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BY E-MAIL

British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Ontario Securities Commission, Attention: The Secretary
Autorité des marchés financiers, Attention Me Philippe Lebel
Financial and Consumers 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
Superintendent of Securities, Nunavut
(the "**CSA**")

Dear Ladies and Gentlemen:

Re: Reducing Regulatory Burden for Investment Fund Issuers - Phase 2, Stage 1

I. EXECUTIVE SUMMARY

- **Workstream One:** As currently drafted, the proposed consolidation of the simplified prospectus and annual information form will not reduce regulatory burden and may, in fact, increase burden. To reduce regulatory burden, we recommend that (i) more immaterial prescribed disclosure be removed from the prospectus, (ii) formatting and drafting style expectations for the prospectus be relaxed, and (iii) the prospectus filing system be changed to a regime similar to shelf prospectuses of public companies.

- **Workstream Two:** As currently drafted, the proposal for mandatory websites will create a significant new regulatory burden without an offsetting burden reduction in other areas. We recommend that (i) websites not become mandatory until other regulatory changes involving the use of those websites also come into effect, and (ii) regulatory oversight of websites be limited to ensuring that information is posted to the website when required.

- **Workstream Three:** We view the codification of notice-and-access relief as a housekeeping matter that does not change regulatory burden. In order to reduce regulatory burden, we recommend a wider use of the notice-and-access approach.

- **Workstream Four:** We agree with eliminating the requirement for personal information forms in certain circumstances, and recommend that the CSA collaborate with Canadian stock exchanges to assist with removing their equivalent requirements.

- **Workstream Five:** We view the codification of various conflict of interest relief as a housekeeping matter than does not change regulatory burden. To reduce regulatory burden, we recommend that the CSA (i) codify other relief which has not yet been widely obtained by industry participants, (ii) adopt measures to prevent such codification from becoming obsolete, and (iii) replace certain technical requirements with a principles-based approach.

- **Workstream Six:** We agree that eliminating the need for CSA approval of certain fund mergers will reduce regulatory burden. We recommend that further burden reduction occur by no longer requiring securityholder approval of the fund mergers in those same circumstances.

- **Workstream Seven:** We agree that eliminating the need for CSA approval of certain changes relating to the managers of investment funds potentially reduces regulatory burden if the eliminated requirements do not resurface in the context of approval under NI 31-103. We recommend the repeal of OSC Staff Notice 81-710, which we believe created substantial new regulatory requirements outside the rule-making process.

- **Workstream Eight:** We view the codification of various prospectus delivery relief as a housekeeping matter that does not change regulatory burden. To reduce regulatory burden, we recommend replacing certain technical requirements in that relief with a principles-based approach.

- **Cost-benefit analysis:** We believe the cost-benefit analysis provided by the Ontario Securities Commission ("**OSC**") staff is flawed. However, since the goal of these proposals is to reduce regulatory burden, we do not believe a more robust cost-benefit analysis is needed, provided our comments in this letter are adopted by the CSA.

II. INTRODUCTION

Thank you for providing us with the opportunity to comment on the proposals described in Reducing Regulatory Burden for Investment Fund Issuers - Phase 2, Stage 1 (the "**Proposals**") set out in the CSA Notice and Request for Comment dated September 12, 2019 (the "**Notice**")

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 our experience advising clients in the investment funds industry. Prior to submitting this letter, we also consulted with a number of industry participants specifically about the Proposals. Though the comments in this letter are those of Fasken alone, we have taken into consideration the feedback we received from those we consulted.

Approach to reducing regulatory burden

An ongoing process

Some of our comments below are fairly easy to incorporate into the final version of the Proposals. Other comments below propose more fundamental changes to securities legislation that require more effort 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 ongoing maintenance of independent review committees ("**IRCs**"); a complete overhaul of the registration regime, including the introduction of a registration obligation for investment fund managers; the introduction and requirement to pre-deliver fund facts; the introduction and requirement to deliver ETF facts; and the CRM-2 amendments and subsequent client focused reforms. We believe that, as part of the CSA's efforts to reduce regulatory burden for investment fund issuers and their managers, the CSA should be willing to undertake amendments to securities legislation that are as significant to reduce regulatory burden as those described above which increased regulatory burden.

Periodic reassessment

We also believe it is important for the CSA to periodically reassess whether the regulatory requirements they have placed on the investment funds industry have produced their anticipated benefits. In the past, many new regulatory requirements have been created with limited consideration of the costs associated with those requirements. The anticipated benefits to investors of those new requirements also were not quantified, nor were any benchmarks established to measure the success of those initiatives in the future. As part of its ongoing efforts to reduced regulatory burden, we recommend that the CSA adopt the following protocols:

1. When new securities legislation is proposed, the CSA provides a meaningful cost-benefit analysis that attempts to quantify the anticipated benefit to investors from the proposal or, alternatively, establishes a benchmark that will be used for measuring the future success of the new legislation.

