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October 13, 2017

**BY E-MAIL**

Ontario Securities Commission

Attention: John Mountain,
Director, Investment Funds and Structured Products Branch

- and -

Vera Nunes,
Manager, Investment Funds and Structured Products Branch

Autorité des marchés financiers

Attention: Hugo Lacroix,
Senior Director, Investment Funds

Dear Ladies and Gentlemen:

**Re: Rationalization of Investment Fund Disclosure ("Project RID") Initiative**

Thank you for providing us with the opportunity to comment on Project RID. We understand that Project RID is an initiative of the Canadian securities administrators (the "**CSA**") aimed at re-examining the investment fund disclosure regime. We further understand that this initiative ties into the CSA priority, as set out in its 2016-19 business plan, to review the regulatory burden for reporting issuers to identify areas that would benefit from a reduction of any undue regulatory burden and streamline requirements without reducing investor protection or the efficiency of the capital markets. As such, the CSA are reviewing the existing disclosure requirements to identify potentially redundant or obsolete disclosures that should be reconsidered by the CSA.[1]

Based on the description above, we have assumed that Project RID includes all elements of the investment fund disclosure regime including the content of such disclosure, the timing and method of delivery of such disclosure, and the review of such disclosure by the CSA.

[1] Our understanding is based on the description of Project RID provided in the June 29, 2017 edition of *The Investment Funds Practitioner* published by Ontario Securities Commission ("**OSC**") staff.

We believe that each of the changes we recommend below would reduce undue regulatory burden on investment funds and their managers without reducing investor protection or the efficiency of the capital markets, in each case by eliminating or streamlining redundant or obsolete disclosure obligations. In some cases, current disclosure obligations have become redundant or obsolete due to more recent securities legislation relating to the same subject matter. In other cases, the redundancy or obsolescence has resulted from the disclosure obligations not being updated to reflect changes in the investment funds industry.

**Background to our comments**

Fasken Martineau DuMoulin LLP ("**Fasken**") is a leading Canadian law firm that provides advice to investment fund managers, portfolio advisers, dealers and service providers across Canada. Currently, eleven partners at Fasken devote a substantial portion of their practice to advising clients on structuring, offering and managing investment fund products and related services, and are supported by further partners with expertise in specific fields including tax, derivatives and financial institution regulation. Fasken is one of the largest Canadian legal practices in the investment products and wealth management area. Our client base includes managers of retail mutual funds, closed-end funds, exchange-traded funds, commodity pools, hedge funds, pooled funds, segregated funds, private equity funds and separately managed account services. We regularly assist clients with developing innovative investment products including, where necessary, obtaining novel discretionary relief under Canadian securities legislation and advance tax rulings to accommodate those products.

Our comments below are based mainly on the issues we have encountered when advising clients on the investment fund disclosure regime. Prior to submitting this letter, we also consulted with more than 20 managers of Canadian public investment funds. Though the comments in this letter are those of Fasken alone, we have taken into consideration the feedback we received from those we consulted.

Some of our comments below are fairly easy to implement as they relate to interpretations or practices of CSA staff that do not require regulatory amendments. Other comments below propose more fundamental changes to applicable securities legislation and may be quite difficult to implement. In our view, simply because a proposed change would require significant amendments to securities legislation does not detract from the merits of that comment. In recent years, the investment funds industry has adapted to major changes to securities legislation including: the introduction and requirement to pre-deliver fund facts; the introduction and requirement to deliver ETF facts; the CRM-2 amendments[2]; and the introduction and ongoing maintenance of

[2] The series of recent amendments to National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Obligations* ("**NI 31-103**") which, among other matters, introduced new disclosure obligations relating to the performance of investment accounts and dealer compensation.

independent review committees ("**IRCs**"). We believe that under Project RID, the CSA should be willing to undertake amendments to securities legislation that are as significant as those made when new regulatory requirements were introduced.

**A. Simplified prospectus**

1. ***Eliminating unnecessary disclosure:*** Form 81-101F1 currently requires that a simplified prospectus (an "**SP**") include various time-sensitive information which is of little use to investors. This information complicates preparation of the SP since it must be updated with each refiling. Primarily for this reason, amendments to an SP typically are disclosed through a standalone amendment, rather than by filing an amended and restated SP, even though an amended and restated SP likely would be easier for investors to understand. We recommend deleting from Form 81-101F1 the requirements to include such time-sensitive information in order to streamline the SP preparation process. Examples of time-sensitive disclosure to delete are:

    (a) ***Dealer compensation from management fees***[3]***:*** This percentage disclosed in Part A of the SP is of little use to investors because it can vary significantly from year to year depending on the volume of sales of the manager's mutual funds under a deferred sales charge purchase option where the manager pays up-front commissions to dealers. The calculation also does not capture compensation to dealers charged and collected at the securityholder account level. More meaningful disclosure has been the focus of, and achieved by, the CRM-2 amendments[4], with the result that this disclosure now is redundant and obsolete.

    (b) ***Securityholders holding more than 10% of the mutual fund***[5]***:*** This information is of little use to investors because large securityholders generally do not pose a material risk to a mutual fund. In many cases, the large securityholders are other mutual funds managed by the same manager engaging in fund-on-fund investments. In these cases, the manager is able to ensure that redemptions by the "top" mutual funds do not cause disruption to the "bottom" mutual fund. In other cases, the large securityholder is an institutional investor that has entered into an agreement with the manager regarding the investor's large investment which includes provisions that mitigate the risk of a large redemption. In all remaining cases, the mutual fund should be able to readily liquidate assets to fund a large redemption, assuming that the mutual fund is

[3] Item 9.2 of Form 81-101F1, Part A.

