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Dear Sirs/Mesdames:

Re: CSA Notice and Request for Comments (the CSA Notice) on Proposed amendments to National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (NI 31-103) and Companion Policy 31-103CP *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (Companion Policy) concerning cost disclosure and performance reporting published for comment on June 22, 2011

We are pleased to provide the members of the Canadian Securities Administrators (CSA) with comments on the above-noted proposed amendments to NI 31-103 and the Companion Policy (collectively, the Proposed Cost Disclosure and Performance Reporting Requirements or the Proposed Amendments).

These comments are those of individual lawyers in Borden Ladner Gervais LLP's Investment Management practice group and do not necessarily represent the views of BLG, other BLG lawyers or our clients.

General Comments on the Proposed Amendments

We completely support the CSA's investor protection policy objectives behind the Proposed Cost Disclosure and Performance Reporting Requirements i.e. to ensure that clients of dealers and advisers receive clear and easily understandable information about the various costs that are associated with their investments and their accounts, together with tailored reports on how their investments perform.

However, as we detail below, we strongly believe that the Proposed Amendments must be modified in order to achieve the CSA's objectives. In our view, amendments to the Proposed Amendments are necessary given the following significant issues with the current version of the Proposed Amendments (each of which is elaborated on in our specific comments below):

1. **Overlap with existing regulatory disclosure**

The Proposed Amendments will likely result in unnecessary regulatory burden to industry participants, due to their overlap with existing disclosure requirements under current securities laws. For example, the prospectus documents of publicly offered investment funds contain full disclosure of all costs and charges levied at the fund level and describe the commissions paid to registered dealers. With the Fund Facts documents, this disclosure is even clearer. Investment funds are also subject to a continuous disclosure regime, wherein information about costs and charges paid by investment funds are clearly described.

In the CSA Notice, the CSA acknowledge the requirements for a mutual fund to prepare a Fund Facts document for each series or class of the mutual fund, but the proposed amendments to NI 31-103 and the Companion Policy contain no references to Fund Facts or any of the other prospectus and continuous disclosure documents for mutual funds (being the simplified prospectus, annual information form, financial statements and management report of fund performance) and other investment funds. This apparent lack of regulatory reliance on the prospectus and other disclosure documents, including the Fund Facts, is curious given the focus of the last number of years by the CSA on the necessity (and usefulness) of the Fund Facts document to ensure clear and very simple disclosure to investors.

2. **Overlapping disclosure may lead to increased investor confusion**

For the reasons noted above, the Proposed Amendments also have the potential to result in **more** investor confusion, given the above-noted duplicative disclosure and the lack of context for the various pieces of disclosure proposed to be mandated by the Proposed Amendments. We are concerned that the Proposed Amendments will serve only to provide investors with more "information", without enhancing their understanding of their investments.

In our view, the proposals for registrants to disclose many of the same topics as are contained in the Fund Facts and other prospectus and continuous disclosure documents, may result in information over-load, lack of uniformity, inaccuracies, double-counting of costs and continued confusion as to the costs of investment funds, particularly since many costs are not charges levied by the registrants in question, but are charges levied by the investment fund managers of the funds for services provided to those funds by the investment fund managers and other service providers.

3. **Proposed Amendments unduly focus on mutual funds and fixed income securities**

In our view, the Proposed Amendments have the potential to result in misleading investors in that the required disclosure focuses heavily on certain types of securities (e.g. mutual funds and fixed income) which may cause investors to think that these types of investments are more problematic – and costly -- than others.

4. **Proposed Amendments will necessitate costly systems changes**

Compliance with the Proposed Amendments can be expected to necessitate costly IT system changes for industry participants (e.g. changes would be required to allow aggregation of the required information as such information is not currently tracked in the same way) without, in our view, a corresponding increase in comprehension by, and meaningful disclosure to, investors.

5. **Proposed Amendments do not account for the work of the MFDA or IIROC**

The Proposed Amendments do not account for the years of work that has been carried out by the MFDA and IIROC, under the review and guidance of the CSA, on the same topics as covered by the Proposed Amendments. We recommend that the CSA explain where the rules of these SROs (proposed in the case of IIROC) are deficient, such that the member dealers will be required to adhere also to the CSA requirements.

