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VIA EMAIL

November 10, 2011

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
Registrar of Securities, Prince Edward Island
Nova Scotia Securities Commission
Superintendent of Securities, Newfoundland and Labrador
Superintendent of Securities, Northwest Territories
Superintendent of Securities, Yukon Territory
Superintendent of Securities, Nunavut

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Dear Sirs/Mesdames:

RE: CSA Notice and Request for Comment – Implementation of Stage 2 of Point of Sale Disclosure for Mutual Funds – Proposed Amendments to National Instrument 81-101 *Mutual Fund Prospectus Disclosure,* Form 81-101F3 and Companion Policy 81-101CP and consequential amendments

We are writing this letter on behalf of the Investment Management practice group of Borden Ladner Gervais LLP (BLG). As such, we are pleased to provide the Canadian Securities Administrators (CSA) with this letter commenting on the above-noted proposed amendments, which is designed to implement Stage 2 of the CSA's overall point of sale disclosure project. Our comments do not necessarily represent the views of other lawyers, the firm or our clients, although we have incorporated feedback received to date from our clients into this letter. Our comments are also based on our experience in working with our clients, and with the various

members of the CSA in preparing and filing the various fund facts documents required by the amendments to NI 81-101 that were effective as of January 1, 2011.

1. Multiple Fund Facts and Flexibility for Binding Regulatory Documents

Proposed section 5.1.1 of NI 81-101 contains restrictions on binding documents that will be delivered to investors. We appreciate the flexibility to include multiple fund facts in one document and to include other specified related regulatory documents in the same bound package. This binding and delivery flexibility is critical to allow for efficiencies in providing materials to investors and also can be expected to be greatly appreciated by investors for their own ease of reference – both when they receive the package and for future review and consultation. However we urge the CSA to make the following additional changes – all of which are designed to ensure appropriate understanding by investors, without overwhelming them with information, while keeping costs to industry participants to acceptable levels.

(a) We recommend that section 5.1.1 of NI 81-101 permit the dealer to extract the Part A section of a simplified prospectus and the applicable Part B sections of the simplified prospectus, so as to permit a dealer to deliver the pertinent pages of a simplified prospectus along with the applicable Fund Facts, even in circumstances where the fund manager has chosen not to follow the NI 81-101 form requirements for multiple simplified prospectuses where the Part A section is printed separately from the various Part B sections. This will serve to permit the dealer to deliver, and the investor to receive, a more tailored and less overwhelming package of information. This would be consistent with relief that has long been granted to at least one industry service provider and, in our view, should be more broadly available to dealers and other service providers alike, particularly with these amendments, the simplified prospectus will no longer be the "delivered" disclosure document and instead, will be a more expansive document providing more details to those who want to have access to this information.

(b) We are concerned with the lack of a reference to fund facts documents in section 7.4 of the Companion Policy, which speaks of the ability of a dealer to include "non-educational" material with the package of regulatory documents delivered to an investor. So long as the material is not "bound" with the section 5.1.1. package of materials, we see no reason from a policy perspective to restrict this information from going to an investor in the same package.

(c) Related to the above-noted comment, we strongly recommend that both section 5.1.1 of NI 81-101 and section 7.4 of the Companion Policy be amended to refer to "educational" documents and client relationship documents, such as the "relationship disclosure" documents required by NI 31-103, account opening materials, registered tax plan documentation, client contracts and the like. To restrict dealers from providing this information and materials in one package would be unduly prescriptive in our view and would increase costs to the industry (in that they would be required to mail this material out separately). It also

increases the likelihood that an investor will not pay attention to these equally important materials. Please see our related comment in (d) below.

(d) We are confused about the interplay of section 5.1(3) of NI 81-101 (which has not been substantially amended) and new proposed section 5.1.1. Given that the fund facts documents are "documents incorporated by reference" into the simplified prospectus under NI 81-101, wouldn't section 5.1(3) allow the fund facts documents to be bound with the simplified prospectus and the other documentation listed in this subsection? If the simplified prospectus is not to be the "delivery" document, why is section 5.1(3) even necessary? We recommend this subsection be deleted and the important flexibility noted in section 5.1(3) be added to proposed section 5.1.1.

