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Delivered by Email

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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
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Dear Sirs/Mesdames

Re: CSA Discussion Paper and Request for Comment 81-407 *Mutual Fund Fees* - Comments of the Investment Management Group of Borden Ladner Gervais LLP

We are lawyers in the Investment Management practice group of Borden Ladner Gervais LLP and are writing this letter to the Canadian Securities Administrators to provide our practice group's collective comments on the above-noted Discussion Paper. BLG has been privileged to work with many managers of mutual funds and other investment funds operating in Canada and internationally for over 50 years. We have assisted in the structuring and establishment of

hundreds, if not thousands, of mutual funds, as well as other types of investment funds. As such, we have seen first-hand the huge growth in the mutual funds and investment funds industry – not only in terms of its increased importance for investors, but also the heightened sophistication of products and services associated with the various funds. We have also seen the significant rise in regulation and regulatory focus on mutual funds. We often assist in industry initiatives, including those organized by The Investment Funds Institute of Canada (IFIC), the Portfolio Management Association of Canada (PMAC), and the Investment Industry Association of Canada (IIAC). Our lawyers participated in the working group that formulated IFIC's comment letter on the Discussion Paper.

It is in this spirit and with this background that we provide the CSA with our collective comments and thoughts on the Discussion Paper. Our comments should not be taken as the views of BLG, other lawyers at BLG who are not within the Investment Management practice group or our clients.

We have chosen to comment on each of the options put forward by the CSA as ways to address the regulatory issues regarding mutual fund fees. We also comment on some of the policy issues identified by the CSA that would lead to one or more of the options being adopted – either by the regulators or by the industry. Notwithstanding the invitation of the CSA to provide comments on other segments of the investment fund industry, we have chosen to restrict our commentary to the public mutual fund industry (mutual funds governed by National Instruments 81-101 and 81-102).

The Discussion Paper is a Positive Regulatory Initiative, Provided Caution is Taken

We wish to commend the CSA for publishing such an informative and thoughtful Discussion Paper. In our view, the Discussion Paper will serve the industry and investors alike as a useful description of the ways that fees are charged – and by whom and to whom they are paid, as well as a good way to analyse some of the long-standing fee structuring issues within the Canadian mutual fund industry (some of which are not new issues) and to consider whether or not these issues have any actual adverse impact on Canadian investors. Given the huge growth in the popularity of mutual funds and the growing complexities in the marketplace, even in the past 10 years, but certainly over the past 20 years, we consider it appropriate and timely that the CSA take the opportunity to analyse mutual fund fees, particularly with the recent global initiatives identified in the Discussion Paper and the attention paid to Canadian fees over the past few years.

However, we wish to emphasize that we consider it vital that the CSA monitor regulatory changes, including the point of sale (Fund Facts) initiative and the recent "client relationship model" final rules (CRM) and determine their impact upon investors' understanding of mutual fund fees and whether this results in any greater informed decision making – before moving forward with any of the regulatory options described in the Discussion Paper. It is also critical that the CSA completely understand the impact of fee initiatives and reforms in other countries before adopting any changes in the Canadian marketplace. Not only must any reform be tailored to the Canadian realities, but we (regulators, investors and industry, alike) have a unique opportunity to monitor in "real time" the impact of local initiatives in other countries and learn from any "mistakes" and unintended consequences to investors' experiences in these other jurisdictions. Similarly we can also benefit from understanding any successes that arise out of the various reforms. We appreciate that the CSA emphasize many times in the Discussion Paper that

they intend to conduct this monitoring – both of current Canadian reforms and the impact of global reforms – before taking any further action.

While the Discussion Paper is a useful *description* of the industry practices and their evolution, we would have found it useful for the Discussion Paper to have contained a description of the regulatory *problems* that the CSA are concerned about. The CSA explain that *we are now examining whether the current mutual fund fee structure raises investor protection concerns that require additional regulatory action.* As we elaborate in more detail below, in our view, the Discussion Paper does not make a case for the existence of investor protection concerns that would warrant any regulatory intervention by the CSA beyond its traditional regulatory focus on disclosure, market conduct and reliance on competitive market forces.