Given the lack of an exemption for dealers who are members of the MFDA, the Proposed Amendments can be expected to result in additional costs being imposed on MFDA dealer members in light of the MFDA requirements that come into effect in July 2012 relating to the same subject matter. In many instances, MFDA dealer members will be required to make compliance and systems changes to comply with the new MFDA requirements and should the Proposed Amendments be implemented as currently drafted these same dealers would be required to make a second set of changes to accommodate the new CSA requirements.

6. **Proposed Amendments do not reflect industry relationships**

We understand that, particularly in the context of managed accounts of advisers (portfolio managers), clients may have accounts with the adviser (as their discretionary portfolio manager), but also with a registered dealer (IIROC members for the most part), with whom they have an account for custody purposes and for trade execution. We recommend that the CSA engage in further discussions with the adviser (portfolio management) community to determine how, in these circumstances, the potential for

duplicative and overlapping costs and performance reports can be minimized, so as to ensure that clients receive reporting from only one registrant, that registrant being the one with whom that client has the complete relationship (generally the portfolio manager). The Proposed Amendments, as drafted would require both firms to provide the same client with the annual cost and performance disclosure about the same investments, whereas the client would only be reasonably expecting to receive a complete report about his or her managed account from the portfolio manager.

Specific comments on the Proposed Amendments

1. General comments on "account" disclosure

It is not clear whether the CSA expect that a registrant will provide the required costs and performance disclosure on an account-by-account basis or whether registrants can group a client's accounts together and provide the information at a *client* level. We believe that clients should be free to request consolidated information that covers all of their accounts (e.g. registered and non-registered accounts) with a registrant. The terminology used in the Proposed Amendments is ambiguous and the requirements should be clarified, provided the above-noted flexibility is permitted.

2. Comments on subsection 14.2 (1) Relationship Disclosure Information

Other than as noted below regarding benchmark disclosure, we have no substantive comments on the proposed amendments to subsection 14.2 of NI 31-103, however, we wish to comment on the new additions to the discussion about the RDI contained in the Companion Policy.

(a) The new sentence included as a new paragraph under the heading *Content of relationship disclosure information* is appropriate. However, we recommend that this sentence refer specifically to the prospectus for prospectus-qualified investments, such as securities issued pursuant to an IPO and continuously offered investment funds. With the focus of the CSA in recent years on ensuring clear and concise disclosure documents (through Fund Facts and other summary prospectus information), we believe the CSA should specifically encourage dealers and their sales representatives to refer to these documents, when they are available for the subject securities, as part of the recommendation process. Similarly, if an offering memorandum exists for exempt securities, dealers and sales representatives should refer clients to that offering memorandum.

(b) We note that the CSA have expanded on the ordinary meaning of the terms "operating charges" and "transaction charges" in the Companion Policy. We point out that this information will likely be duplicative of the more complete and specific information provided in the prospectus of publicly offered securities, such as investment funds. We consider providing explanatory educational information about costs and charges as appropriate, but of equal importance is the need to encourage investors to read the prospectus and to explain to those investors what information is contained therein. We do not, however, consider it appropriate to

duplicate in the RDI, specific detailed information that is clearly set out in the prospectus (and that changes from time to time).

We encourage the CSA to confirm that the benchmark disclosure proposed by the draft amendments to section 14.2(1) of NI 31-103 does not apply to firms, whose funds are required to, or decide to show their performance compared to appropriate benchmarks in their prospectuses. For example, this disclosure is provided in the fund prospectuses (pursuant to NI 41-101 or NI 81-101) at the fund level, and not at the individual account level. We assume that the CSA did not intend to capture use of benchmarks by funds in the new proposed "benchmark" disclosure requirements and we recommend a clarifying statement to this effect be provided in the Companion Policy.

3. *Comments on subsection 14.2 (3.1) [the "pre-trade" information]*

We recommend that the CSA clarify their expectations on how the specified information is to be provided to clients on a pre-trade basis by registered firms. We assume that the different drafting of this section -- "the firm must disclose" -- compared with subsection (1) "the firm must deliver to a client" -- was deliberate and means that oral disclosure of the information required to be disclosed by subsection 3.1 will be sufficient. We request that the CSA clarify their expectations in the Companion Policy in this regard.

