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December 23, 2008

VIA EMAIL

British Columbia Securities Commission
Alberta Securities Commission
Saskatchewan Financial Services Commission
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
New Brunswick Securities Commission
Office of the Attorney General, Prince Edward Island
Nova Scotia Securities Commission
Financial Services Regulation Division, Newfoundland and Labrador
Registrar of Securities, Department of Justice, Northwest Territories
Registrar of Securities, Legal Registries Division, Yukon Territory
Registrar of Securities, Legal Registries Division, Nunavut

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Dear Sirs/Mesdames:

Re: CSA Notice 81-318 Request for Comment on Proposed Framework 81-406
Point of Sale Disclosure for Mutual Funds and Segregated Funds

We are pleased to provide the members of Canadian Securities Administrators (the CSA) with comments about the implementation issues we believe arise from the above-noted revised Framework (the Framework) as it relates to mutual funds regulated by the CSA. We commend the CSA for asking for feedback on these issues before developing any new CSA rules to implement the Framework.

Our comments are those of lawyers in BLG's Investment Management practice group and do not necessarily represent the views of the firm or our clients, although we have incorporated feedback received to date from our clients into this letter.

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We commented on the earlier version of the Framework, as published for comment in June 2007, and many of the comments we are making in this letter echo the comments we made in our earlier comment letter.

1. Support for Availability of Clear Disclosure for Investors

We fully support the aim of the CSA to improve disclosure for mutual fund investors and to make it easier for investors to have an appropriate level of understanding of the potential benefits, risks and costs of investing in a fund and to be able to meaningfully compare one fund with another. We believe that a Fund Facts document could assist in achieving this objective provided the Fund Facts contains relevant information and is flexible enough to accommodate differences among funds. As we will outline below, we strongly recommend that the CSA focus on rationalizing the entire disclosure regime for mutual funds, as opposed to simply layering the Fund Facts on top of the existing requirements. In making this comment, we note that we do not support the Framework's proposition that the Fund Facts must be physically provided to investors before a trade can be completed. We provide our comments on the proposed delivery requirements below.

2. Support for IFIC's Recommended Staged Approach

We support the recommendations of The Investment Funds Institute of Canada to the CSA that the CSA first implement the requirements for a Fund Facts to be prepared and delivered to investors after the trade (pursuant to section 71 of the OSA and equivalent sections of other provincial securities legislation) in substitution for the delivery of the current simplified prospectus. We completely support IFIC's recommendation that the CSA consider changes to the delivery requirements for mutual fund prospectuses as a second phase in implementing the Framework.

3. Support for Disclosure Rules that Recognize the Important Role of Advisors to Investors

In considering how to move forward with the Framework, we urge the CSA to keep in mind the important role of advisors to investors in mutual funds. Securities of mutual funds can **only** be acquired by investors who work with a registered dealer and its registered representatives, unless a dealer registration exemption is available. It is critical to keep in mind that investors do **not** generally invest in mutual funds after only reviewing a prospectus or other written information about those funds. In all cases (other than investors who acquire mutual funds through discount brokers), the investor is relying on the advice of a registered representative, including, in many cases, recommendations of that registered representative.

While written information about a particular fund or funds is important, we believe that a continued regulatory focus – and recognition – of the importance of the "know-your-client", "know-your-product" and suitability rules in the context of mutual fund investing through registered dealers is equally, if not more, important.

Although the Framework contains some changes from the June 2007 version of the Framework, we continue to view the Framework as reinforcing the popular, but

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unfounded, belief that investors actively review and make decisions on their own based solely or even primarily on the written disclosure they receive about a fund. As such, we believe that the costs of implementing the Framework, particularly the "pre-sale" delivery requirements, will far outweigh the benefits to investors (which we submit remain somewhat speculative and impossible to substantiate).

4. **Need to Differentiate between Disclosure of Dealer Information and Fund Information**

Mutual fund disclosure documents should not necessarily relay information about the distribution process and the investor's relationship with distributors (advisors and dealers) of that fund. We believe that the CSA's approach in proposed National Instrument 31-103 to mandate that registrants provide a relationship disclosure document to clients at account opening is the better approach to ensure information about the dealer's role in distributing funds is provided to investors. In this way, important information about dealer compensation and incentives can be provided, as well as their relationships with the funds that they are distributing. This will mean that the fund-specific documents can focus on providing meaningful information solely about the fund, its management and administration.