Considerations to add to the Discussion Paper

There are some considerations that we consider important for the CSA to add to its analysis in the Discussion Paper.

1. We urge the CSA to keep in mind the traditional regulatory focus of ensuring clear disclosure of fees, of setting conduct rules for industry participants and of moderating fees that are unconscionable, but otherwise allowing competitive forces and the free market system to bring efficiencies to bear. We consider that, on the whole, these forces have been active and effective in the Canadian market place and that this continues today, particularly with the recent regulatory initiatives relating to point of sale disclosure and CRM. We have reviewed the studies commissioned by IFIC, which, as noted in IFIC's comment letter, dispel the previously oft-cited "statistic" that Canadian mutual fund fees are among the "highest in the world". The IFIC studies indicate that, in fact, Canadian mutual fund fees are consistent with those charged by U.S. and European mutual funds. This fact serves to positively reinforce the efficacy of the current and long-standing regulatory focus in Canada towards clear disclosure of mutual fund fees.

2. It should be acknowledged that all parties in the financial services industry are "for profit" and that services provided to investors, such as advice and investment services, are not provided on a gratuitous basis. All participants – including fund managers, portfolio managers, dealers and advisors – are providing a service to investors (and in some cases to other industry participants) in exchange for a fee and there is nothing inherently negative or unfair about this. The discussion of the various types of fees in the Discussion Paper – and to whom, and by whom, they are paid – although largely accurate, is missing this acknowledgement and balance. Dealers rightfully expect to receive revenue for their distribution services from either the fund managers or the investors. Dealers pass a portion of this revenue onto their dealing representatives (advisors, in the Discussion Paper), as compensation for their agency or employment services to the dealers. Fund managers wish to enhance the compensation they receive by way of management fees; one way of doing this is through good performance (with increased value in the units), but also through larger mutual funds with more assets under administration. This is not unreasonable nor is there is anything inherently "wrong" with this concept. In addition, fund managers and dealers, who are each subject to a prescribed standard of conduct, are not, in our view, acting in a particularly adverse "conflict" position vis a vis investors because of this profit motivation. We consider that the background to the various types of

fees and sales charge options is more nuanced than is suggested in the Discussion Paper, particularly as that discussion relates to "trailing commissions" (we elaborate on this topic below).

3. The Discussion Paper does not discuss the tax considerations that are a key part of any discussion of mutual funds, their fees and structuring. We highlight below some of the tax considerations that are raised by some of the CSA's options, and we would be pleased to provide the CSA with any other information about taxation of mutual funds that the CSA might find helpful in this context.

4. The Discussion Paper fails to acknowledge the CSA's regulation of mutual fund sales practices through National Instrument 81-105, which has been in place since 1998. This instrument contains rules that seek to moderate the conflicts of interest that are inherent in a commission, incentive-based distribution model. These rules also forbid fund managers to pay any money or incentives directly to dealing representatives (advisors). The CSA was very deliberate in its formulation of NI 81-105, including the extent to which the CSA would be willing to regulate specific incentive practices and commission levels. Any future CSA initiative in the area of mutual fund fees, must, in our view, include a consideration of NI 81-105, including any necessary reforms and updating of NI 81-105.

5. The evolution of mutual fund fees provided many *benefits* to investors, including considerations relating to changes in industry focus from front end load commissions to DSC to low load sales charges and also of investing in mutual funds, generally, which include:

    (a) With DSC and low load sales charges – 100 percent of the investor's cash is invested, whereas with front end load, particularly at the 8-9 percent levels in the mid-late 1980s, the commission comes out of the initial investment, meaning less money is actually invested in the mutual funds.

    (b) With DSC and low load sales charges – if the investments are held for the prescribed period (which has shortened over the years), the investor pays no sales charges at all.

    (c) Front end load commission based sales can lead to more active trading in mutual funds (which may result in churning of investments, being traded in order to maximize commission based income).

    (d) Mutual funds give the average retail investor access to a professionally managed pooled vehicle managed by professional money managers and administrators for a comparatively low cost and at low investment thresholds. Mutual funds are easily accessed by investors working through thousands of dealing representatives (including as part of a more wholistic financial planning exercise) and hundreds of dealer firms. In our view, mutual funds are a real Canadian success story, with access to mutual funds being (generally) available in all of the provinces and territories of Canada.

