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December 11, 2019

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Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
Financial and Consumer Services Commission, New Brunswick
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island
Nova Scotia Securities Commission
Securities Commission of Newfoundland and Labrador
Registrar of Securities, Northwest Territories
Registrar of Securities, Yukon Territory
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Dear Sirs/Mesdames:

Re: CSA Notice and Request for Comment
***Reducing Regulatory Burden for Investment Fund Issuers – Phase 2, Stage 1* published for comment on September 12, 2019 (the Proposed Amendments)**
Comments of the Investment Management Group of Borden Ladner Gervais LLP

We are pleased to provide the members of the Canadian Securities Administrators (**CSA**) with comments on the above-noted Proposed Amendments. Our comments are those of the individual lawyers in the Investment Management practice group of Borden Ladner Gervais LLP listed below, and do not necessarily represent the views of BLG, other BLG lawyers or our clients.

As we indicated in our letter dated March 1, 2019 commenting on the OSC Staff Notice 11-784 *Burden Reduction,* we welcome the CSA's commitment to reduce regulatory burden for

investment funds and their managers. We have collectively many years of experience working with funds and their managers and are aware of the costs associated with compliance with the various rules and policies that apply to publicly offered investment funds. We are very pleased to provide our feedback on ways in which the CSA's Proposed Amendments could be enhanced to achieve appropriate levels of regulatory burden reduction, without compromising investor protection. In so doing, we have not necessarily repeated our comments in our March 1, 2019 letter to the Ontario Securities Commission where our comments were on matters outside of the Workstreams noted in the Proposed Amendments. We urge the CSA to continue to work on these other burden reduction initiatives and look forward to seeing the product of decisions and recommendations outlined in the OSC's November 2019 publication entitled *Reducing Regulatory Burden in Ontario Capital Markets.* (the **OSC Report**).

To assist the CSA's review of our feedback, we provide our comments on the Proposed Amendments provided for in each of the Workstreams, by Workstream. We also comment on certain of the questions set out in Appendix A and refer to the applicable questions by question number.

Workstream One: Consolidate the Simplified Prospectus and the Annual Information Form

1. We fully support the CSA's proposal to repeal the requirement for a mutual fund in continuous distribution to file an annual information form (**AIF**) and instead consolidate Form 81-101F1 *Contents of Simplified Prospectus* (**Form 81-101F1**) and Form 81-101F2 *Contents of Annual Information Form* (**Form 81-101F2**). However, we urge the CSA to continue to streamline the proposed content of the consolidated document, together with the disclosure provided for in the Fund Facts (Form 81-101F3) to ensure to the greatest extent possible, that the disclosure is meaningful, not duplicative, in a reasonable and appropriate order and as simple and "evergreen" as possible (i.e. with the least amount of data points that would need to be updated on a periodic basis). We consider that it would be a major step backwards if the CSA's proposal to consolidate the SP and AIF were to inadvertently create an unwieldy (and largely unread) document with prescribed disclosure similar to the long-form prospectuses of pre-1986 (when the simplified prospectus regime for mutual funds was first introduced). We are not convinced that the content of the new consolidated SP and its proposed ordering is optimal and we encourage the CSA to continue to reassess the content in the form in order to determine which information is relevant to an investor's decision to invest in a mutual fund. We outline below a number of unnecessary disclosure requirements that we consider could be removed, streamlined or modified without impacting investor protection.

2. We urge the CSA to consider mocking up a consolidated simplified prospectus, and review it along side a typical fund facts document to make sure that the disclosure items are as streamlined (non-duplicative), simplified and evergreen as possible. In particular, we consider that the following items of disclosure should be modified so as to achieve the CSA's objectives (the list below does not purport to be comprehensive).

    a. We do not understand the rationale now that only Fund Facts documents are delivered to investors for continuing with the concept of separate Part B documents for each fund, which will be bound separately with Part A disclosure. In addition, is it still necessary for the consolidated SP to be divided into a Part A

and a Part B section? The catalogue approach for a per fund Part B disclosure was to allow investors to easily consider the disclosure for each fund, which seems to us to be less important now that there are Fund Facts for each series of the fund. Why not drop this in the interests of simplifying the document and introducing comprehensive tables of information covering all of the applicable funds?