2. When formulating proposed new securities legislation, the CSA also considers the extent to which it will duplicate existing regulations, and modify the proposals to minimize such duplication. As an example, we note that current proposals to introduce a derivatives registration and derivatives business conduct regime[1] will largely duplicate the requirements that already apply to market participants that are registered as portfolio managers under Canadian securities legislation. Such duplication should be identified and avoided.

3. On a regular basis, the CSA reviews the benefits of specific legislation against its previously anticipated benefits or other benchmark and, where the actual benefits to investors are materially smaller than what was expected, considers modifying or eliminating the requirement to reduce unnecessary regulatory burden.

III. COMMENTS ON WORKSTREAMS

Below are our comments on each of the workstreams described in the Notice.

Workstream One:

Consolidate the Simplified Prospectus and the Annual Information Form

We agree that consolidating the simplified prospectus (the "**SP**") and annual information form (the "**AIF**") into a single document (the "**New SP**") has the potential, if implemented properly, to reduce existing regulatory burden on public mutual funds and their managers. However, the Proposals for Workstream One, as currently drafted, fall short of that objective, and potentially increase regulatory burden.

In order to reduce regulatory burden, we believe that the Proposals for Workstream One should reflect three objectives:

1. The New SP should not include any information which is of marginal use to investors or which is substantially repeated in other documents such as the fund facts, ETF facts, financial statements or MRFPs. Any remaining time-sensitive information currently prescribed to be included in the New SP should instead be moved to the financial statements or MRFPs.

2. The style and formatting requirements for the New SP should be relaxed.

[1] CSA Consultation Paper 91-407 *Derivatives: Registration* and proposed National Instrument 93-101 *Derivatives: Business Conduct*.

3. The process for filing prospectuses by mutual funds should be streamlined to a process similar to the shelf prospectus system used by public companies.

Each of these objectives is reflected in our more detailed comments which follow.

Eliminate unnecessary or redundant information

Under the Proposals, the New SP would continue to require disclosure of certain matters that are of marginal use to investors and impose unnecessary regulatory burden on mutual funds. Since mutual funds currently must refile their prospectuses annually, this marginally useful information must be reviewed and updated annually as part of the renewal filing process. This is particularly applicable to information that must be provided as of a prescribed date or covering a prescribed time period ("**time-sensitive information**") and therefore changes each year. We recommend that such information not be included in the New SP for the reasons described below:

1. **Part A, Item 4.3(3)(b):** Investors and their financial advisers typically do not know who are the individual portfolio managers that make the investment decisions for their funds, and do not choose their mutual funds based on the identity of the relevant portfolio managers. Individual portfolio managers assigned to a mutual fund also may change frequently, and may leave their portfolio management firm. It is onerous to compile each year and transcribe into a mutual fund's prospectus information for all of the individual portfolio managers that may make investment decisions for the mutual fund. We recommend that this disclosure no longer be required.

2. **Part A, Item 4.9:** This item would continue to require that the New SP disclose the municipalities where the register of securities of the mutual fund is kept. This requirement originally was adopted from a similar requirement applicable to public companies many years ago when a transfer of securities required presenting an endorsed share certificate at the office of the registrar to complete the transfer. This information is irrelevant to mutual funds because securities of mutual funds generally are uncertificated and non-transferable. It therefore is irrelevant to investors in mutual funds where the electronic register of its securityholders is maintained.

3. **Part A, Item 4.14:** Disclosing the name of each person that owns, of record or beneficially, more than 10% of the outstanding securities of any class or series of a mutual fund, including the number and percentage of securities they own, is very onerous to compile. The prospectus for a mutual fund family often includes hundreds - and in some cases thousands - of classes or series of securities, and identifying each person that owns more than 10% of any class or series within 30 days of the date of the prospectus is difficult to compile and transcribe into the prospectus. The information also is of no value to investors.

   This disclosure has its roots in the original format for a mutual fund prospectus from several decades ago which, at that time, copied the equivalent prospectus disclosure prescribed for public companies without considering its merits in a mutual fund context. Unlike a public company where a significant ownership position could influence the

management of the public company and affect the outcome of a take-over bid, no such considerations apply in the mutual fund context. Securityholders of mutual funds generally do not have voting rights beyond those prescribed by NI 81-102 and therefore cannot affect the control or management of the mutual fund. As well, to our knowledge, there never has been a take-over bid for a mutual fund, nor is there ever likely to be take-over bid for a mutual fund in the future.