[4] See, for example, section 14.17 of NI 31-103 now requiring enhanced cost and compensation disclosure by dealers to their clients.

[5] Item 9(1.1)(a) of Form 81-101F1, Part B.

compliant with the restrictions in National Instrument 81-102 *Investment Funds* ("**NI 81-102**") relating to illiquid assets. We also would point out that a large volume of redemptions can be triggered by the simultaneous decision to redeem the securities of a number of smaller securityholders, such as where an advising representative with discretionary authority over a large number of accounts decides to move the assets in those accounts to a different mutual fund. For these reasons, it should be sufficient if an SP simply discloses that any mutual fund may, at any time, experience a large volume of redemptions and any related risks, without disclosing point-in-time positions of large securityholders.

(c) ***Investments exceeded 10% of net asset value***[6]***:*** This information is of little use to investors because it discloses a state of affairs which may no longer exist at the time the SP is filed. Further, even when such an investment occurs, it generally does not constitute a material risk to the mutual fund provided the investment is not an illiquid asset. This is why NI 81-102 does not require divestiture of such holdings. This disclosure is obsolete and therefore should be deleted.

(d) ***High portfolio turnover***[7]***:*** This information is of little use to investors because a high portfolio turnover rate generally does not change the tax implications to the mutual fund or its securityholders. Compared to a mutual fund with a lower portfolio turnover rate, a mutual fund with a higher portfolio turnover simply realizes many smaller gains during a year, rather than a few larger gains during the year. Unless the mutual fund has adopted a strategy expressly seeking to defer the realization of capital gains[8], we do not believe that the tax consequences of a mutual fund's portfolio turnover are material to investors. We acknowledge that a mutual fund with a higher portfolio turnover rate may incur a larger amount of transaction costs during the year than a mutual fund with a lower turnover rate. Such transaction costs now are disclosed in fund facts as the trading expense ratio ("**TER**"), which disclosure did not exist at the time this item was first included in Form 81-101F1. Accordingly, this disclosure in the SP now is redundant and obsolete and should be deleted.

(e) ***Suitability and risk rating***[9]: Suitability disclosure was first included in Form 81-101F1 before the fund facts regime was created. The mutual fund's risk rating was recently added. The same information is provided in

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[6] Item 9(6) of Form 81-101F1, Part B.

[7] Item 7(5) of Form 81-101F1, Part B.

[8] Some mutual funds in the United States have adopted such a strategy, but we are not aware of any Canadian mutual fund having done so.

[9] Items 9.1 and 10 of Form 81-101F1, Part B.

the fund facts[10]. This information also may need to be updated from time to time as the risk rating of a mutual fund changes according to the investment risk classification methodology prescribed by Appendix F to NI 81-102. When this occurs, it will be more efficient for the mutual fund simply to file an amended fund facts with the new disclosure, rather than also file an amendment to its SP. Accordingly, this disclosure should be deleted from Form 81-101F1 because it is redundant and will cause unnecessary inefficiency when the information is updated.

(f) ***Fund expenses indirectly borne by investors***[11]***:*** This information is of little use to investors because it relies on a variety of assumptions that may not apply to the mutual fund, either at the time its securities are purchased by an investor or during the period such securities are held. These assumptions include that the mutual fund experiences a constant annual rate of return of 5% and that its management expense ratio ("**MER**") does not change. The calculation also does not capture compensation to dealers charged and collected at the securityholder account level. Further, this information may cause some investors to place an inordinate amount of focus a mutual fund's MER, rather than its net return. Accordingly, this disclosure in the SP is obsolete and should be deleted.

We reiterate our opening comment that if the unnecessary time-sensitive information described above is no longer required, this will enable mutual funds to more easily file amended and restated versions of their SP, which we believe would provide investors with disclosure that is easier for them to understand.

## B. Annual information form

2. ***Eliminating unnecessary disclosure:*** Like the SP, Form 81-101F2 currently requires that an annual information form (an "**AIF**") of an investment fund include various time-sensitive information which has little value to investors. This information complicates preparation of the AIF since it must be updated with each refiling. Primarily for this reason, amendments to an AIF generally are disclosed through a standalone amendment, rather than by filing an amended and restated AIF which would be easier for investors to understand. We recommend deleting from Form 81-101F2 the requirements to include such time-sensitive information in order to streamline the AIF preparation process. Examples of time-sensitive disclosure to delete are:

[10] Items 4 and 7 of Form 81-101F3.

[11] Item 13(2) of Form 81-101F1, Part B.

(a) ***Principal securityholders***[12]***:*** This item requires several different types of disclosure which are discussed below.