2. Additional modifications are necessary to NI 81-101F3

We appreciate that the CSA does not want to make wholesale changes to the fund facts form, however, there are other amendments, in addition to the few being proposed by the CSA, that we strongly believe are necessary in order to permit funds and fund managers to continue to meet their disclosure obligations, including their responsibility to ensure that disclosure is not misleading, including through omission of material facts.

Our comments on Form 81-101F3 are as follows

(a) We appreciate the proposed amendment to the Form through new 1(c.1) of Item 1, however, we recommend the reference to "any applicable fund identification code" be changed slightly to refer to multiple codes, which will arise if a particular series is distributed with various purchase options, with each purchase option being given a particular specific identification code. We also urge the CSA to permit fund identification codes for single class funds – including those with multiple purchase options (i.e. this fund may have more than one identification code). From a technical perspective, the wording proposed in new 1(c.1) of Item 1 would not permit this.

(b) Item 2 (Quick Facts) should be amended to require funds to disclose not only the date that the Fund was established – but also the date that a particular series or class was established. This disclosure is essential to ensure clear and plain disclosure and not mislead investors. Although many of our clients have tried to include this concept so as to provide investors with the necessary information, our experience to date with staff of the CSA has been mixed, with strong resistance on the part of staff to allowing this important information to be included. Accordingly, we recommend that the Form be amended to permit this specifically.

(c) We strongly recommend that the CSA review the entire Form to better articulate why some portions of the Form relate and speak to the fund (as a whole) and others relate and speak to the series, given that each fund facts document is intended to describe a specific series or class. For example, the Quick Facts

section contains disclosure that applies at a fund level (total value of the fund), but also at a series/class level (MER). It is not obvious to us why this distinction is made. We also note that although some of the Form requirements relate to the specific series, the language required by the Form speak to the "fund" (which is misleading and inaccurate). For example, item 4 of Part I (past performance) requires performance of the class or series, which is appropriate, but the lead-in words suggested in the Form speak to the "fund's" performance. Similarly item 1.3 of Part II also requires data at a series level (which again is appropriate), but the language of the Form speaks to "fund". We recommend the language be amended and the Form requirements rationalized to ensure clarity and consistency in the disclosure requirements.

(d) Item 8 should be amended to reflect the fact that the CSA's wording can be improved with respect to its accuracy, relevance and completeness. For example, an investor's tax rate depends on more factors than where the investor lives, and the type of income earned by the fund is a primary factor in determining the tax payable by investors. BLG's tax lawyers have cleared language substantially similar to the following with various CSA members and we recommend that our clients include this disclosure in compliance with this Item (modified as necessary due to the legal form of the fund – corporate or trust.).

In general, you pay tax on your share of the fund's earnings and on taxable capital gains you realize from redeeming your investment. The amount of tax depends on the tax rates that apply to you, and the type of earnings realized by the fund (for example, interest, dividends, capital gains, etc.). In general, registered retirement savings plans and other registered plans don't pay tax on investments.

If you hold your investment outside of a registered plan, we will send you a tax slip that shows your share of the fund's earnings. You must calculate your taxable capital gains realized on redemption.

3. Fund Facts Form Must Permit Disclosure of Future Material Changes

Some of our clients have experienced the very worrisome situation of not being able to disclose in the fund facts documents for their funds future material changes – that is, for example, changes in portfolio manager or proposed fundamental changes that will occur at some future date. As you know securities regulation deems a material change to have occurred when a "decision" is made to move forward with a fundamental change (such as a change in investment objective, manager, portfolio manager etc.). Under section 11.2(d) of National Instrument 81-106, the fund must file an amendment to the SP, AIF "or fund facts documents" that discloses the material change "in accordance with requirements of securities regulation". The inflexibility of the fund facts form is such that it is not possible to include disclosure about such future changes to a fund, without going to the effort of applying for a variation in the form requirements, with the attendant increased legal fees and lack of timeliness inherent in having to apply for and obtain such relief. We consider that the fund facts form must permit this additional disclosure of future amendments to be included where the fund manager considers the disclosure

most relevant (that is, if it is a proposed change to the investment objective – the disclosure should be included in the investment objective section). This is particularly important, now that the CSA propose to require that the investors receive *only* the fund facts documents.