b. We urge the CSA to drop the requirement to disclose the principal holders holding 10% or more securities of any class or series of a mutual fund. This disclosure is time consuming to obtain and requires a significant allocation of resources, especially when considering it must be within 30 days of the date of the SP. We believe that investors do not likely consider this data when making an investment decision, and even if they do, the data is not useful since the individual investors are anonymized and the data becomes stale dated once available. The key investor information is around the risks associated with large investors in the fund (as opposed to a class or series), which is already captured elsewhere in the SP. Class or series level information is only relevant if there is a vote to be conducted on a class or series level basis. However, in this situation, the information would be disclosed on a class or series level basis in the information circular. This is an example of disclosure that is not necessary in our view – and would detract from the objective of maintaining an evergreen SP.

c. The order of the disclosure to be provided in the SP should not be dictated or mandated by the CSA. Before the Fund Facts regime, specific ordering was important to allow for comparability of the funds included in a SP– this is less important (and may not be important at all) when the SP is a background document available for investors who seek more information about a fund they are considering investing in.

d. Some of the disclosure currently required by Form 81-101F2 has been moved to Part B of Form 81-101F1 in the Proposed Amendments without the ability to disclose common issues in the introduction to Part B or elsewhere in the SP. Although we wonder if separate Part B sections are even necessary anymore, we consider that there will be redundancy and repetition for each Part B section. This will make for a longer SP. The AIF generally only required this information to be disclosed once.

e. The investment restrictions of a mutual fund are required to be disclosed in response to a number of items throughout proposed Form 81-101F1 and we consider the following examples should be streamlined and rationalized.

    i. Item 5(7) of Part B (Investment Strategies) requires the mutual fund to describe any restrictions on investments beyond what is required under securities legislation that do not pertain to the fundamental nature of the mutual fund.

    ii. Item 6 of Part B (Investment Restrictions) requires the mutual fund to describe any approval of the securities regulatory authorities to vary any of the investment restrictions and practices contained in securities legislation,

including National Instrument 81-102 *Investment Funds* (**NI 81-102**) and provide details of the permitted variations.

iii. Item 14 of Part A (Exemptions and Approvals) requires the mutual fund to disclose all exemptions from or approval under NI 81-101 *Mutual Fund Prospectus Disclosure* and NI 81-102.

In our view, this results in repetitive disclosure of the applicable investment restrictions. We note that this is also an issue with the ETF form of prospectus provided for in National Instrument 41-101 and we urge the CSA to reconsider this duplicative disclosure in both prospectus forms.

3. We urge the CSA to also review and reconsider the prospectus form for ETFs in National Instrument 41-101 to ensure that parallel information and amendments can be made to these documents so as to eliminate duplicative, redundant and unnecessary disclosures. We consider that a reconsideration of the mandatory disclosure for ETFs to be as important as for other publicly available mutual funds.

4. We are in complete agreement with the decisions and recommendations outlined in the OSC Report listed as Decisions and Recommendations F-1 and F-2 and look forward to reviewing the proposals released for comment in this regard.

   a. We highlight, however with respect to Decision F-2, and in response to Question 11, that it would be preferable to eliminate the requirement to file a final prospectus within 90 days of obtaining a receipt for the preliminary prospectus, or at the very least, extend this deadline to at least 180 days. It is not optimal to have to apply for an extension, even using a simplified process as suggested in Decision F-2. Sometimes issues arise after the preliminary filing, and oftentimes 90 days is not sufficient to fully address these issues. For instance, a manager may become aware through the process of exchanging correspondence with the CSA subsequent to the preliminary or pro forma filing, or while negotiating material contracts with third parties, that an exemption is required from certain requirements of NI 81-102. The manager on behalf of the investment fund would then have to apply for and obtain an exemption all within the 90 day period, which likely at this point has been shortened, since the CSA has 10 business days to provide their first set of comments. This means that exemptions must be obtained on an expedited basis. This is particularly the case when there are amendments to NI 81-102. For example, with the recent amendments to NI 81-102 relating to alternative mutual funds that came into force on January 3, 2019, it was not clear which exemptions from NI 81-102 would be required by alternative mutual funds, until after they filed the preliminary prospectus documents and subsequently exchanged correspondence with the CSA and/or began negotiating agreements with their prime broker.

   b. Decision F-1 highlights the need for an evergreen SP as we have suggested in the above commentary. We are completely in support of a rethinking of the prospectus renewal process for investment funds (inclusive of ETFs) and urge the

CSA to consider a two or three year cycle, as opposed to the annual renewal cycle. Filing prospectuses annually serves to increase the costs to funds and their investors, given that considerable regulatory filing fees are payable annually, as well as legal, accounting and other resources are necessary on an annual basis.