We believe that it is critical that any rule that would mandate different mutual fund disclosure be harmonized and developed closely with the proposed relationship disclosure documents. The proposed Fund Facts document must be integrated with the proposed relationship disclosure document, and vice versa. Greater attention must be paid to ensuring that the appropriate information is provided in the Fund Facts (information related to the fund and its management and administration) and in the relationship disclosure document (distribution information and dealer-specific information, including specific information about the forms of compensation the dealer and advisor are receiving or will receive in respect of fund sales).

The revised Framework does not discuss this issue and we recommend that the CSA work to achieve this recommended harmonization.

5. **Continued Need for Analysis of the Costs and Benefits of the Proposals**

We continue to believe that the research conducted by the Joint Forum into investor sentiment about the Fund Facts must be supplemented by focused cost-benefit analysis and additional research, including investor research, into the actual system of delivery and use of the Fund Facts document in the mutual funds industry. We believe that the practicalities of the proposed disclosure system needs additional exploration and various alternatives, including technological solutions, need to be considered further before a formal rule can be developed to replace existing regulation.

In our view, a proposed rule must be capable of relatively easy compliance without undue expense. Industry participants must be given sufficient time to come up with the compliance and technological systems that are necessary to ensure that compliance.

We also point out that costs of preparation of a Fund Facts and any new disclosure document can be expected to be borne by mutual funds as operating expenses, and hence, investors will be effectively paying these increased costs.

6. Need for Recognition of Today's More Technologically Adept Society

We urge the CSA to consider mandating availability and accessibility of the disclosure documents rather than mandating physical advance delivery of documents. We point out that the Canadian securities regulators are increasingly insisting on disclosure documents being posted "prominently" on fund manager websites, presumably in recognition that investors can easily access this information, so long as it is readily available and investors know about the information and where they can locate it. We urge the CSA to recognize the validity and accessibility of website postings and to reinforce the obligations on participants in the mutual fund industry, including dealers, sales representatives and fund managers, to ensure that investors know how and where they can access this information.

At the very least, we recommend that investors be given a choice on how (or whether) they wish to receive a disclosure document, including a choice on being given the ability to access the document on a website.

7. Proposals Should be Developed to Change Entire Prospectus Disclosure Regime

We urge the CSA not to simply layer the Fund Facts on top of our existing disclosure regime, but rather to develop an appropriate disclosure regime when developing the proposed rules to implement the Framework. We believe that the CSA should take a more holistic approach, rather than make incremental amendments to the disclosure documents that are costly to implement and may be difficult to explain to investors.

We believe that the Fund Facts should not simply be an add-on to today's disclosure documents, being the simplified prospectus and annual information form. While these documents will no longer have to be printed or delivered to investors other than on request, there is still a cost to prepare them and, in our view, the information currently contained in them is today duplicative and inconsistent with the aims of the CSA regarding simplifying the disclosure system and ensuring investors have access to full, true and plain disclosure about their mutual fund investments. These documents also must be reviewed in light of the advances in the continuous disclosure system since NI 81-106 came into force.

We are strongly in favour of a foundation document for a fund of the nature described in the CSA's Consultation Paper released in 2003, but urge the CSA to consider allowing funds in a fund family to combine disclosure into one central foundation document. This foundation document should not be considered a reversion back to the pre-2000 "simplified prospectuses" or even the pre-1986 "prospectuses" for mutual funds, but a simple and complete discussion of the important material facts about the operations, management, structure and administration of a fund that would not repeat information contained in the continuous disclosure documents. The foundation document would (to the greatest extent possible) be "evergreen". The combination of the foundation document and the continuous disclosure information would allow a fund to disclose all

material facts about the fund so that disclosure would be "full, true and plain" as required by securities laws.

8. **Preparation of Fund Facts**

We continue to have concerns about the proposals for a Fund Facts document as described in the Framework.

(a) Logistical and cost implications remain for a fund manager in having to prepare a Fund Facts for each series or class of units of a fund at least once a year in English and also in French (if the funds are sold in Quebec). Given our views on the contents of a Fund Facts document (described below), we believe that a single Fund Facts document per fund is all that should be required. This approach will allow an investor a more complete picture of the fund and his or her investment options.

(b) The CSA rules should reflect the possibility that technological solutions may be developed for posting Fund Facts on line – making them available for access (and printing) by dealers, sales representatives and investors, alike. From a logistical perspective, we believe the CSA rule must recognize that Fund Facts may likely not be delivered by fund managers in printed format to dealers for delivery to investors – rather, fund managers may choose to post them onto a website (whether their own or a central industry website) as the most appropriate and least costly solution. We recommend further consultations with industry participants on this point.