6. Related to the above-noted comment, with manager-established commission structures – that is, fund managers set the level and type of compensation that will be paid to dealers (and therefore indirectly to advisors) – the parties have more equal negotiating positions than would be the case if investors alone were left to negotiate their fees (on an individual basis) with their advisors and dealer firms. Fund managers have interests that are aligned with investors (including smaller retail investors) – they want investors to invest in their mutual funds, they want their product to be competitively priced vis a vis other financial products (including other mutual funds) and they are required to act in the best interests of the mutual funds. Accordingly, fund managers wish to incent dealers to distribute their mutual funds, while not paying more than is necessary to achieve this objective. Fund managers have much more “clout” and negotiating power than do individuals, particularly smaller retail investors. The CSA should carefully consider the potential for unintended consequences if the current tri-party bargaining relationship is replaced with a two-party model with clearly unequal bargaining power.

7. Related again to the two above-noted comments, dealers and fund managers can be said to have a somewhat symbiotic relationship. This relationship feeds the negotiating equality noted above, but also, in our view, led to the growth of the various compensation and incentive models discussed in the Discussion Paper and as regulated by NI 81-105. Because the majority of fund managers generally have no way to distribute their mutual funds to the public (which is more of an operational rather than regulatory issue, given the tremendous operational, compliance and back-office operations that are necessary for a viable dealer network), fund managers must incent dealers to distribute their products, through commissions and other incentives, as well as good management, adoption of best practices and performance. Similarly, dealers are dependent on fund managers to create and properly manage the mutual funds that can be investment options for their clients. As noted above, the operational aspects that are necessary for a viable dealer network have costs which dealers, understandably, consider should be shared by fund managers through compensation and incentives, given the “sharing” of client relationships between dealers and fund managers. This relationship is a reality – but it is not inherently a negative reality, which is hinted at in the Discussion Paper.

In our view, the above considerations are of ultimate importance if the CSA propose to move forward with any regulatory initiative in this area. Mutual funds – as well as the entire Canadian mutual funds industry – provide significant benefits to Canadian investors and also to the Canadian economy. Thousands of Canadians achieve their financial goals through investing in mutual funds – and similarly many thousands of employees and agents of dealers and fund managers are employed in this industry. The potential to affect both investors and firms, and their agents and employees, by regulatory reforms that are not warranted by substantive regulatory problems, is concerning as it is real. It will not be beneficial for investors – or the industry – if the end result of reform efforts is reduced access to mutual funds and investment advice for investors and/or the inevitable consolidation of the industry (particularly of dealer firms and advisors). This may be a consequence if the regulatory burden is increased to levels beyond the common consensus of benefits to investors and the industry.

Comments on the Discussion Paper Issues and Options

We have the following comments on the regulatory issues and options identified in the Discussion Paper.

1. *Investor understanding and control of advisor compensation*

We believe that the current regulatory initiatives – point of sale and CRM – should serve to alleviate the concerns noted in the Discussion Paper. However, these initiatives must be understood in light of the obligations of investors to better understand their investments as well as the cost of such investments. We question whether it is the industry's or regulators' role to ensure that investors act in ways that would appear to make sense to regulators, that is, to "be aware of the impact costs have on net returns" or to "choose lower cost mutual funds, which could influence their returns". Indeed, there may come a point when no additional amount of disclosure (such as that mandated by CRM (oral and written)) or increased regulatory obligations, will cause an average investor to make choices that are based on facts that are perceived to be more "rational" or to take more in depth and informed interest in their investments.

As we note above, there is a cost to investing, and so long as there is clear disclosure of the material facts, particularly when the other regulatory duties of industry participants are considered (suitability obligations, for instance), there may be no regulatory issue that needs to be addressed.