5. In response to Question 7, we consider that it would be burdensome to *require* investment funds and investment fund managers to file amended and restated prospectus documents, as opposed to having the option of filing a standalone amendment to the prospectus documents. Preparing an amended and restated prospectus is time consuming and costly, especially considering that the CSA sometimes require the data in the document to be updated. We do not see the benefits of only being able to illustrate a material change (for instance) through producing amended and restated documents. We note that from the investors' perspective, it is easier for investors to spot the changes to their fund or funds in a standalone amendment, as opposed to an amended and restated document.

6. In response to Question 8, we consider that the requirements in Item 11.2 (Publication of Material Change) of NI 81-106 could be streamlined by eliminating the requirement to file a material change report. The information included in the material change report is essentially the same information that is included in the press release. Often issuers insert identical information in the material change report and press release, or insert a cross-reference to the press release in the material change report. Therefore, investor protection and market efficiency is maintained if the requirement to file a material change report is eliminated, since the information that investors and the market require is already disclosed in the press release. This will also serve to reduce costs to funds and their managers, among other things, considering that some CSA members charge a fee for filing of a material change report.

7. In response to Question 9, transition to the new regime will be very important. We urge the CSA to allow funds at least 6 months to prepare the new documents – and to be able to do this in conjunction with their next renewal cycle. The work to develop the new consolidated document should not be underestimated – and there will be a need to build in additional time for translation of the documents.

Workstream Two: Investment Fund Designated Website

8. We support improving accessibility of disclosure to investors and also making more efficient the ways in which funds and their managers can meet their disclosure obligations by permitting investment funds to post disclosure documents on a website. While introducing a requirement for an investment fund to have a designated website does not in and of itself reduce regulatory burden, we understand that the purpose of introducing this requirement is so that certain disclosure could be provided on the designated website, instead of being delivered (electronically or by mail) to investors. We urge the CSA to acknowledge that "access equals delivery" is sufficient (as opposed to physical or electronic delivery) for as many fund disclosure documents as possible.

9. The Proposed Amendments do not explicitly permit the investment fund or investment fund manager to outsource the ability to maintain a "designated" website, and therefore, we suggest broadening the language to specifically allow for this. We urge the CSA to

drop the description of a website as being a "designated" website and simply allow a common sense requirement – that is, there should be SP disclosure of the website where fund disclosure documents are posted. Given the prevalence of websites for fund managers and their funds, we consider that it is not necessary for the CSA to mandate this requirement in ways proposed.

10. We note also that subsection 11.1(6) of the Proposed Amendments to the Companion Policy to National Instrument 81-106 *Investment Fund Continuous Disclosure* (**NI 81-106**) states that investment funds and their managers should review and follow guidance issued by securities regulators and self-regulatory organizations concerning cybersecurity. Given the prevalence of "guidance" about cybersecurity, not only from securities regulators, we wonder if this statement is necessary. We note also that suggesting that investment funds and their managers <u>follow</u> regulatory guidance effectively turns the regulatory guidance into an obligation when it should be just guidance. If this CP section is to be maintained, we suggest deleting the final sentence.

11. We look forward to reviewing the results of the proposals in the OSC Report listed as Decisions F-6 through F-11, although we urge the CSA to think more boldly than is reflected in the items so listed. For example, NI 81-106 requires a more comprehensive review by the CSA, in our view. Among other things, MRFPs should be rethought and streamlined, given the very low readership of these documents, against the considerable costs (time and resources) of producing them. Rather than developing and implementing an alternative to the annual notice requirement (F-6) or promoting "electronic delivery" (F-10), we consider the CSA should drop the notion of "delivery" of fund continuous disclosure documentation in favour of the concept of "access equals delivery" through posting on websites.

Workstream Three: Codify Exemptive Relief Granted in Respect of Notice-and-Access Applications

12. While we agree with the CSA's proposal to codify "notice-and-access" exemptions which have been widely given to funds and fund managers regarding proxy circulars, we urge the CSA to reconsider proposed subsection 12.2.1(k) of NI 81-106, which states that the notice must only be combined with a form of proxy and no other document. This has the effect of not permitting cover letters to be sent with the notice and form of proxy. A cover letter can assist the investor in understanding the enclosed documents. We do not see the harm in allowing a cover letter, as long as the information contained in the cover letter is factual and consistent with the information circular.

