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British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
Financial and Consumer Services Commission (New Brunswick)
Office of the Superintendent of Securities, Prince Edward Island
Nova Scotia Securities Commission
Office of the Superintendent of Securities, Newfoundland and Labrador
Office of the Superintendent of Securities, Northwest Territories
Office of the Yukon Superintendent of Securities
Office of the Superintendent of Securities, Nunavut

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Dear Sirs and Mesdames:

Re: CSA Notice and Request for Comment – Mandating a Summary Disclosure Document for Exchange Traded Mutual Funds and its Delivery – Proposed Amendments to National Instrument 41-101 and to Companion Policy 41-101CP to National Instrument 41-101 and Related Consequential Amendments

TD Securities welcomes the opportunity to provide comments regarding the requirement to prepare and deliver a summary disclosure document (the **ETF Facts**) for exchange traded mutual funds (**ETFs**) and the proposed amendments to National Instrument 41-101 *General Prospectus Requirements* (the **Rule** or **NI 41-101**) and Companion Policy 41-101CP *General Prospectus Requirements* (the **Companion Policy**). We refer to the proposed amendments to the Rule and the Companion Policy together as the **Proposed Amendments**.

TD Securities is a leading full-service securities dealer in Canada. TD Securities acts as an ETF market maker, designated broker and executing broker for a range of products in the Canadian ETF space for the benefit of both retail and institutional ETF investors.

Executive Summary

We support mandating a summary disclosure document which provides investors with important information about ETFs in a manner that is easy to understand. Our comments are intended to: (i) enhance the usefulness and accessibility of the enhanced disclosure contemplated under the Proposed Amendments, (ii) ensure that this enhanced disclosure is provided to those investors who will benefit from it, and (iii) ensure the enhanced disclosure is delivered to such investors in an efficient and cost-effective manner consistent with the Exemptive Relief (defined below). In summary, our comments are the following:

1. **The requirement to deliver the ETF Facts should be tied to the requirement to deliver a trade confirmation**: the Proposed Amendments require that all purchasers of an ETF receive an ETF Facts. This is inconsistent with the Exemptive Relief, which requires that only investors who are required to receive a trade confirmation must receive the ETF Facts. As a policy matter, Canadian securities law recognizes that not all investors stand to benefit from or require delivery of a prospectus and/or a trade confirmation. For example, investors with managed accounts are both exempt from the delivery of a trade confirmation and the delivery of a prospectus. While the Exemptive Relief is consistent with this policy, the Proposed Amendments are not. The Proposed Amendments should continue the delivery model established under the Exemptive Relief by linking delivery of the ETF Facts to the delivery of a trade confirmation.

   In addition, 'delinking' the delivery of the ETF Facts from the delivery of trade confirmations would require the creation of new delivery infrastructure which will involve significant additional costs and approximately 12 to 18 months to implement.

2. **Certain quantitative elements required to be disclosed in the ETF Facts are difficult to understand and may be misleading to investors**: the ETF Facts includes enhanced disclosure about quantitative items specific to ETFs to explain pricing, including (i) average daily trading volumes, (ii) bid-ask spreads, and (iii) average premium/discount to net asset value (**NAV**). These quantitative disclosure items are difficult to understand and may be misleading to investors. We recommend that the CSA lead the development of a standardized disclosure framework regarding factors affecting an ETF's price in the market which is based on the ETF's asset class (the **Standardized Framework**). The goal of the Standardized Framework is to provide investors with relevant pricing information in an accessible format to facilitate more informed investment decisions. We would be pleased to contribute to the CSA's development of the Standardized Framework. Prior to finalizing the Proposed Amendments, we recommend that the CSA conduct document testing to ensure the pricing factors disclosed pursuant to the Standardized Framework are meaningful to investors.

Delivery of the ETF Facts

The Proposed Amendments require delivery of the ETF Facts to all purchasers of ETFs. This is a departure from the delivery obligation currently in effect under the exemptive relief granted by the CSA from the prospectus delivery requirements in respect of ETFs (the **Exemptive Relief**). The Exemptive Relief requires that a summary document (a **Summary Document**) be sent only to a purchaser of an ETF to whom a trade confirmation is required to be sent under the *Securities Act* (Ontario).The Exemptive Relief took this approach because dealers face the difficulty of identifying purchasers of ETFs for the purpose of delivering a Summary Document, unlike when delivering mutual fund disclosure to purchasers of conventional mutual funds. The Exemptive Relief acknowledged and alleviated this challenge by linking delivery of the Summary Document to those investors for whom a trade confirmation is required to be delivered.

The delivery requirement for the ETF Facts in the Proposed Amendments should be consistent with the delivery requirement in the Exemptive Relief: only purchasers who are required to receive a trade confirmation should be delivered an ETF Facts. The delivery requirement under the Exemptive Relief (a) limits the class of investors who receive an ETF Facts to those investors who would stand to benefit from enhanced disclosure, and (b) would allow dealers that are subject to the Exemptive Relief to transition from the delivery of the Summary Document to the ETF Facts without incurring the significant costs or delays associated with moving to a new disclosure regime.