It is not clear to us after reading the Companion Policy discussion about this subsection, what the CSA's intention is in proposing that registrants disclose to clients "the charges the client will be required to pay in respect of the purchase or sale". Does this mean that the only specific (presumably oral) disclosure (that will be in addition to the prospectus and the RDI) to the client on a pre-trade basis will be of commissions? Given the focus of the CSA to ensure that investors understand the costs and charges that they will incur once they are investors, we do not consider that this narrow disclosure focus will achieve the CSA's purpose for investments in mutual funds or other forms of securities, for example.

We recommend that this subsection be rewritten to require a registered firm to inform the client that there are costs and charges that will be incurred by the investor after he or she makes the investment in question, which are disclosed in the current prospectus that is available for any publicly offered security. Investors should be referred to the available prospectus for this information; in our view, registrants should highlight the availability of this information in the prospectus in a way that will reinforce the use of the prospectus as the definitive source of this information.

4. *Comments on subsection 14.2 (4.1) [the annual "cost" disclosure].*

We recommend that the CSA provide further clarity about the statement in the Companion Policy that reads "*we do not expect registered firms to provide clients with information on product-related charges since the range of products offered by a registrant may be quite broad and the types of products in a client's account may change over time*". If this statement is intended to signal that the CSA do not expect the annual cost statement to include *any* references to fees paid by the investors in mutual funds or other investment funds (i.e. management and administration expenses and operating

costs), then we believe investors will not be receiving the information we consider important.

We understand the inherent (and practically impossible to surmount) difficulties in mathematically calculating how much of a fund's overall costs that are paid at a fund level could be said to be paid by each investor during the past 12 months. These difficulties would be multiplied by the number of funds' invested in and it is inappropriate (and impossible) for registered dealers to undertake this mathematical exercise. Even if this calculation was possible, providing it would be misleading to investors, given that these payments are made at a fund level, and not at an individual client level. We believe there would also be a strong possibility for client confusion, given that the fund disclosure documents list payments out of the funds; a client may consider he or she is paying fees twice – once out of the funds and a second time directly out of his or her account.

Notwithstanding this, we do not believe it appropriate for the annual statement of costs to say *nothing* about fees and expenses charged at a fund level if the account has invested in an investment fund. We recommend that the annual statement of cost refer investors specifically to the continuous disclosure information that is readily available regarding investment funds (including privately placed mutual funds) pursuant to NI 81-106 and explain what information is available for those investors in those documents and how they may access this information, as well as *why* they might wish to review this information. In this way, we consider that investors will be better served in understanding the costs of their investments.

We also ask the CSA to clarify their expectations about disclosure of referral fees in the annual statement of costs. Given that NI 31-103 contains a full regime concerning referral fees, including advance disclosure to investors about referral arrangements (and the fees), we do not consider it necessary or appropriate for the annual costs disclosure proposed by these amendments. In certain cases, any "account-level" disclosure of referral fees may be next to impossible to calculate, not to mention potentially very confusing, given the nature of referral fees. Requiring this information to be provided twice will result in investor confusion and overload of information.

We recommend continued review by the CSA of the proposed disclosure in an annual account statement about commissions received by registrants, particularly since the Proposed Amendments will require explicit disclosure about the receipt of trailing commission payments by registrants, without (necessarily) recognition of other commissions, such as the initial sales charges paid in respect of trades in DSC mutual funds. We also recommend greater clarity about the impact on the investor of payments of these commissions and their relationships with the different purchase options of mutual funds. We consider that the proposed disclosure must be accompanied with some explanation, so as to allow appropriate understanding of the information being provided. The proposed disclosure in the Proposed Amendments only tells a part of the story.

5. *Comments on Transition Periods*

We note that different transition periods are proposed, where some provisions will come into force immediately (section 14.2(3)), others have at least a two year transition period.

We consider that a uniform transition period should be in place for **all** of these requirements, given the amount of preparation and overhauling of procedures and systems that will be necessary to put in place compliance with the Proposed Amendments. The uniform transition period should not be any shorter than the proposed two-year period for much of the Proposed Amendments.

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We thank you for allowing us the opportunity to comment on the Proposed Cost Disclosure and Performance Reporting Requirements. Please contact either one of us at the contact details provided above if the CSA members would like further elaboration of our comments. We, together with other BLG lawyers who have considered the Proposed Amendments, would be pleased to meet with you at your convenience.

Yours truly,

"Rebecca Cowdery" *"Marsha Gerhart"*

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