The "regulatory concerns" noted in the Discussion Paper about trailing commissions are particularly misplaced. Given the structures and relationships amongst the various industry participants, we believe it is misguided to suggest that investors should have a "say" in the extent to which their "mutual fund assets" are used to pay for "advisor compensation" or to suggest that there is a lack of clear benefit for investors in trailing commission payments. Trailing commissions are not paid simply to reimburse "advisors" (individual dealing representatives) for "servicing" [this is oftentimes equated with advisors having to meet with the client on a regular basis]; indeed trailing commissions cannot be paid directly to advisors (see NI 81-105). We believe that these payments are more properly viewed as payments to dealers (firms) to compensate them for their overall distribution services, again in recognition that fund managers generally have no other way to distribute their mutual funds to investors nor do they otherwise have to pay for the *costs* associated with distributing mutual funds. The compensation is paid in recognition that the dealer firm provides a valuable service to the fund manager and its mutual funds, as well as to investors, and incurs significant costs (regulatory, operational, agency, etc.) that should be "shared" with fund managers and is paid for through payment of trailing commissions. The distribution services provided by – and costs borne by – dealer firms goes far beyond simply having advisors meet regularly with clients. Enhanced disclosure of the fact that a large portion of the trailing commission payments go to support the significant infrastructure costs of a dealer firm (and not to pay individual advisors for services they provide to a client) could be useful and should be considered by the CSA.

We disagree that it is somehow wrong that mutual fund investors do not have a "say" in the amount of compensation that fund managers pay to dealers as compensation for their distribution services. We particularly disagree with the way the CSA have chosen to characterize this concept in the Discussion Paper: *investors have no say in the extent to which their mutual fund assets are used to pay for advisor compensation.* The CSA have not explained why this is important, nor

have the CSA recognized that Canadians invest in many other financial products, where they have no knowledge or "say" of the amounts paid in the distribution chain (oftentimes with far less transparency than that which exists for mutual funds).

2. *Potential conflicts of interest at the mutual fund manufacturer and advisor levels*

The Discussion Paper discusses perceived conflicts of interest resulting from the commission structures at both the level of the fund manager and the advisor.

While it is accurate to suggest that conflicts of interest exist for fund managers (in theory), that is, fund managers have a profit motive (more assets in funds equals more management fees), which causes them to incent dealers to distribute their mutual funds, we do not consider that a case has been made by the CSA that this conflict is at odds with the fund managers' duty to act honestly, in good faith and in the best interests of the mutual funds, as required under securities legislation. It is only when the conflict is elevated to this level that securities legislation requires consideration of the conflict of interest by an independent review committee of the mutual funds (IRC) under National Instrument 81-107. We are not aware that prevailing industry practices – or the earlier positions of the CSA – would suggest that fund managers should refer trailing commissions or incentives paid to dealers to the IRC of the funds for a recommendation. In our view, the CSA regulate this area in ways that moderate the most obvious conflicts of interest for fund managers through National Instrument 81-105. It would only be if the CSA considered that NI 81-105 did not operate to deal with the conflicts inherent in a commission-based industry, that further action would be necessary. We do not consider that simply paying commissions for distribution services means that the fund manager is acting without regard to its fundamental duty of care towards its mutual funds.

We understand that commissions and incentives can create conflicts of interest at the dealer and advisor level, which may lead (theoretically) to mis-selling of mutual funds (recommendations for mutual funds based solely on the compensation that the dealer/advisor will receive). However, again these conflicts have been regulated, since 1998 by NI 81-105 and through written and oral disclosure (enhanced as it will be in due course by CRM), as well as standards of conduct on advisors and dealer firms, including suitability requirements. The CSA explain that recommendations to investors by advisors cannot be made primarily on the basis of the compensation that the advisor will receive. We consider that this is an area where further discussions by the CSA with the SROs and their members may be useful.

3. *The potential for cross-subsidization of commission costs*

We consider the issues identified by the CSA under this topic warrant further study. We are not aware that cross-subsidization of commission costs are an actual significant issue, in practice, as opposed to a theoretical one. We note that cross-subsidization of mutual fund costs are inherent in other areas of charges borne by mutual funds (and indirectly their investors), for example, HST/GST costs in the various applicable provinces, number of accounts per series versus the actual cost of services, and prospectus and regulatory fees paid to the different members of the CSA. Is this issue of sufficient actual concern that it would be necessary for fund managers to incur the costs (which will be borne by investors) of setting up and maintaining separate series/classes of mutual funds?