Linking delivery of the ETF Facts to delivery of trade confirmations ensures that the ETF Facts reaches investors who will benefit from the disclosure

Given the recent amendments to National Instrument 45-106 *Prospectus Exemptions* (**NI 45-106**), there is consistency between exemptions from the obligation to deliver a trade confirmation and exemptions from the requirement to deliver a prospectus in the context of "fully managed accounts", as such term is defined in NI 45-106 (**Managed Accounts**). The OSC has previously granted exemptive relief to various investment dealers from the obligation to deliver a trade confirmation to clients with Managed Accounts (provided certain conditions are satisfied)[1]. Similarly, NI 45-106 has expanded the definition of "accredited investor" to include registered advisors transacting on behalf of Managed Accounts, such that Managed Accounts are exempt from the prospectus delivery requirement.

Therefore, the purchase of an ETF made under a Managed Account would be exempt from the requirement to deliver both a trade confirmation and a prospectus. Further, under the Exemptive Relief, given that there is no requirement to deliver a trade confirmation, the purchase is exempt from the obligation to deliver a Summary Document.

The policy rationale behind the exemptions for Managed Accounts from the trade confirmation delivery and prospectus delivery requirements is the same. Investors who have granted investment authority to their advisor do not need to receive prompt confirmation of each purchase made in their account.

[1] See, for example, *In the TD Waterhouse Private Investment Counsel Inc. (December 31, 2008)*.

Similarly, such investors do not need to receive a prospectus for the purchased security because they are not making the investment decision: they have delegated management of their investments to their advisor.

By linking the requirement to deliver a Summary Document to the requirement to deliver a trade confirmation, the Exemptive Relief is consistent with the policy rationale described above, and recognizes that not all purchasers of ETFs have a need or would benefit from enhanced disclosure about the ETF, whether in the form of a prospectus or a summary disclosure document. In contrast, the Proposed Amendments, by requiring that all purchasers of ETFs receive an ETF Facts, provide additional disclosure to an overly broad class of investors who have delegated the authority to purchase investments to their advisor and have no need or interest in receiving an additional disclosure document. In these cases, there is no material benefit to investors that outweighs the significant cost of delivering the ETF Facts to such purchasers. The delivery requirement currently in effect under the Exemptive Relief strikes the appropriate balance between providing enhanced disclosure to certain purchasers of ETFs and exempting those purchasers who would derive little benefit from or have no interest in receiving such disclosure.

The discussion above may also apply to other circumstances where exemptive relief has been granted from the trade confirmation requirement, including in connection with: (1) employer-sponsored stock investment plans, (2) contributions to a self-determined scholarship plan, (3) rebalancing of “model portfolios", (4) trading matching for institutional customers, and (5) certain automatic plans. As with Managed Accounts, mandating delivery of the ETF Facts to purchasers in the above circumstances would unnecessarily broaden the class of investors receiving disclosure about the ETF.

Linking delivery of ETF Facts to delivery of Trade Confirmations will allow dealers to transition to the Proposed Amendment's new disclosure regime without incurring unnecessary costs

Maintaining the current delivery requirement under the Exemptive Relief would also allow dealers to transition from the delivery of the Summary Document to the ETF Facts without incurring significant costs or delays and maintaining a consistent investor experience. By requiring delivery of the ETF Facts to all purchasers, not just those who receive a trade confirmation, dealers subject to the Exemptive Relief, which together make up approximately 80% of all ETF assets under administration, will be obligated to create a new delivery infrastructure which identifies and delivers an ETF Facts to all purchasers.

Contrary to the CSA's assertion that dealers already have the requisite delivery systems in place, creating this infrastructure will involve considerable costs and time. Major system changes to delivery mechanisms entail substantial cost and take at least one year to execute. For illustrative purposes, implementation of Point of Sale 2 and delivery of the Summary Document pursuant to the exemptive relief was costly and took between 12 to 24 months to implement. These costs will be in addition to those costs previously incurred by dealers to build a delivery model in accordance with the terms of the Exemptive Relief.

Content of the ETF Facts

We agree with the CSA's view that ETF Facts should contain relevant information suitable for making investment decisions related to ETFs. While the ETF Facts is generally useful to investors and easy to understand, we believe that the ETF Facts includes certain quantitative disclosure items which may not be generally useful and may in fact prove to be misleading to investors. Our comments on specific elements of the ETF Facts are provided below. We also recommend an alternative approach to explaining ETF pricing which may be more helpful to investors.

Disclosure of average daily trading volume and number of trading days

We question the usefulness of this information to investors. Historical average daily trading volume and the number of trading days are backwards-facing metrics which tell investors very little about a particular ETF's liquidity or its suitability for investment in the future. Much like sales volumes for a mutual fund, which is not disclosed in a Fund Facts, trading volume for an ETF is not an accurate or reliable indicator of its future liquidity, or its inherent safety or risk. It is an indicator of net flows in and out of the fund among other investors rather than the investment capacity of the fund. Emphasizing trading volume data may cause investors to favour more established or popular ETFs with larger average trading volumes at the expense of newer ETFs with smaller trading volumes. This may have the effect of discouraging new entrants and innovative ETF products. Also, because the data provided in the ETF Facts will be in respect of a 12 month period 60 days before the ETF Facts' date and may significantly predate the delivery of the ETF Facts to a particular investor, it may no longer be relevant and accurate, and could be misleading.