(c) We also recommend further consultation with industry participants about the need for a single Fund Facts per fund. We believe that investors may consider that they are better served by having access to a document that compares and contrasts different mutual funds in a fund family in order to understand the full range of investment options. Certainly, this format may lessen the logistical and cost burden on industry participants.

9. **Liability for the Fund Facts**

We recommend further consultation on the liability of funds and fund managers for the disclosure contained in Fund Facts, and the other prospectus and continuous disclosure documents. This is an important issue and deserves specific attention and analysis, given the complicated legislation across Canada giving investors so-called statutory rights for prospectus disclosure, as well as continuous disclosure. We are unclear how the prospectus rights would work in the context of an investor who receives only a Fund Facts document, even with the statement in the Framework (at page 21) that "the Fund Facts will be incorporated by reference into the simplified prospectus".

The Fund Facts will contain less than complete disclosure about the Fund. The theory behind giving investors a simple two-page document should be that this document is deemed to incorporate by reference all of the other permanent disclosure documents, so that, in effect, investors are deemed to receive the other documents when they receive the Fund Facts. This is important for investors so that they can take action on any

misrepresentation that may appear in one of the other documents, even though it doesn't appear in the Fund Facts. It's also a very important concept for the fund company and the fund, since the Fund Facts, will of necessity, have many omissions of "material facts", given its limited content and style of drafting. Having the other documents incorporated by reference into the Fund Facts, means that investors will not have any rights of action for such omissions, assuming the information is contained in the other documents. This is the approach taken with National Instrument 81-101, which has worked well in practice.

We do not understand the sentence in the Framework (quoted above) that appears to propose that the Fund Facts will be incorporated by reference into the simplified prospectus – a document that will not be delivered to investors, except in exceptional circumstances.

10. **Consequences of Non-Delivery of the Fund Facts**

At page 21 of the Framework, the Joint Forum explains that investors will continue to have today's rights if a Fund Facts is not delivered as required. This right is today provided for in Ontario by section 133 of the Ontario Securities Act. Although this right has difficulties even in today's prospectus delivery regime, even more problematic issues will arise with the complicated system of "advisor-initiated", "investor-initiated" and investor waivers proposed by the Framework. In all cases, whether delivery of the Fund Facts was required or not will be completely out of the control of mutual fund managers and the funds. However, an investor exercising his or her right of action pursuant to section 133 could impact the funds, particularly if an investor chooses to rescind the purchase and the dealer then redeems the units purchased in the fund. We urge the CSA to re-consider these statutory rights in the context of the proposed delivery systems set out in the Framework and work to ensure that they are not potentially harmful to the funds and other investors in the funds.

11. **Complicated Compliance Systems for Dealers**

In addition to the difficulties of ensuring "point of sale delivery", the delivery systems outlined in the Framework will necessitate significantly more complex compliance systems for dealers. Dealers will be required to ensure that their compliance systems catch all of the nuances set out in the Framework (whether a trade is advisor initiated or client initiated, whether it is for a money market fund, whether the client has waived receipt of the Fund Facts, whether the trade is for additional units of a fund the client already owns). In our view, we believe that these complexities simply are not justified. The different requirements may seem "doable" and logical in the context of a concept paper, but in reality when a dealer is supervising hundreds of advisors, the complexities become far in excess of any benefits of the different requirements. In our view, many dealers if required to comply with the new delivery rules, will simply opt to ensure their advisors give the Fund Facts to each investor on each trade, in advance of the trade. We do not view the revisions made in the Framework in response to comments made on the June 2007 version of the Framework to be helpful developments.

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12. Contents of the Fund Facts

Our central recommendations about the contents of the Fund Facts (as revised in the Framework) are:

(a) Fund managers must have some flexibility to prepare the Fund Facts in ways that make sense for their funds. It is not clear from the Framework exactly how prescriptive the Fund Facts form (the CSA rule) would be – but excessive prescription will run the risk of making all Fund Facts appear the same (which would not help inspire investors to read them, since their importance would be muted and could conceivably easily confuse readers) and of requiring a fund manager to include disclosure about a fund that it believes is inappropriate or misleading.

(b) Disclosure that is subject to constant change should be minimized so as to minimize the need to update the Fund Facts. This would mean, for example, that MER and costs of a particular fund should be taken from the year-end financial statements (and not be required to be updated). We question the need for Fund Facts to contain performance disclosure given the wide availability of this information in other sources, including the MRFPs and in reports readily available to dealers and sales representatives, such as Morningstar.