(i) ***Securityholders of the investment fund:*** The AIF is required to disclose securityholders holding more than 10% of any class or series of securities of the investment fund. This disclosure is derived from an equivalent requirement imposed on public companies to disclose their principal shareholders. In the context of public companies, these holdings may be considered material since they reveal persons who, as a result of such holdings, may influence voting control of the company or have access to information that can make them an insider of the company. Such considerations are irrelevant in the context of an investment fund since investment funds typically issue securities which are non-voting and therefore cannot affect the control of the investment fund, nor would such a holding provide access to information that would make the person an insider of the investment fund. This disclosure also raises privacy concerns since, unlike public companies, large securityholders of mutual funds are not required to self-identify their holdings through insider reporting[13]. The issues associated with a potentially large redemption of securities of such securityholders are addressed by specific prescribed disclosure in the SP. For the reasons provided above, the existence of a large securityholder of the mutual fund is not a material fact to investors. We therefore believe that this information is redundant and obsolete, and should be deleted from AIFs.

(ii) ***Securityholders of the manager***: Upstream ownership of the investment fund manager is not a material fact to investors in deciding whether to purchase securities of a particular investment fund. Where a change in the control of a manager occurs, section 5.8(1)(b) of NI 81-102 requires that securityholders of the investment fund be provided with written notice of the change of control. Such notice typically states that the change of control is not expected to materially impact the operations of either the manager or the investment fund. For these reasons, we believe that ongoing disclosure in the AIF of the upstream ownership of an investment fund manager in the level of detail currently prescribed is obsolete and should be replaced merely with disclosure of the person who controls the manager.

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[12] Item 11 of Form 81-101F2.

[13] See, for example, the carve-out for mutual funds in section 107(1) of the *Securities Act* (Ontario).

(iii) ***Ownership of securities by management and IRC members:*** The AIF is required to disclose the level of ownership by directors and senior officers of the manager, as well as the IRC members, in the mutual fund (if greater than 10%), the manager or any service provider to the mutual fund or manager. This disclosure is intended to identify potential conflicts of interest and was first included in Form 81-101F2 before National Instrument 81-107 *Independent Review Committee for Investment Funds* ("**NI 81-107**") was enacted. Now that NI 81-107 provides a more comprehensive regime regulating conflicts of interest, this disclosure is redundant and obsolete.

(b) ***IRC compensation***[14]***:*** The AIF currently is required to disclose the compensation paid to members of the IRC. The compensation level for IRC members is determined by the IRC itself. Such compensation, together with the process and criteria used by the IRC to determine its compensation, are set out in the IRC's annual report to securityholders[15], including other enhanced disclosure regarding the IRC. Accordingly, the disclosure currently included in the AIF regarding IRC compensation is redundant and obsolete and should be deleted.

(c) ***Names of individual portfolio managers***[16]***:*** The AIF currently is required to identify the individual portfolio managers who make investment decisions for the portfolio adviser to the mutual fund, as well as the extent to which those decisions are subject to oversight by others. However, this information is immaterial to investors since the identity of the individual portfolio managers rarely are known to investors, nor are they a material fact in the decision whether to invest in the mutual fund. This is reflected elsewhere in securities legislation which acknowledges that the identity of a individual portfolio manager is material only if the individual has been promoted as such by manager[17]. Accordingly, unless the individual portfolio manager is a high-profile individual, the departure of whom would constitute a material change to the mutual fund, there should be no requirement to disclose such individual in the AIF.

## C. Relocate non-offering information from the SP to the AIF

3. Many years ago, securities legislation was revised to split the prospectus disclosure of most mutual funds between the SP and AIF as part of a regime

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[14] Item 15(2) of Form 81-101F2.

[15] Sections 4.4(1)(e) and (f) of NI 81-107.

[16] Item 10.3(3) of Form 81-101F2.

[17] See section 7.1(b) of Companion Policy 81-106.

change where all investors received the SP, but received the AIF only on request[18]. The concept at that time was that the information of most use to investors would be contained in the SP delivered to investors, with further background information available upon request in the AIF.

Under the fund facts regime, the information of most use to investors now is contained in the fund facts delivered to investors, with background information available upon request in the SP and AIF. Accordingly, the traditional basis for disclosing certain information in the SP rather than the AIF is obsolete and is causing unnecessary duplication between the two documents. This increases the risk of discrepancies.

Having said that, a remaining distinction between the SP and AIF is that investment funds no longer distributing securities generally are obligated to file an AIF annually[19], similar to the obligation on large public companies to file an annual information form annually[20]. In such circumstances, it is common for the AIF to include certain information otherwise disclosed in the SP because such information is not dependent on whether the investment fund's securities are being offered (for example, the investment fund's risk factors, fees and expenses, and information in the introduction to Part B of the SP).

In order to reduce duplication and streamline the preparation of the SP and AIF, we recommend that most information currently in the SP which is unrelated to the terms on which securities of the mutual fund are being offered instead be disclosed in the AIF. The disclosure that will remain in the SP will relate principally to the terms on which the securities of the mutual funds are offered, and would continue to include Part B disclosure for each mutual fund. We also recommend that the certificate page be moved from the AIF to the SP since the certificate page is not signed when the investment fund no longer is distributing securities.

**D. New streamlined prospectus filing process**

4. ***Adopting a regime equivalent to shelf prospectuses:*** Mutual fund prospectus renewal filings account for a large volume of the prospectuses reviewed annually by the CSA, notwithstanding that (i) most aspects of the operations of mutual funds are heavily regulated, and (ii) the amount of material information which changes from year-to-year is relatively small. When compared to the prospectus

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[18] Enacted under National Policy No. 36 which became effective on January 1, 1985. This, in turn, was preceded by the summary statement system in all the provinces (except Quebec) since 1980 and a simplified prospectus system in Quebec since 1983.