Further, disclosing the holdings of individual investors potentially breaches Canadian privacy legislation, which is why the Canadian securities regulators have permitted this information to be disclosed on an anonymous basis. In contrast, significant ownership positions of public companies are required to be publicly disclosed by their owners through insider reporting and early warning reporting obligations under Canadian securities laws, which reporting obligations do <u>not</u> apply to mutual funds.

Disclosing the ownership of the manager of a mutual fund likewise may involve disclosing non-public proprietary information regarding the manager. We also see little benefit it disclosing this ownership information to investors. Except for mutual fund managers owned by Canadian financial institutions, we believe that investors typically do not know who owns the manager of their mutual funds, and do not care.

For these reasons, we recommend that Part A, Item 4.14 be deleted.

4. **Part A, Items 4.18(2) and (3):** Financial information of this detail is more suitable for note disclosure in the financial statements of the mutual fund (in the case of any amounts paid by the mutual fund to its directors) or the annual report of the IRC (in the case of any amounts paid by the mutual fund to its IRC members). For these reasons, we recommend that this disclosure be either deleted or moved to the annual financial statements and annual IRC report.

5. **Part B, Item 5(5):** Current disclosure of a portfolio turnover rate exceeding 70% is potentially misleading because it can be due, in whole or in part, to the mutual fund experiencing significant net purchases or net redemptions of its securities, rather than any particular investment strategy involving a high rate of portfolio turnover. As well, the principal consequence of a high portfolio turnover rate is that the mutual fund's portfolio trading costs may be greater than that of another mutual fund with a lower portfolio turnover rate. This consequence is reflected in the trading expense ratio included in the mutual fund's fund facts and therefore need not be mentioned in the New SP. As well, the Canadian securities regulators initially assumed that a high portfolio turnover rate would change the taxation of the mutual fund or its securityholders, or the distribution policy of the mutual fund. This assumption was incorrect. A higher portfolio turnover rate does not change how the mutual fund or its securityholders are taxed. It also does not change the mutual fund's distribution policy. A mutual fund with a higher portfolio turnover rate simply realizes a larger number of smaller gains (or losses) during its taxation year compared to another mutual fund that realizes fewer but larger gains (or losses) during the same time period. The aggregate amount of gains (or losses) realized and distributed

by a mutual fund during the course of a year under either scenario typically does not differ materially. For these reasons, we recommend that this disclosure be deleted.

6. **Part B, Item 8(4) and 8(5):** We recommend that these items carried over from the annual information form not be included in the New SP as the information required by such items is historical in nature, can often run many pages in length, and is of little, if any, relevance to investors in a mutual fund. Also, for any investor (new or existing) that has an interest in the history of their mutual fund, such information already is available in the mutual fund's continuous disclosure record. Accordingly, we recommend that these items be deleted.

7. **Part B: Item 9(2):** Similar to our comments above on Part A, Item 4.14, the requirement to identify and disclose the number of investors that own more than 10% of the mutual fund within 30 days of the date of the prospectus, including the percentage of securities owned by each such person, is difficult to compile and transcribe into the prospectus. We also believe that this information is of minimal use to investors. We understand that the CSA have required this disclosure in the past to alert investors of the potential risk of a large redemption order by a large securityholder. However, we believe such a risk is minimal because:

   - securities legislation already requires mutual funds to invest at least 85% of their assets at all times in liquid investments in order to ensure its ability to fund large redemptions should they occur, and

   - many mutual fund companies have implemented procedures requiring additional notice from investors seeking to request a large redemption so as to provide the mutual fund with additional time to liquidate assets in an orderly manner.

   As well, the risk of large redemptions is not limited to circumstances when a mutual fund has one or more large securityholders. A mutual fund also can experience a large volume of redemptions at any time from smaller securityholders (for instance when a mutual fund dealer recommends that its clients replace a given fund by another).

   Accordingly, we do not see a compelling reason to require disclosure in the New SP of the number of investors owning more than 10% of the mutual fund and their respective percentages of holdings. We believe it would be sufficient if the New SP merely includes a general risk factor that large redemptions can occur at any time.

8. **Part B, Item 9(7):** It is onerous to compile and transcribe to a mutual fund's prospectus a list of each investment held by the mutual fund during the immediately preceding twelve months that represented more than 10% of the net asset value of the mutual fund, together with the name of the issuer and the maximum percentage reached during that twelve month period. We also believe this information is of marginal use to investors for several reasons:

- National Instrument 81-102 *Investment Funds* ("**NI 81-102**") already regulates the circumstances in which the CSA permit a mutual fund to hold securities of an issuer representing more than 10% of the mutual fund's net asset value. We do not see the benefit of requiring that the mutual fund itemize each circumstance when the mutual fund held such a permitted investment.