(c) We are concerned as legal advisers to many in the fund industry just how we would advise our clients about compliance with a rule that requires disclosure to a particular grade level of the Flesch-Kincaid readability tests, although we recognize that these tests are used by some government offices in the United States and software programs such as WORD have options available to test documents against these tests.

We feel a rule of this nature would need to allow considerable time for transition given the current standards of disclosure in the industry today and the need to adopt writing standards necessary to meet those tests.

We wonder if these tests, and the suggested less than grade 6.0 writing level are even appropriate for Canadian investors, the vast majority of whom are adult and literate. Writing to this level would, in our opinion, mean that the writing would be extremely simplistic, with complex information provided in a form that could not allow for an adequate level of information or discussion. This would allow only for very generalized statements to be made, without even a reasonable level of explanation. Misunderstandings will no doubt arise. We recommend further consultation be undertaken by the CSA on the need and appropriate levels for these tests.

We note that this letter is apparently written at a grade 12.0 level according to the Flesch-Kincaid test built into the WORD software we use. We also note that we are unable to double-check that this test is the correct test that the Joint Forum mentions in the Framework, although we

assume it is. Any rule would have to clearly allow industry participants to use tests built into commonly used word processing programs to ensure that no additional costs were imposed by this rule.

(d) If the CSA agree with our submission (above in comment 8), disclosure about costs should either be given per series – or the most commonly held series should be highlighted – and information given about how the investor can get similar information about the other series options available.

(e) Disclosure about the investment mix should not be mandated by the Joint Forum, other than the general disclosure requirement. Different categories may be more appropriate for some funds than others – fund companies will have the best understanding of the appropriate categories than can be outlined in a regulatory form.

(f) The section titled "what does the fund invest in" must include the fundamental investment objective of the fund. We do not understand the Joint Forum's response to similar comments made on the June 2007 version of the Framework. Understanding the fundamental investment objective is of vital importance for investors. The simplistic statements made in the Joint Forum's sample that the "fund invests in Canadian companies. They can be of any size and from any industry" really will not be applicable to many mutual funds, given the complexities of some objectives and strategies. Mutual funds are required to have a fundamental investment objective, and investors should know what that is, along with an understanding of the strategies to be used to achieve that objective. We also point out that investors are required to approve any change in investment objective – if they are not given this information, how can they be expected to approve any changes?

(g) The disclosure under the headings "how risky is it?", "are there any guarantees", "who is this fund for" and "how has the fund performed" contained in the sample Fund Facts for the Equity Fund remains curiously negative about mutual funds and appears to be quite prescriptive. Would all funds have to include an exclamation point with a bold face statement about certain investors being warned not to buy a fund, for instance? The risk table seems very simplistic and capable of a wide range of interpretation by fund managers, such that it will be of very little use for an investor.

(h) Further the CSA's consideration of risk is limited to risk of loss of principal. This is not the only form of risk, particularly for funds that are likely to be held for longer periods, where purchasing power risk can be an equal or greater concern.

(i) The section "for more information" should refer to the availability of the other documents, in addition to the simplified prospectus, and should refer the reader to the website where this information is posted. We don't

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recommend the Fund Facts direct the reader to the SEDAR website, given the difficulties inherent in finding any documents easily on this website.

13. Regulatory Filing Fees

We recommend strongly that the CSA work together to rationalize the filing fees payable in respect of disclosure documents so that (i) fees are levied on the same filings, assuming that all commissions feel that fees must be paid to all provinces in respect of a filing and (ii) do not influence compliance behaviour. On the last point, we note that the Ontario Securities Commission does not charge fees for amendment filings for prospectuses. In our view, this was a very welcome change to the fees levied by the OSC, since now decisions about whether or not an event is a "material change" requiring a prospectus amendment can be made without regard to cost considerations (which remain considerable in provinces outside of Ontario). We strongly recommend that the securities regulators closely examine how regulatory filing fees can be rationalized across Canada in conjunction with moving forward with the Framework.

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We thank you for allowing us the opportunity to comment on the implementation issues we believed are raised by the Framework. Please contact the following lawyers in our Toronto, Ottawa, Vancouver and Montreal offices if the CSA would like further elaboration of our comments. We would be pleased to meet with you at your convenience.

- Rebecca A. Cowdery (Toronto office) at 416-367-6340 and rcowdery@blgcanada.com
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Yours truly,

"INVESTMENT MANAGEMENT PRACTICE GROUP"

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