13. Pursuant to proposed subsection 8.2(1) of the Companion Policy to NI 81-106, the CSA suggest that notice-and-access should only be used for a particular meeting if the fund or fund manager has concluded it is appropriate and consistent with the purposes of notice-and-access to do so, taking into account factors such as whether a better participation rate would be obtained, and whether there was a material decline in beneficial owner voting rates in prior meetings where notice-and-access was used. We do not think that a better or worse participation rate is obtained where notice-and-access is used compared to, when it was not used. We consider that participation rates are not correlated with the method of communication with investors and the length of the document provided to investors. Thus,

we do not think it is appropriate or meaningful for investment funds and their managers to consider whether a better participation rate will be obtained by using notice-and-access, and whether a worse participation rate was obtained in the past due to using notice-and-access. We urge the CSA to drop this policy discussion.

Workstream Four: Minimize Filings of Personal Information Forms

14. The proposal to eliminate the filing of a personal information form for individual registrants and permitted individuals who have already submitted a Form 33-109F4 *Registration of Individuals and Review of Permitted Individuals* is very welcome and we hope that this rule amendment will be implemented as soon as possible.

15. We urge the CSA to work with the stock exchanges to help facilitate similar reductions in the regulatory burden for ETFs. ETFs currently file Personal Information Forms (**PIFs**) with both the exchange on which the series of the ETF are listed and with the securities regulators, which is unnecessarily duplicative. The burden is exacerbated given the different methods of filing PIFs (for instance, through an online portal with the Toronto Stock Exchange (**TSX**) and via SEDAR with the securities regulators) and the different timing requirements for when updated PIFs need to be filed. On October 10, 2019, the TSX reduced the frequency with which certain individuals have to submit an updated PIF or Declaration from every three years to every five years. Under NI 81-101, the securities regulators continue to require a new PIF to be filed every three years. This timing discrepancy causes confusion and creates administrative pressures for fund managers and individuals that have to complete or update a PIF. While it would be ideal to eliminate the duplicative PIF filings, we would suggest that, at a minimum, the timing requirements for updated PIFs to be consistent between the stock exchanges and the securities regulators.

Workstream Five: Codify Exemptive Relief Granted in Respect of Conflicts Applications

16. While we support the codification of exemptions granted in respect of applications for relief from the stated prohibitions relating to conflicts of interest, we note that the CSA do not address the transition period for those investment funds and managers that operate pursuant to previously obtained exemptions after the Proposed Amendments come into effect. Will it be the case that all such relief is nullified and replaced by the Proposed Amendments and if so, pursuant to which provision in securities legislation? We do not consider this should be the case. Not all existing exemptions have the exact same provisions (although in our experience, they are quite similar, particularly in recent years). Existing exemption orders should continue to stand due to unique provisions that may be included. Ideally, industry participants would have the choice whether to continue to rely on their exemption order, or on the new proposed codified exemptions, whichever is more current and least burdensome.

    We also urge the CSA to provide comfort to managers and to independent review committees of funds (**IRCs**) about the expectations, if any, on essentially redoing referrals to IRCs and reconsideration by IRCs of previously granted approvals, if the previously granted relief cannot be relied upon or is different from the exemptions provided in NI 81-102. In any event, it will be important for the CSA to explain its position and, if it intends to revoke prior relief, how the applicable regulators have the authority to do this.

We note that managers that have obtained discretionary relief orders in the past have structured their business around this relief and often incurred significant cost to apply for, obtain and implement the relief. To require them to change structures to comply with the codified relief would cause undue harm to both those businesses, and potentially investors and fund IRCs (as applicable).