[19] Section 9.2 of NI 81-106.

[20] Part 6 of National Instrument 51-102 *Continuous Disclosure Obligations*.

review process for public companies that frequently raise capital by public offering, the level of scrutiny by the CSA of mutual fund prospectuses, the extent of the technical comments made by the CSA during those reviews, and the timespans for completing such filings appear unduly onerous, burdensome and inefficient.

In our view, the prospectus filing and review process applicable to mutual funds has become obsolete and should be modernized. The operations of mutual funds are subject to less change from year to year than public companies. They also are more regulated by securities legislation than those of public companies, and the key service providers to mutual funds also are subject to regulation[21]. Against this backdrop, it should be possible to modernize the prospectus filing process for mutual funds to achieve the same level of efficiency available to public companies eligible to utilize the shelf prospectus system[22]. On this basis, the prospectus filing process for mutual funds should include, at a minimum, the following features comparable to NI 44-101:

(a) the AIF is filed as a background document annually, but not part of the prospectus review process in the normal course;

(b) comparable to a short form prospectus, the SP is filed for mutual funds in distribution and the principal regulator provides its comments on the SP within 3 business days[23] such that a final receipt typically can be issued less than 10 business days after the preliminary or pro forma SP is filed; and

(c) comparable to a short form prospectus, only filings raising novel issues would be subject to a longer review period.

The features of the shelf prospectus system could be appropriately modified for mutual funds as follows:

(a) similar to a base shelf prospectus, the SP filed in respect of one or more mutual funds would contain generic information relating to the basis on which one or more mutual funds may offer their securities under the SP,

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[21] The manager and portfolio adviser to a mutual fund must be registered under securities legislation as an investment fund manager and portfolio manager, respectively, and the custodians of mutual fund assets generally must be regulated financial institutions.

[22] National Instrument 44-101 *Short Form Prospectus Distributions* ("**NI 44-101**") and National Instrument 44-102 *Shelf Distributions* ("**NI 44-102**").

[23] This is the timeline under section 5.5(1) of National Policy 11-202 *Process for Prospectus Reviews in Multiple Jurisdictions* ("**NP 11-202**") for review by the principal regulator of a preliminary short form prospectus.

including the classes and series of securities offered, and the available purchase options;

(b) the SP would be usable for 24 months (currently 25 months for a base shelf prospectus); and

(c) each mutual fund's Part B information and fund facts, together, would be treated as the functional equivalent of a prospectus supplement to a base shelf prospectus. A template of such documents would be filed with and reviewed by the principal regulator as part of reviewing the SP. However, like the prospectus supplements to a base shelf prospectus, any Part B's and fund facts filed during the 24-month lifespan of the SP would not be subject to review by the CSA unless they raise a novel issue.

The streamlined prospectus filing regime described above would enable fund companies to add new mutual funds, and add new classes or series of securities to existing funds, as long as no amendment to the SP is required. This would achieve a level of efficiency comparable to short-form eligible issuers that are able to offer new securities by filing prospectus supplements to a base shelf prospectus. In particular, it would be equivalent to the manner in which various financial institutions are able to issue new non-principal protected notes which provide exposure to one or more mutual funds simply by filing a prospectus supplement to their base shelf prospectus. We believe the same level of efficiency should be made available to all public mutual funds.

**E. Management reports of fund performance disclosure**

5. ***Eliminating disclosure of investment objectives and strategies:*** Management reports of fund performance ("**MRFPs**") currently are required to repeat information regarding the investment fund's investment objectives and strategies[24]. This duplication complicates the process for preparing the MRFPs since the information must be checked against that currently in the SP and fund facts and increases the risk of discrepancies. This disclosure is redundant and we recommend that it be deleted to streamline the process for preparing MRFPs.

6. ***Replacing disclosure of transactions with related parties:*** MRFPs also are required to include detailed information regarding transactions with related parties[25]. This information is burdensome to compile and was first prescribed before NI 81-107 came into effect. Conflicts of interest involving transactions with related parties now are regulated by NI 81-107. Accordingly, this disclosure has become obsolete and should be deleted. We recommend that it be replaced

[24] Item 2.1 of Form 81-106F1, Part B.

[25] Item 2.5 of Form 81-106F1, Part B.

with a requirement to disclose in the investment fund's AIF the manager's policies and procedures regarding these types of transactions, including a summary of the basis on which such transactions have been approved by the IRC.

**F. Quarterly portfolio disclosure**

7. ***Eliminating unnecessary disclosure:*** The information provided by quarterly portfolio disclosure[26] is of limited use to investors since the merits of the investments comprising the top 25 holdings of an investment fund can be assessed only by an individual with relevant expertise. For most investors, reviewing an investment fund's top 25 holdings likely involves little more than name recognition. Since quarterly portfolio disclosure is made within 60 days after the end of the relevant quarter, the information can be stale by the time it is published. A mutual fund's top 10 holdings now are included in its fund facts for any investor seeking illustrative holdings. Top 25 holdings also are disclosed twice each year in MRFPs. In our view, disclosing an investment fund's top 25 holdings on two further occasions during the year is of virtually no use to investors, is obsolete and should be eliminated.