Disclosure of average bid-ask spread

Bid-ask spread is a technical concept which, as noted in the Proposed Amendments, investors find difficult to understand. Moreover, much like data on trading volumes, bid-ask spreads may be misleading in determining an ETF's liquidity, future price, or its suitability as an investment. Quoted bid-ask must always be considered in the context of the arbitrage mechanism between the ETF and its underlying assets. Therefore, the most relevant metrics are the typical bid-ask spreads of the ETF's holdings, as compared to quoted prices of the ETF on the secondary market. These are difficult metrics to observe for any practitioner not directly involved or experienced in arbitrage, and may vary significantly with market conditions and time of day. Furthermore, a meaningful analysis of trading implementation cost is difficult to convey to retail investors who are not intimately familiar with arbitrage principles.

Conceptually, disclosing bid-ask spread may also cause investors to favour ETFs with lower price points (because such ETFs will have smaller absolute spreads in cents per share) as well as more established ETFs (which will potentially have a more active secondary market among current holders). Again, this would occur at the expense of new entrants or innovative ETF products and potentially to the detriment of investors.

Finally, as with daily trading volume data, because the average bid-ask spread disclosed will be in respect of a 6 month period 60 days before the ETF Facts' date and that may significantly predate the delivery of the ETF Facts to a particular investor, it may no longer be relevant or accurate, and could be misleading.

Disclosure of Premium/Discount to NAV

Disclosure of premium/discount to NAV may also be misleading to investors. Premium/discount to NAV is determined based on a comparison of the secondary market price of an ETF at any given time during the trading day with the published NAV of an ETF. While the ETF's market price fluctuates during the trading day, NAV is determined following the close of each trading day (similarly to the NAV of a comparable mutual fund). NAV is therefore a static figure during a trading day, even though the prices of the ETF's holdings (which make up the NAV) are fluctuating during such trading day, along with any premium or discount. The end-of-day disclosure of an ETF's premium/discount to NAV would be a point-in-time snapshot and may not be comparable with investor experience for the majority of the trading day.

Finally, we highlight that published ETF NAVs are frequently subject to measurement methodology variation related to the time at which asset prices are determined (which may be at a different time than the close of Canadian markets), or subject to proprietary fair value estimation for international holdings. Due to these factors, published NAVs are not comparable with observed market prices at the end of the Canadian trading day. Comparisons between the ETF price and the NAV may therefore mislead investors into thinking the ETF they are purchasing is expensive or a bargain, without providing investors with the full context about the actual price of the ETF's holdings on the secondary market. We therefore recommend against the blanket inclusion of premium/discount metrics, as we believe these numbers to be generally misleading in the absence of a rigorous, robust and very technical measurement approach. The required level of sophistication in quantifying an ETF's premium/discount would be prohibitively costly and difficult to implement for fund providers, particularly new entrants.

Disclosure regarding "How ETFs are Priced"

As noted above, the concept of bid-ask spread and ETF arbitrage is technical, complex and not generally well understood by retail investors. Providing an overly simplified explanation of these concepts may be misleading, in that it will cause investors to view certain information (i.e. average bid-ask spread) as a relevant factor to consider in making an investment decision, while not providing investors with the full context underlying such data. Providing metrics about the bid-ask spread of the ETF's underlying investments would be more relevant to understanding ETF liquidity than what is proposed to be disclosed in the ETF Facts, but this would entail additional complexity and technical detail that is not easily explained in a summary document intended for retail investors.

Standardized Framework for disclosing ETF pricing

We recommend that the CSA develop the Standardized Framework to ensure the ETF Facts contains consistent disclosure of relevant market pricing factors based on asset class. The Standardized Framework would seek to provide investors with relevant information about the factors which may affect an ETF's market price, in an accessible format to facilitate more informed investment decisions. For example, the price of an international fixed-income ETF may be affected by foreign bond prices, foreign exchange rates and the trading hours in foreign markets. In contrast, the pricing of a Canadian equity ETF may be primarily affected by Canadian equity market prices. Such distinctions by asset class are relevant to investors which may be selecting investments across ETF categories, and in our view would provide better context about the how ETFs are priced on the market than the quantitative factors referenced. We would be pleased to provide insights to help the CSA both develop and refine the Standardized Framework.

Prior to finalizing the Proposed Amendments, we recommend that the CSA conduct document testing to ensure the pricing factors disclosed pursuant to the Standardized Framework are meaningful to investors.

Conclusion

Thank you for providing us the opportunity to make comments on the Proposed Amendments. We would be pleased to provide any further explanations or submissions with respect to the matters discussed in this response and would gladly make ourselves available for any further discussion.

Yours truly,

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