17. Proposed section 2.5.1 of NI 81-102 has been added to provide an exemption to permit investment funds that are not reporting issuers to invest in investment funds. Although we welcome this codification of relief, we have a number of comments on the proposed section and the various conditions to this relief.

    a. Condition (c) - There is no explanation as to why the "other fund" has to comply with section 2.4 (restrictions concerning illiquid investments). This must mean that the "underlying fund" must comply with this section at the point in time of the investment, but it is not clear why the CSA propose this restriction, which we note is an increase in the regulatory burden and not a reduction.

    b. Condition (d) – this should be modified to reflect the fact that certain members of the CSA decided that NI 81-106 should not apply to certain non-public funds, as written, this condition cannot be met by "other funds" in those provinces.

    c. Condition (f) – the word "objective price" is used for the first time in NI 81-102 – this should be revised to use the same terminology as elsewhere in NI 81-102 – otherwise readers of this condition, will not understand what is meant.

    d. Condition (g) requires in (i) disclosure that the fund (the top fund taking advantage of this relief) "may purchase securities of other <u>related</u> funds from time to time" and (ii) that the IFM of the top fund is the manager or PM to each of the other funds. We read (i) literally (i.e. this "may" happen), but are confused about (ii) [this should only be required disclosure if it applies]. We urge the CSA to clarify that this section does not mean that the relief <u>only</u> applies when the top fund is investing in related funds, which would be an unduly narrow scope of this relief – again increasing the regulatory burden, as opposed to reducing it.

    e. Condition (g) – we urge the CSA to clarify review each item of disclosure – is each really necessary and why? The length of the disclosure document may be unduly long – and contain information which is irrelevant to the end investor (i.e. they are purchasing the top fund and do not care about the underlying investments – other than the PM for the top fund is making decisions that are in the best interests of the top fund. Some provisions may be relevant only when the top fund is investing in related funds, therefore at a minimum, the words "if applicable" should be included, so as to give the manager some leeway and flexibility.

    f. Condition (g) - We also assume that this disclosure document does not apply to investors in funds where <u>previously</u> granted relief has been provided and we urge the CSA to clarify this.

18. We note that via the proposed amendments to section 1 – namely new subsection (2.1), funds that are not reporting issuers will be subject to <u>all</u> of section 9.4 of NI 81-102. The implications of this are not specifically called out in the CSA notice, namely that these funds will be subject to subsections (1) -(6), in addition to being able to take advantage of the exemptions provided for in new subsections (7) and (8). This proposed addition is not a regulatory reduction – and indeed it increases the burden on funds that are not reporting issuers, given they will need to ensure their constating and offering documents adhere to the new requirements. At the very least the CSA should explain why it is necessary to cause non-reporting issuer investment funds to be subject to these provisions.

19. In addition, in conjunction with new subsections 9.4(7) and (8), if funds take advantage of the exemptions, the funds will also need to comply with section 2.4 (on illiquid investments). It is not clear to us why this is considered necessary (i.e. what is the investor protection rationale for this requirement) and/or whether a fund that is not a reporting issuer will need to comply with section 2.4 for its life or simply for a moment in time before and after the "in specie" transaction referred to in these subsections. This issue should be clarified, and ideally, a non-reporting issuer fund not be made subject to this provision. Again, to impose this condition in the absence of an investor protection rationale is adding to the regulatory burdens, not reducing them.

20. Subsection 13.5(2)(b) of NI 31-103 prohibits an adviser of a managed account causing the managed account to acquire securities of a fund and transferring securities of that managed account, in specie, in payment for the subscription price of the securities of the fund. This subsection also prohibits an in specie redemption by the managed account and the transfer out of securities from the fund into the managed account in payment of the redemption proceeds. We were pleased to see the codified exemptions provided for in new subsections 9.4(7) and (8). We have several comments in respect of these sections:

    a. In subsection (7)(a) it is assumed that the fund (where it is a fund that is a reporting issuer) <u>making the subscription</u> to the second fund and deciding to pay the subscription proceeds through an in specie transaction has a conflict of interest matter which should be referred to the IRC. It is not at all clear to us why this is <u>assumed</u> to be a COIM for the fund deciding to invest in the other fund and pay for the subscription proceeds using fund securities, particularly given the parameters of section 9.4(2)(b) and the balance of subsection (7). We urge the CSA to allow each fund manager to make this determination, without mandatory IRC referrals mandated by the CSA. We note that this requirement does not apply if the second fund is a reporting issuer (we agree that this should not apply – this comment is relevant in connection with our comments on proposed subsection (8)).

    b. Proposed subsection (8) purports to provide relief in respect of "payments made on behalf of a managed account", however, we query whether the CSA has authority to make this rule – given that section 1.2 of NI 81-102 clearly states that NI 81-102 only applies to the circumstances listed. We recommend an amendment to section 1.2 regarding managed accounts similar to what is proposed by subsection 1.2 (2.1).