**G. Sales communications**

8. ***Streamlining sales communications warnings:*** Part 15 of NI 81-102 prescribes a large number of warnings and disclaimers that must be disclosed in sales communications, depending upon their content. At least eleven different types of disclosure are prescribed by section 15.6 alone. This disclosure generally is ignored by investors and therefore is of little use. Maintaining these disclosure requirements results in an unnecessarily complex compliance burden for investment funds to include specific warnings and disclaimers with the particular sales communications.

For these reasons, we recommend that the CSA replace the myriad of prescribed warnings and disclaimers with a single, brief warning that is included in all sales communications and refers the investor to a more detailed explanation of sales communications (the "**Sales Literature Guide**"). The single, brief warning may, for example, state:

> "There is no guarantee how this fund will perform in the future. Read the Sales Literature Guide at www.●.com to better understand the information provided above."

The Sales Literature Guide would apply to all sales communications and would explain to readers how different types of information within a sales

[26] Part 6 of NI 81-106.

communication should be read in conjunction with its related warning. We recommend that the Sales Literature Guide be developed collaboratively between the CSA and the investment funds industry, and that the approved version of the Sales Literature Guide be posted on the websites of all managers of public investment funds as well as the CSA.

**H. Material changes**

9. ***Scope of material changes:*** The CSA have stated that certain changes to an investment fund are "material changes" under securities legislation that trigger various disclosure obligations. We disagree with the generality of some of those conclusions, and recommend that the CSA clarify those positions in order to eliminate the unnecessary disclosure obligations they currently trigger. In particular:

   (a) ***Change to portfolio adviser[27]:*** A change to the portfolio adviser to an investment fund is not material to investors unless the investment fund represented that the portfolio adviser is uniquely qualified to achieve the investment fund's objective. This rarely is the case as portfolio advisers generally are not described as essential to the success of the investment fund, and usually can be replaced with other equally competent portfolio advisers. We recommend that the CSA refine its position on this issue by adopting for portfolio advisers the same standard it applies to changes to individual portfolio managers[28]. This will reduce the number of amendments made to prospectus documents when portfolio advisers change.

   (b) ***Change to risk rating:*** Notwithstanding the CSA's articulated position[29], a change to a mutual fund's risk rating, by itself, does not constitute a "material change" under securities legislation. A mutual fund's risk rating is a backward-looking calculation that summarizes the impact of other events. In this way, an update to a mutual fund's risk rating is comparable to an update to the mutual fund's past performance information or MER. An update in these circumstances is not a material change, though the updated information may reflect other events that were material changes and should have been disclosed when they occurred[30]. This is consistent with the views express by the Supreme Court of Canada in the *Danier*

[27] Section 7.1(a) of Companion Policy 81-106.

[28] Section 7.1(b) of Companion Policy 81-106.

[29] Section 2.7(2) of Companion Policy 81-101.

[30] For example, a change to a mutual fund's investment objectives or key strategies, or changes to its fee structure, might be expected to materially impact the mutual fund's performance, MER and/or risk rating and should be treated as a "material change" when it occurs.

*Leather* decision which confirmed that the announcement of a public company's results of operations, by itself, is not a material change, though there may have been previous events impacting those results which should have been treated as material changes when they occurred[31].

If the CSA's current stated position is followed, then each mutual fund may need to continuously recalculate its risk rating in order to determine whether the risk rating has changed since the risk rating it last disclosed. It also creates uncertainty regarding the proper interpretation of a "material change" for investment funds under securities legislation. For these reasons, we suggest that the CSA (i) delete the reference to risk ratings currently in section 2.7(2) of Companion Policy 81-101, and (ii) add to National Instrument 81-101 *Mutual Fund Prospectus Disclosure* ("**NI 81-101**") and Form 81-101F3 a requirement to disclose in fund facts a change that the manager anticipates will occur to the mutual fund's risk rating in the future as a result of a recent material change to the mutual fund. In this way, when a manager makes a material change to a mutual fund, the amendment to its fund facts would include the anticipated impact of that change on the mutual fund's risk rating in the future.

(c) ***Taxable mergers:*** Most taxable mergers do not trigger any material tax liability for the terminating investment fund or its securityholders. In most cases, such a merger is effected on a taxable basis because both (i) the terminating investment fund and its securityholders will not realize any material capital gain (and typically realize a capital loss) as a result of the merger, and (ii) the continuing investment fund has a material amount of loss carryforwards that would be lost if the merger was implemented on a non-taxable basis. Requiring that such mergers be approved by the securityholders of the terminating investment fund and by the CSA is an unnecessary expense. Accordingly, we recommend that section 5.6(1)(b) of NI 81-102 be modified to include taxable mergers where neither

[31] [2007] 3 S.C.R. 331. In that decision, the Supreme Court of Canada articulated the difference between a "material change" (which triggers an obligation to amend a prospectus) and a new "material fact" (which does <u>not</u> trigger an obligation to amend a prospectus) as follows: "It almost goes without saying that poor intra-quarterly results may reflect a material change in business operations. A company that has, for example, restructured its operations may experience poor intra-quarterly results because of this restructuring, but it is the restructuring and not the results themselves that would amount to a material change and thus trigger the disclosure obligation. Additionally, poor intra-quarterly results may motivate a company to implement a change in its business, operations or capital in an effort to improve performance. Again, though, the disclosure obligation would be triggered by the change in the business, operations or capital, and not by the results themselves. In the present case, there is no evidence that Danier made a change in its business, operations or capital during the period of distribution. It is not disputed that the revenue shortfall as of May 16 was caused by the unusually hot weather, a factor external to the issuer. Consequently, Danier experienced no material change that required disclosure…".

terminating investment fund nor its securityholders are expected to realize any material capital gain as a result of the merger.