There is also a practical issue in "amending" Fund Facts documents upon the occurrence of a material change, in that NI 81-101 requires that the entire applicable Fund Facts documents be updated and replace the previous Fund Facts documents. This means that fund managers must work within very tight timeframes to update the financial and performance information to be included in the updated Fund Facts documents to within 30 days of the date of the updated Fund Facts. Particularly when this 30-day period falls after a calendar month end, it is very difficult to calculate the updated information, and this effort can take more time than is available (that is, the 10 days after the occurrence of a material change). We urge the CSA to amend the Fund Facts form to permit disclosure of the necessary information as of the calendar month end that ended immediately prior to a date that is at least 30 clear calendar days from the date of the Fund Facts documents. We recommend this change to allow Fund Facts documents to be filed upon the occurrence of a material change, but we also recommend this change apply more generally to the preparation of the Fund Facts documents (that is, not just when there is a material change). This will greatly facilitate cost effective compliance with the requirements and will promote consistency and accuracy.

4. Additional Flexibility in CSA Administration

While we recognize the need for the CSA staff to monitor compliance with the Form requirements so as to meet the CSA's policy objectives, we urge the CSA to allow additional flexibility in such compliance. For example, we have received comments about the need to follow the order of the form, when our clients have followed the order, but have simply adopted a columnar approach to the document to ensure appropriate page length and clarity of lay-out. While we have generally successfully demonstrated to the staff that the document does follow the ordering of the form, this has necessitated additional time and legal costs to our clients to achieve this result. We also have experienced resistance to using different language from that proposed in the form, which we consider inappropriate given that the form requires only language "substantially in the form" of that set out in the form. This resistance concerns our clients given their responsibility (and legal accountability) to ensure accuracy in disclosure.

In our view, an issuer's duty to not be misleading or make misrepresentations, including by omissions of material facts, must take precedence over ensuring ultra strict conformity with the form requirements.

5. Status of Legislative Changes to Implement Stage 2

The CSA explain that various provinces require changes to securities legislation to implement Stage 2 of the CSA point of sale project, but there is no further information about this issue. Given that the affected industry participants – fund managers and dealers alike – need to understand the potential time-frame for implementation of Stage 2, we urge the CSA to provide more information as to the status of the amendments. For example, we note that the amendments to the *Securities Act* (Ontario) required to implement Stage 2 in Ontario (the amendments to section 71 of the Act) have received royal assent, but have not been proclaimed in force. We

understand that the applicable governments' next steps are largely out of the control of the CSA, but it would be very useful information to understand which provincial legislation needs amending and for what reason, along with understanding the potential time-line. We urge the CSA to provide a more complete explanation of this status, perhaps by way of separate notice.

6. Status of the Simplified Prospectus

We continue to be confused about the status of the simplified prospectus and the fund facts documents under the laws of the applicable provinces. The delivery obligations are proposed to be changed, along with the withdrawal and rescission rights, to tie into the fund facts documents. However, the fund facts documents are incorporated by reference into the simplified prospectus, and under section 2.4 of NI 81-101 (which is not amended) the simplified prospectus is the "prospectus" for the purposes of securities regulation. We assume this is because the CSA did not want to amend (or have the governments amend) the various rights of action that relate to misrepresentations in the prospectus documents, including those incorporated by reference into such documents.