c. There is a drafting inconsistency between the use of the terms "portfolio adviser" and "portfolio manager" in proposed subsection (8). NI 81-102 currently uses the term portfolio adviser, but we recommend using portfolio manager to better align with registration terminology. Regardless of the term chosen, we think that one term should be used, as opposed to using "portfolio manager or portfolio adviser" and it should be used consistently.

d. Proposed Condition (a) speaks to the "receiving" mutual fund – and unlike condition (a) in (7), it is assumed this fund (where it is a fund that is a reporting issuer) receiving the subscription from the managed account and deciding to accept the subscription proceeds through an in specie transaction has a conflict of interest matter which should be referred to the IRC. It is not at all clear to us why this is assumed to be a COIM for this fund, in these circumstances (managed account), particularly given the parameters of section 9.4(2)(b) and the balance of subsection (8) (and the fact this is not the case for (7)). We urge the CSA to allow each fund manager to make this determination, without mandatory IRC referrals mandated by the CSA.

e. Proposed condition (b) is problematic and does not reflect the realities of the agreements of portfolio managers with their clients who set up managed accounts with those portfolio managers. Portfolio managers are given discretionary authority with respect to the assets in the managed account. If the PM considers that an investment in a fund is appropriate for that account and that it is appropriate to pay the subscription price by transferring securities to the fund, then it should be up to the PM to do this. We do not consider "prior written consent" to be necessary in these circumstances – why is this necessary for this transaction and not other transactions in the client's account, particularly in light of the conditions to this relief.

f. Proposed condition (e)(7) and (g)(8) - We recommend changing the wording as follows, as the trade may not be completed through a dealer at all, and if it is, the custodian may still charge a fee: *The portfolio adviser does not receive any compensation in respect of any payment and the only charges paid by the applicable fund is the commission charged by the dealer executing the trade (if any) and/or any administrative charges levied by the custodian.*

21. The same comments as above are applicable to the exemptions provided for in proposed subsections 10.4(6) and (7) and we recommend careful review of these exemptions.

22. We also reiterate our comment 18, but in respect of the balance of section 10.4 which under proposed subsection 1.2 (2.1) will subject pooled funds to these requirements – again this would be an increased regulatory burden, not a reduction.

23. We note the expansion of the "inter-fund trading" relief provided for in NI 81-107 with the proposed amendments to section 6.1. We are particularly appreciative of the correction to the definition of "current market price of the security" provided for with these revisions.

Workstream Six: Broaden Pre-Approval Criteria for Investment Fund Mergers

24. We support the CSA's proposal to broaden the pre-approval criteria for investment fund mergers. However, we do not agree with the requirement in proposed subsections 5.6(1)(a)(ii)(B) and 5.6(1)(b)(ii)(C) to disclose why the investment fund merger is in the <u>best interests</u> of securityholders. Recent exemptions granted in respect of investment fund mergers only require managers to provide reasons why the investment fund merger is <u>beneficial</u> to securityholders and we urge the CSA to use the same terminology.

Workstream Seven: Repeal Regulatory Approval Requirements for Change of Manager, Change of Control of a Manager, and Change of Custodian that Occurs in Connection with a Change of Manager

25. We support the CSA's proposal to repeal the requirement to obtain regulatory approval for a change of manager, change of control of manager or a change of custodian that occurs in connection with a change of manager. We do not think that the repeal raises any investor protection concerns given that approval from the manager's principal regulator is still required under sections 11.9 and 11.10 of NI 31-103.

26. We note in response to Question 22, that this is not a new issue and was one raised by the CSA in the notices leading up to the implementation in 2000 of NI 81-102. Our position has not changed – we do not consider it appropriate to change contractual obligations in these circumstances. Provided the disclosure that goes to investors about these events clearly disclose what charges will be payable, we consider that the CSA should not mandate anything.