(d) ***Merging a larger investment fund into a smaller investment fund:*** The CSA have stated that a merger of a larger terminating investment fund into a smaller continuing investment fund generally constitutes a material change to the continuing investment fund, and therefore triggers timely disclosure, a prospectus amendment, and a securityholder approval requirements for the continuing investment fund[32]. We disagree with that conclusion in circumstances where the merger meets the requirements for pre-approval under section 5.6 of NI 81-102. The CSA's current position can lead to the anomalous result that approval is not required from the securityholders of the terminating investment fund, but is required from the securityholders of the continuing investment fund. If the portfolio assets acquired by the continuing investment fund are acceptable to its portfolio adviser and consistent with its investment objective, we see no reason why the merger should be considered a material change to the continuing investment fund that triggers the disclosure obligations described above. We therefore recommend a refinement of the CSA's current position to exclude mergers that meet the requirements for pre-approval under section 5.6 of NI 81-102.

10. ***Eliminating unnecessary material change reports:*** The substantive content of a material change report filed by an investment fund typically is the same as its related press release. The obligation on an investment fund to file a material change report is derived from the equivalent obligation on public companies. However, this obligation fails to acknowledge that an investment fund in continuous distribution already is required to amend its prospectus to disclose the material change. Except for (i) investment funds not currently distributing securities, and (ii) a small number of investment funds that utilize a short-form prospectus which incorporates material change reports by reference, material change reports filed by investment funds serve no purpose and are redundant. We therefore recommend deleting the requirement for any investment fund to prepare and file a material change report if it is in continuous distribution of its securities.

## I. Other documents

11. ***Eliminating trade confirmations for pre-authorized trades:*** Trade confirmations are not required to be delivered in connection with pre-authorized trades under most systematic purchase plans and systematic withdrawal plans, as well as pursuant to dividend reinvestment plans[33]. However, there is no equivalent

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[32] Section 7.3(2) of Companion Policy 81-102.

[33] Section 14.13 of NI 31-103.

exemption for other types of pre-authorized trades (such as trades pursuant to automatic rebalancing services, adjustments to model portfolios, and pre-determined switches based on the size of account holdings). Each such trade is implemented without any further investment decision by the investor. The trade is consistent with either the standing instructions of the investor pursuant to the service in which they enrolled, or made pursuant to discretionary authority given by the investor to another. The trades are reflected in the investor's next account statement. In our view, requiring the delivery of trade confirmations in addition to account statement disclosure for any type of trade that does not require a further trading instruction from the investor is redundant and creates an unnecessary disclosure obligation. We therefore recommend that Section 14.13 of NI 31-103 be expanded to exclude all trades in investment fund securities implemented pursuant to any type of arrangement that does not require a further trading instruction from the investor.

12. ***Eliminating personal information forms***: In connection with filing a prospectus for an investment fund, the manager must submit a personal information form ("**PIF**") for each of its directors and executive officers. PIFs are intended to provide the CSA with an opportunity to review the backgrounds of directors and executive officers of issuers at the time they are raising capital by prospectus. In the context of public companies, those individuals typically are not otherwise subject to background checks. This practice has been extended to managers of investment funds.

Generally, all managers of public investment funds now must be registered as investment fund managers under securities legislation, and the directors and executive officers of managers must submit a completed Form 33-109F4 and undergo extensive background checks as part of such registration process. As a result, it should no longer be necessary for the CSA to perform background checks on these individuals when their funds file prospectuses if the CSA previously approved those individuals to act as directors and executive officers of the investment fund manager. The current requirement to prepare and submit PIFs is burdensome and obsolete. Accordingly, we recommend the elimination of the requirement to submit PIFs for the directors and executive officers of investment fund managers.

## J. Delivery

13. ***Exemptions from delivery of fund facts for pre-authorized trades:*** NI 81-101 currently requires delivery of fund facts to an investor before executing a purchase for that investor unless the current fund facts was previously delivered to the investor in connection with a previous purchase. An exception is available where the purchase is pursuant to a pre-authorized purchase plan. While the scope of "pre-authorized purchase plan" includes periodic purchase plans and periodic

switch plans, it is not broad enough to cover all forms of purchases which do not require further instructions from the investor to execute, such as:

(a) adjustments to model portfolios;

(b) automatic switches between classes or series based on the investor's account size; or

(c) automatic switches from a deferred sales charge class or series to another class or series of a fund with a lower management fee once the deferred sales charge schedule expires.

It also is unclear whether the existing exception for pre-authorized purchase plans includes trades pursuant to an automatic rebalancing service in which the investor has enrolled.

Pre-delivery of fund facts in the circumstances of pre-authorized trades is extremely burdensome since the pre-authorized trade typically occurs on the same day that a pre-determined threshold is crossed. There is no opportunity to pre-deliver the fund facts to the investor unless implementation of the pre-authorized trade is delayed, which would undermine the efficiency of the pre-authorized trading arrangement. The pre-delivery requirement also is unnecessary in this context since no discussion is expected to occur between an investor and their dealing representative before the trade is executed.

