mutual fund (i) the most recently issued financial statements and MRFP, and (ii) the deadline by which its next financial statements and MRFP will be issued. We believe this approach would be more useful to investors than issuing press releases.

#### 4. ***The CSA should review the benefits of providing financial statements and MRFPs to retail investors in mutual funds***

In the past, the CSA has utilized investor focus groups and behavioral economics specialists to identify information which is the most useful for investors and how it is presented.<sup>2</sup> We believe those resources (including those of the Office of the Investor of the Ontario Securities Commission) also can be used to evaluate current disclosure requirements, rather than focus solely on new disclosure requirements.

To that end, we encourage the CSA to utilize its resources in this area to conduct a review on the extent to which financial statements and MRFPs of mutual funds are relevant to retail investors. Topics for analysis could include:

- Quantifying the percentage of securityholders who continue to receive paper-based designated documents.
- Of the securityholders who continue to receive paper-based designated documents:

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<sup>2</sup> For example, the content and presentation of fund facts was subject to extensive analysis during the design stage.



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- whether those documents are delivered due to recent instructions from the investor rather than legacy standing instructions which have not been updated; and
- the percentage of those investors who open and read the designated documents received by mail.
- Quantifying the percentage of securityholders that seek out designated documents from a designated website or SEDAR.
- For all investors investment funds (whether currently receiving paper-based designated documents or locating them on the internet), their feedback on the information contained therein, and their level of understanding of, and reliance on, that information.

We believe such an evaluation would help inform both the CSA and market participants on the best manner for providing financial information to retail investors in the future in a meaningful and cost-efficient manner.

5. ***The CSA should republish the Proposed Model for further comment if it deviates materially from the Proposed Amendments***

We acknowledge that, by posing a series of specific questions in the notice accompanying the Proposed Amendments, the CSA will gather additional information which may refine its views on the best model for implementing access-based delivery for designated documents. However, such feedback will not be based on a specific proposed rule amendment, nor will commentators have the opportunity to review and respond to the comments made by others. In our view, any material change to the Proposed Amendments – even if they are based on responses provided to the specific questions posed by the CSA – should be republished for further comments. To proceed otherwise would jeopardize a full public comment process on a rule amendment before it is implemented. While we further acknowledge that republication of the Proposed Amendments could delay its implementation, we believe it is more important to engage in thorough public consultation when exercising the rule-making authority.

## **Responses to specific questions**

Below are our responses to the specific questions posed by the CSA.

1. We disagree. Please see our comments above expressing our view that the Proposed Model should better reflect the modern practice of searching and obtaining information on the internet, with paper-based deliveries available on an exceptional request-by-request basis.
2. We agree that the cost of providing electronic copies of designated documents is lower than the cost of providing paper copies. However, we defer to industry participants regarding the issues they encounter – and related costs – with collecting, maintaining and using e-mail addresses for electronic delivery.



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3. As described above, we believe that a press release would be an ineffective method of giving notice to retail investors as they typically do not have access to services that monitor press releases. We believe that including disclosure or a tool on each designated website is more likely to be used by investors to determine which designated documents are available, and when.
4. Due to technical complexities, we do not believe the CSA should prescribe designated website design. We recommend that any requirements regarding designated website design and posting be principles-based.
5. We support the extension of access-based delivery to other types of documents. However, we believe it would be advantageous if the principles and conditions of the Proposed Model are resolved through a complete public consultation process before extending them to other current requirements in securities legislation.

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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,

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