4. *Alignment of advisor compensation and services*

As discussed above, we consider that the CSA must consider trailing commissions in a more complete way than provided for in the Discussion Paper. We do not consider there is any "misalignment" between the compensation paid to dealers (again, not advisors) and the services provided to investors by dealers. Trailing commissions, as we explain above, are not paid purely to compensate "advisors" for providing "services" to investors, but rather go towards covering the infrastructure costs of the dealer firm – and are inherent in the relationships between the dealers and fund managers. We do not see that there is anything "wrong" with the fund manager's profit motive whereby the "trailing commission" is a "sales commission" that is paid out over time. This, indeed, is how NI 81-105 characterizes these payments and how these payments are treated for the purposes of HST/GST payments.

5. *Low-cost options for do-it-yourself (DIY) investors*

We cannot comment on the regulatory issues noted under this topic, other than to provide our philosophical perspective that, if there is a problem here, we believe that competitive market forces should be left to resolve it.

We also note that discount brokers continue to have infrastructure costs, notwithstanding the lack of a suitability obligation, which means that it may be appropriate for some sharing of revenues between fund managers and these dealers.

6. *Regulatory Option One – Advisor services to be specified and provided in exchange for trailing commissions*

Consistent with our earlier commentary, we consider this option to fundamentally misconstrue, and overly simplify why trailing commission payments are made by fund managers to dealers. We note that trailing commissions cannot be characterized as payment for "advisor services", otherwise GST/HST would be payable on these payments, which additional cost would not be in the best interests of investors. Also, typically the largest portion of a trailing commission is retained by the dealer firm and is not paid to individual advisors. Although we consider this option to be a non-starter (and not necessary), we see other issues with it, including:

- Who would set the level of service? The fund manager (who is paying the commission) or the dealer (who is receiving it) or the advisor (who receives a portion of it and deals directly with the investor)?

- Who would monitor the level of service provided in return for the fee? This would appear to be a shared requirement – again the compliance costs of this monitoring may be prohibitive.

We do however consider that it would be valuable for fund managers and dealers alike to better describe to investors what trailing commissions are – and why they are paid. This disclosure is mandated in Fund Facts, and will be enhanced with CRM, but further explanation and clarification may still be desirable.

7. *Regulatory Option Two – A standard class for DIY investors with no or reduced trailing commission*

We consider that this is something that should be left to competitive market forces, as referred to above.

8. *Regulatory Option Three – Trailing commission component of management fees to be unbundled and charged/disclosed as a separate asset-based fee*

We note that unbundling in the ways suggested by the CSA could give rise to unintended tax consequences for funds – the separate asset-based fee would likely be treated as a capital expense, with the best case scenario of deductibility over 6 years. Today, the single, bundled management fee is completely deductible by the mutual fund, which is a benefit to investors in that fund.

In our view, this option is not necessary, particularly given the clear disclosure – enhanced as it will be under CRM and the Fund Facts documents.

We see no benefits to investors – only increased costs - in having securityholder votes or enhanced governance requirements for separate asset-based fees. We do not consider that the CSA have made a case that the benefits for this option would outweigh the negatives or even solve the perceived regulatory concerns.

9. *Regulatory Option Four – A separate series or class of funds for each purchase option*

As noted above, we consider the regulatory concerns that give rise to this regulatory option to be overstated and the perceived benefits would not, in our view, outweigh the considerable costs of having to create and maintain separate series. In our view, one series with various purchase options, benefits investors – since all purchase options can be described in a single Fund Facts document, allowing the investors to make better, more informed choices by comparing purchase options side by side. The proliferation of single classes would not be a positive step forward for anyone – the industry or investors.

10. *Regulatory Option Five – Cap commissions*

We are philosophically opposed to any regulatory action that supplants competitive market forces and disclosure, particularly when we do not consider that the Canadian industry has a problem that needs this kind of intervention. In our view, the Canadian industry has largely managed to keep commissions fairly comparable over the various fund groups – there does not seem to be a large disparity amongst commissions, which to us, suggests that competitive market forces are working well.