However, we continue to respectfully submit that this position fails to recognize that all the investor will receive by way of disclosure document is the fund facts document for the specific class or series he/she is investing in. Given that the investor does not receive the simplified prospectus or any other document incorporated by reference into the simplified prospectus, how will the rights of action for misrepresentations work and how will the investor even know about the potential issue? We noted our issues in our comment letter to the CSA dated October 16, 2009 and are still concerned about these issues, which are important from the view point of the investor and also the fund and the fund manager, which need to be concerned about the potential for claims of misrepresentation. For ease of reference, we reproduce our October 2009 comment below:

> *Notwithstanding the CSA's responses to earlier comments we made about the liability of funds and fund managers for the disclosure contained in Fund Facts and the other prospectus and continuous disclosure documents, we believe additional legal analysis and explanation is required. We remain unclear how the prospectus rights would work in the context of an investor who receives only a Fund Facts document, particularly with the proposal that the Fund Facts be incorporated by reference into the simplified prospectus, along with the AIF and the continuous disclosure documents.*
>
> *We note section 2.4 of NI 81-101 will continue to provide that the "simplified prospectus" will be the prospectus for the purposes of securities legislation. This section was first included in NI 81-101 when the revised simplified prospectus system based on National Policy Statement No. 36 was adopted, in recognition that the SP was the only document that was delivered to investors, but that the AIF and the relevant continuous disclosure documents were incorporated by reference into that document. Through this legal construct, the investor was deemed to have received all of the disclosure about the fund, even though he or she only physically received the simplified prospectus. This protected the rights of the investor in that he or she could sue for misrepresentations contained in any of the documents incorporated by reference, even though he or she only received the prospectus. It also protected the fund and any other signatory to the AIF,*

including the fund manager, because the limited disclosure contained in the SP (which, by definition, omits material facts), is modified by the more complete disclosure contained in the other documents.

We do not understand how this regulatory theory will work when the Fund Facts is the only document that is delivered to investors, but the SP remains the "prospectus" within the meaning of securities legislation, and all documents are incorporated by reference into the SP, which is not given to investors.

The Fund Facts will contain less than complete disclosure about the Fund. In our view, consistent with NI 81-101 (and NP 36 before it), 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.

We continue to believe that further study is required of this concept, particularly as it relates to the rights of investors to sue for misrepresentations and how the other investor rights are tied to delivery of the various documents.

7. Transition Period for Implementation of Stage 2

Related to our comment 5 above, we urge the CSA to propose a suitable transition period for implementation of the new requirements. We completely support IFIC's recommendations for an 18-month transition period for the reasons articulated by IFIC in its comment letter.

8. Provincial Differences

The CSA explain in the CSA Notice that not all provinces will implement Stage 2 in exactly the same way. We understand the difficulties inherent in ensuring uniformity from a government legislative framework perspective (given the different provincial governments), although we urge the CSA to do whatever it can to work towards this goal. We would also like to emphasize our long-standing comment that differences in CSA rules to accommodate philosophical differences in regulatory administration are very difficult for the industry to comprehend and work with and should be avoided at all costs. In this regard, we cannot understand the two specific references in the proposed rules to "except in British Columbia".

9. Reconciliation of Simplified Prospectus and Annual Information Form

We have previously urged the CSA to begin work now to rationalize the three disclosure documents required by NI 81-101. Now that the CSA are close to implementing Stage 2 of the point of sale project, the redundancies and duplications apparent in the disclosure provided for in

the simplified prospectus, the annual information form and the fund facts documents are very clear and unsupportable. Accordingly, we urge the CSA to begin work to rationalize these documents as soon as possible. Investors are not well served with duplicative and redundant disclosure documents.

10. Status of Withdrawal and Rescission Rights

This most recent publication proposes amendments to the disclosure in the Fund Facts documents about investor rights – but does not make corresponding changes to the same disclosure required in the simplified prospectus. We recommend the two disclosure requirements be made the same.

We also wish to acknowledge our strong support for IFIC's comments about the need for the legislation relating to withdrawal and rescission rights to be clarified and made more uniform. The glitches inherent in the current requirements have been acknowledged for years and we agree with IFIC that the legislators should be encouraged to also change these provisions at the same time as making the other changes necessary to implement Stage 2 of the point of sale project.

Thank you for considering our comments. We would be very pleased to discuss them with you in more detail at any time that is convenient to you.

Please contact any of the following lawyers at the contact information provided below if you have any questions about our comments or you would like to meet with us to discuss them.

Yours very truly,

Borden Ladner Gervais LLP

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