For the reasons stated above, we recommend that the exception in section 3.2.03 of NI 81-101 be expanded to cover all types of trades made in circumstances where no further trading instruction from the investor is needed. A number of one-off exemptive relief orders already have been issued in respect of the programs described in (a) to (c) above. Consequently, this change could be viewed as merely codifying exemptive relief currently being granted by the CSA.

14. ***General adoption of notice and access approach:*** The internet is a powerful tool for storing and providing a large amount of information quickly and easily. It should be embraced as the primary means by which investors obtain information about their investment funds. Virtually all Canadians have access to, and are comfortable using, the internet. Where this is not the case, the investor has a relationship with a dealing representative capable of providing the investor with information from the internet.

Securities legislation has been slow to adapt to the availability of information through the internet. Rather than focusing on how to ensure investors are able to locate this information, securities legislation instead has tended to preserve hard copy delivery as the default delivery option. This approach is inefficient, costly and obsolete and not aligned with how Canadians generally want to obtain their information. More recent securities legislation adopting a "notice and access" approach in certain circumstances is encouraging[34], but that approach should be more widely adopted by the CSA.

Delivery of disclosure is further complicated by the different delivery regimes that currently apply to different disclosures. For example, the delivery options for an SP or AIF differ from those for continuous disclosure under National Instrument 81-106 *Investment Fund Continuous Disclosure* ("**NI 81-106**"), and differ further from delivery of proxy-related materials for which "notice and access" discretionary relief has been granted. There generally is no compelling public policy reason for retaining these differences. In our view, a "notice and access" approach can be applied to virtually all documents that are made available to investors, including:

(a) the SP and AIF pursuant to NI 81-101;

(b) the long form prospectus for exchange-traded mutual funds under National Instrument 41-101 *General Prospectus Requirements*;

(c) financial statements and MRFPs under NI 81-106; and

(d) other prescribed periodic disclosure to investors[35].

For each of the documents described above, an investment fund instead can mail one written notice annually to all its securityholders that provides the same information (with appropriate modifications) about these documents as that provided under a "notice and access" approach for proxy-related materials. In our view, the only documents requiring exceptional delivery obligations are (i) fund facts and ETF facts (in order to satisfy the policy objectives underlying those documents), and (ii) documents including personal information of the investor (for privacy reasons) such as account statements.

For the reasons stated above, we recommend that the CSA permit investment funds to use a "notice and access" approach for all documents required to be delivered to securityholders, other than fund facts, ETF facts, and documents containing personal information.

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[34] See section 2.7.1 of National Instrument 54-101 *Communication with Beneficial Owners of Securities of a Reporting Issuer* which allows a "notice and access" approach for delivery of proxy-related materials. Though not applicable to investments funds, equivalent treatment has been given to many investment funds through discretionary relief.

[35] For example, the annual description to securityholders of redemption rights prescribed by section 10.1(3) of NI 81-102.

## K. Other process matters

15. ***Greater accommodation of blacklined fund facts:*** Due to the amount, nature and format of the information required to be included in fund facts, these documents often are prepared using software that does not easily accommodate blacklining. In some cases, managers are advised by staff of the CSA that the blacklined versions submitted as part of the prospectus renewal filings do not identify changes in the CSA's preferred format and must be redone and resubmitted[36]. The amount of resources required to produce alternate blacklined versions of fund facts can be considerable. Given the amount of fees paid with these filings, we request that CSA staff allocate additional resources to reviewing blacklined fund facts in order to be able to accommodate a wider variety of blacklining formats for fund facts.

16. ***Changes to prospectus disclosure requirements during the prospectus review process:*** Preparation of the disclosure contained in a mutual fund prospectus typically involves a large amount of resources and advance planning by the manager and its service providers to meet prospectus filing deadlines. For example, a relatively short timeline exists (often less than 45 days) between the date that various information is obtained and included in fund facts for a preliminary or pro forma prospectus filing, and the date the fund facts must be filed in final form before such information becomes stale-dated. Managers attempt to complete the document preparation in compliance with all prescribed content and formatting requirements, as well as their experience from previous prospectus filings.

    The prospectus preparation process can be severely disrupted when comments are made by CSA staff on the disclosure in a prospectus which are beyond the scope of what is prescribed by securities legislation. In some cases, the changes requested by CSA staff also require substantive operational changes to the mutual fund which cannot be easily accommodated. While the manager may be able to anticipate some of such comments based on the recent experiences of other investment fund managers or the advice of external legal counsel, the exact nature of the additional changes often are unclear, which introduces uncertainty and inefficiency to the prospectus preparation process.

    Comments provided in this manner impose a burden on the mutual fund and its manager. It also can result in the change requested by CSA staff evolving over time as their understanding of the issue and range of acceptable responses deepens. It also can place mutual fund complexes at a relative disadvantage to others if the changes are not implemented quickly and consistently across the entire industry.

[36] This disclosure obligation arises under Section 2.3(2)(b)(ii.1) of NI 81-101.

For these reasons, we recommend that CSA staff adopt an approach whereby it undertakes some form of consultation with industry once it identifies a concern, but before it decides upon the changes it wishes made during the prospectus review process. Such consultation would ensure that the concern is well understood by both sides, and that all options for addressing the concern have an opportunity to be considered. Following such a consultation process, we recommend that CSA staff publish their findings in some written form, as well as articulate the exact nature of the change to be made and the timeline for implementing that change. This type of approach will better ensure that changes to prospectus disclosure are made in the best possible manner, and on a basis that is applied across the industry consistently and quickly with minimal disruption to the prospectus preparation process.