27. In response to Question 24, we do not agree with any proposed requirement that a draft information circular be sent to the CSA for approval before it is sent to securityholders. This would result in an even more time consuming process. Timing is already tight considering the timing requirements in National Instrument 54-101 *Communication with Beneficial Owners of Securities of a Reporting Issuer.* In addition, additional time generally needs to be built in to accommodate service providers that are printing and delivering the meeting materials. Service providers typically request final versions of the meeting materials that are to be printed and delivered, approximately 7 to 10 business days in advance of the delivery date. Adding 10 additional business days to allow the CSA to approve the information circular would mean that the final meeting materials would need to be ready up to 20 days prior to the delivery date (and potentially even earlier than that if there is some back and forth with the CSA on the content of the information circular). Preparing and sending an information circular is the issuer's obligation, and thus we do not believe that the CSA should be commenting on the information circular. We also do not think it is a useful practice for the CSA to comment on the information circular. Currently the information circular is provided to the CSA with the NI 81-102 application, and often times, we note that the CSA have immaterial drafting changes to the information circular.

Workstream Eight: Codify Exemptive Relief Granted in Respect of Fund Facts Delivery Applications

28. We note the amendments to section 3.2.04 of NI 81-101. We have long advocated that fund facts do not need to be provided to the ultimate account holders in respect of ETF or mutual fund investments made in managed accounts or by permitted clients that are not individuals, given the relationships amongst the dealer, the portfolio manager and the client of the portfolio managers, and the decision making that is occurring in these circumstances. We do not consider that section 3.2.01(1) requires delivery of fund facts in these circumstances and would have preferred that the CSA acknowledge this by way of companion policy, as opposed to the proposed rule change.

29. We also note, however, that the same clarifications, particularly in connection with non-delivery of ETF Facts documents in respect of investments in ETFs by managed accounts and by permitted institutional clients must be made to National Instrument 41-101 *General Prospectus Requirements* (**NI 41-101**). We recommend that a discussion of this issue be included in the Companion Policy to NI 41-101 to ensure clarity that no ETF Facts documents need to be delivered in these circumstances as they apply to investments in ETFs through managed accounts.

30. The Proposed Amendments include prescribed disclosure in the year-by-year returns, best-and-worst 3-month returns, and average returns sections of the fund facts for new funds and funds that have not been distributed for a full calendar year or 12 consecutive months. The Proposed Amendments do not take into consideration that only one class or series may be new or distributed for less than a calendar year or 12 consecutive months, as applicable. Investment funds and their managers should be able to modify the prescribed disclosure to reflect this situation. We note that often CSA staff do not allow any modification to the fund facts form and have in the past required disclosure to be included in a certain way even if it simply were not accurate (for instance, CSA staff have required the disclosure state that the fund is new, even though only one series is new, as opposed to the whole fund). Therefore, mutual funds and their managers should be permitted to deviate from the fund facts form requirements where the required disclosure is inaccurate and does not reflect the situation of the mutual fund.

31. In response to Question 26, we strongly urge the CSA to permit the preparing and filing of consolidated fund facts and ETF facts even in the absence of an automatic switch program, and even if there are distinguishing features between the classes or series in addition to fees. There are very few differences between different series or classes of funds and therefore, there is no reason to have a separate fund facts or ETF facts for each series. Additionally, where there are differences, it is beneficial for an investor to receive one fund facts or ETF facts that shows the differences so that it can easily compare the features of the different series. In order to prevent the form from becoming too long, the information can be provided on the designated website and there can be cross-references in the fund facts and ETF facts to the investment fund's designated website where necessary. We consider that it is overdue for the CSA to rethink the necessity for and utility of Fund Facts and ETF Facts on a series by series basis.

Consequential Amendments

32. We note that the CSA refer to consequential amendments to certain instruments for reasons not directly related to efforts to reduce regulatory burden. However, the CSA do not describe these consequential amendments. Given the manner in which the Proposed Amendments have been published and the fact that no blacklines against the current rules have been provided, it is virtually impossible to identify these consequential amendments. We request that the CSA describe these consequential amendments in order to provide the industry a fair opportunity to review them and provide commentary.

Description of Anticipated Costs and Benefits of the Proposed Amendments and Proposed Changes.

33. We note the CSA's cost benefit analysis. We note that translation costs have not been taken into account, which can quickly add up and will most definitely be higher in the first year of implementation of the Proposed Amendments as they relate to preparation of the proposed consolidated SP.

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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 the important matters outlined in the Proposed Amendments. 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 Rebecca Cowdery at rcowdery@blg.com and 416-367-6340 if you have any questions on our comments or wish to meet with us to discuss any or all of our comments.

Yours very truly,

Borden Ladner Gervais LLP

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