The automatic conversion option described in the Discussion Paper seems to us to be overly complex, difficult to explain easily to an investor (therefore there is a risk that it would not be easily understood), and could give rise to the potential for an increased level of "churning".

11. *Regulatory Option Six – Implement additional standards or duties for advisors*

We have provided a detailed comment letter on the CSA's October 2012 Consultation Paper on a potential best interest standard for dealers (and their representatives), which is available for review by the CSA.

We found interesting the following statement in the recent (March 2013) Securities and Exchange Commission release (SEC Release No. 34-69013 *Duties of Brokers, Dealers and Investment Advisers)* at page 11:

> *In this release, we discuss a potential uniform fiduciary standard of conduct and alternatives to that standard of conduct. A uniform fiduciary standard of conduct can be understood quite differently by various parties. In fact, public comments on such a standard have made widely varying assumptions about what a fiduciary duty would require. Comments have assumed, for example, that a uniform fiduciary duty would require all firms to, among other things: provide the lowest cost alternative, stop offering proprietary products; charge only asset-based fees, and not commissions, and continuously monitor all accounts.* ***These outcomes would not necessarily be the case.***[emphasis added]

And at page 26:

> *Assume that the uniform fiduciary standard of conduct would be designed to accommodate different business models and fee structures of firms, and would permit broker-dealers to continue to receive commissions; firms would not be required to charge an asset-based fee. As provided in Section 913* [of the Dodd-Frank Act] *"the receipt of compensation based on commissions, fees or other standard compensation for the sale of securities, for example, would not, in and of itself, be considered a violation" of the uniform fiduciary standard of conduct." … To satisfy the uniform fiduciary standard of conduct, however, assume that at a minimum a broker-dealer or investment adviser would need to disclose material conflicts of interest, if any, presented by its compensation structure.*

In our view, the CSA's proposed "best interest" standard would not necessarily forestall the receipt of commission-based compensation from fund managers as is assumed in the Discussion Paper. This issue requires further consultation.

12. *Regulatory Option Seven - Discontinue the practice of advisor compensation being set by mutual fund manufacturers*

We welcome the cautionary words of the CSA in the Discussion Paper that the CSA will be monitoring the impact of reforms in this area in other countries. It can be assumed that there will be many unintended consequences that must be carefully considered – already complex fee structures are said to be adopted by dealer firms, which in turn gives rise to concerns about investor information overload, with the unintended consequence that investors will have no affordable access to advice.

Our recommendation is that the CSA stay the course they have set – and consider the issues discussed in the Discussion Paper (enhanced in the ways we – and no doubt other commenters – suggest) again only once the full impact of both the point of sale initiative and CRM are known.

We are very concerned that the balance we discuss earlier in our comments between dealers and fund managers will be lost – and the only one to lose out will be the smaller retail investor who will have little to no hope of separately negotiating fees for distribution services and may indeed lose affordable access to advice and professional money management.

In our view, the drastic measures suggested by this Option are unwarranted at the present time – certainly as a regulatory option. If individual fund managers and dealers wish to modify commission and fee structures, they should not be stopped from doing this (through regulation), but this is something that competitive market forces can be left to deal with.

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We hope that our comments will be considered positively by the CSA and as helpful to advance the CSA's considerations of their regulatory concerns and options.

In accordance with the OSC's News Release of March 19, 2013, we would very much appreciate being able to participate in the June 7 roundtable scheduled by the OSC. Having regard to our respective schedules, John Hall and Lynn McGrade would be able to participate. We will notify Chantal Mainville of our wish to participate as requested in the News Release.

We would also be very pleased to organize a meeting with the lawyers who participated in the preparation of this comment letter to discuss our comments further with interested CSA staff if this would be considered useful. Please contact any one of us at the contact details listed above, if you would like to do this, or if you have any questions on our comments or submissions.

Yours very truly,

"John Hall"	*"Lynn McGrade"*	*"Rebecca Cowdery"*
John E. Hall	Lynn M. McGrade	Rebecca A. Cowdery