17. ***Resolving prospectus disclosure comments on a dual prospectus:*** As described in the preceding comment, preparation of the disclosure contained in a mutual fund prospectus typically involves a large amount of resources and advance planning by the manager and its service providers to meet prospectus filing deadlines. When the preliminary or pro forma prospectus of the mutual fund is filed as a dual prospectus under NP 11-202, the principal regulator frequently conveys to the manager comments originating from the review by OSC staff. In these circumstances, the manager is expected to resolve such comments through communications only with staff of the principal regulator, rather than communicate directly with OSC staff[37]. This is inefficient since it adds an unnecessary link in the communication chain between the manager and the OSC staff member commenting on the prospectus. The resulting time delays place additional pressure on the manager's ability to remain on the prospectus filing timeline.

    Due to the relatively short timeframe before information in the preliminary or pro forma fund facts becomes stale-dated, it has become obsolete to preclude a filer from communicating directly with OSC staff to resolve their comments on the dual prospectus. Accordingly, we recommend that this feature in NP 11-202 be changed and, in the interim, each principal regulator treat all comments from OSC staff on a dual prospectus as exceptional circumstances that permit the manager to communicate directly with OSC staff regarding those comments.

18. ***Adoption of blanket relief:*** When exemptive relief is provided from disclosure obligations, it typically is granted only to those parties who made the application. Other parties in equivalent circumstances then are required to submit equivalent exemption applications to obtain equivalent relief. This approach is inefficient

[37] According to section 5.3(2) of NP 11-202, the manager may communicate directly with OSC staff only when there are exceptional circumstances and the principal regulator has referred the manager to the OSC.

and burdensome as it requires each investment fund group to separately incur the cost of obtaining the same relief.[38] It also creates the possibility that substantially the same relief may be granted to different parties on slightly different terms, particularly if the conditions of the relief change over time. All of the above, creates a risk of non-compliance since market participants may (i) overlook the need for exemptive relief once a practice becomes widespread in the industry[39], and/or (b) fail to update their previous exemption orders as different versions of the orders emerge[40].

To reduce the risk of such non-compliance and the burden of multiple exemptive relief applications, we recommend that the CSA find a means for granting such exemptive relief industry-wide. In our view, if the CSA are able to impose new requirements industry-wide when it is in the public interest to do so, the CSA also should be able to grant exemptive relief industry-wide when it is not contrary to the public interest to do so.

If the CSA remain unable to overcome legal impediments to issuing "blanket" orders, then we encourage more widespread use of the following practices:

(a) an "opt-in" order which creates a streamlined process for a new party to be added to an existing order[41];

(b) a "representative" order to one person which other persons with similar facts can rely upon[42]; or

(c) a "no enforcement" statement which provides industry participants with a "safe harbour" for non-compliance[43].

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[38] See, for example, the recent series of exemption orders granting relief from the requirement to deliver fund facts in connection with certain trades; as well as the recent series of exemption orders permitting investment funds to use a "notice and access" approach for proxy-related materials.

[39] For example, prior to the addition of section 3.2.03 to NI 81-101, various fund complexes may have overlooked the requirement to obtain exemptive relief from the delivery of a prospectus in connection with trades under pre-authorized purchase plans.

[40] For example, earlier versions of exemptive relief allowing certain trades otherwise prohibited by section 13.5(2)(b) of NI 31-103 are not as permissive as more recent versions of that relief.

[41] See, for example, *Re Frank Russell Company et al.* (June 19, 2009) which authorized the director at the OSC to vary the order after receiving an identifying notice from a party wishing to be added to the order.

[42] See, for example: the orders granting exemptions to dealers from pre-delivery of fund facts in various circumstances provided they have the same facts as the representative dealer named in the order; and *Re CI Investments Inc. et al.* (October 26, 2005) which allowed RSP clone funds to rely on the relief therein provided they had the same facts as the mutual funds named in the order.

[43] See, for example, OSC Staff Notice 91-703 which effectively exempted corporations from reporting certain over-the-counter derivative transactions with their affiliated companies.

19. ***More frequent codification of exemptive relief:*** Exemptive relief from any part of a wide range of securities legislation applicable to investment funds must be disclosed in an investment fund's AIF[44]. As well, some exemptive relief, by its terms and conditions, also must be disclosed in the SP. This disclosure typically becomes more streamlined or disappears altogether once the exemptions are codified. Further, relying upon exemptive relief rather than exemptions within securities legislation tends to create more uncertainty since the representations and conditions in exemption orders often are lengthy, and deviations may exist between different exemption orders relating to the same subject matter. To streamline the prospectus disclosure and remove uncertainty associated with exemptive relief, we recommend that the CSA develop a practice of codifying exemptive relief more quickly than currently is the case.

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We trust that the foregoing comments will be of assistance to the CSA. We would be pleased to elaborate upon our comments at your request. If you would like to discuss our comments further, please do not hesitate to directly contact any of the following partners in our practice group:


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Yours truly,

***"Fasken Martineau DuMoulin LLP"***

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[44] Item 23 of Form 81-101F2.