- The information also is potentially misleading since it is backward-looking and may not reflect the positions currently held by the mutual fund, nor is it a predictor that the mutual fund will hold any such positions in the future.

We believe it is sufficient if the New SP discloses generically that any mutual fund may, from time to time in the certain circumstances permitted under Canadian securities legislation, have more than 10% of its assets invested in a single issuer, together with the risks associated with such concentrated investments.

9. **Part B, Item 11:** This prescribed description of investors for whom the mutual fund may be a suitable investment is repeated identically in the fund facts and now is redundant in the SP. In our view, this prescribed disclosure should have been removed from the SP when the fund facts regime came into effect. We therefore recommend that it be deleted at this time.

We also note several apparent errors or inconsistencies in the prescribed information and instructions for the New SP which we recommend be corrected or clarified. These matters are described below:

10. **Part A, Item 4.6(7):** This item refers to the ultimate designated person and chief compliance officer "of the mutual fund". Mutual funds, themselves, are not registered in any capacity under securities legislation and therefore do not have an ultimate designated person or chief compliance officer. We assume this item was intended to refer to the ultimate designated person and chief compliance officer of the manager of the mutual fund.

11. **Part A, Item 4.13(1) v. Item 4.13(2):** We note that proposed Item 4.13(1) requires a brief description of the IRC and its mandate, while Item 4.13(2) requires a detailed description of the IRC's mandate. We believe this conflict and redundancy resulted from combining the equivalent existing disclosures in the SP and AIF without identifying their commonality. We recommend that this be corrected in the final version of the Proposals.

12. **Part A, Item 4.15(3):** Disclosure in the New SP relating to officers of the manager generally is limited to "executive officers" of the manager. However, this item requires disclosure relating to all officers of the manager even if the officer is not an "executive officer". For consistency in approach, we recommend that this item be corrected to refer only to "executive officers".

13. **Part A, Item 8:** The instruction to this item refers to "foreign content monitoring plans" and "U.S. dollar purchase plans". Ever since the foreign property ownership restrictions

imposed on registered plans were removed from the *Income Tax Act* (Canada) many years ago, foreign content monitoring plans became irrelevant and this reference is now outdated. We also believe a U.S. dollar purchase plan is a purchase feature rather than a "plan" and that purchase feature is described in Item 7 of the New SP. Accordingly, these references should be removed from the instruction.

14. **Part B, Items 2(3) and 2(4):** Item 2(3) states that risk factors and other investment considerations can be disclosed in the introduction to Part B if it is applicable to "more than one" mutual fund. However, Item 2(4) states that the introduction to Part B can include information "that would otherwise be repeated identically in each Part B", which implies that the disclosure must apply to all the mutual funds included in the New SP. We believe that Item 2(3) establishes the correct standard for inclusion of information in the introduction to Part B, and that Item 2(4) is too stringent. We therefore recommend that Item 2(4) be deleted, and Item 2(3) be expanded to include any information that would be repeated by more than one mutual fund in its Part B. Please also see our recommendation below that the formatting and drafting style requirements for the New SP be relaxed.

15. **Part B, Item 4:** We disagree with the reference to "securities of another mutual fund" in Instruction (1). Whether a mutual fund obtains its investment exposure directly by holding stocks and bonds, or indirectly by holding securities of other mutual funds that, in turn, hold stocks and bonds, is immaterial to an investor. It only reflects the manner in which the portfolio adviser to the mutual fund believes it can obtain a particular type of investment exposure in the most efficient manner. For the same reason, we disagree with the reference to "primarily through the use of derivatives" in Instruction (3). Given the restrictions imposed by NI 81-102 on how mutual funds may use specified derivatives, it is irrelevant to investors whether a mutual fund obtains some of its exposure through derivatives. We believe both references above should be deleted, as they otherwise may create an unnecessary regulatory burden for a mutual fund to obtain securityholder approval to change its investment objectives if its approach to investing in other mutual funds or using derivatives changes in the future.

16. **Part B, Item 6(2):** The New SP potentially requires a mutual fund to disclose in two places the exemptive relief the mutual fund has obtained from investment restrictions in NI 81-102: Part A, Item 14 and Part B, Item 6(2). Part A, Item 13(b) also may apply. We recommend that these Items be harmonized to eliminate duplication. Please also see our recommendation below that the formatting and drafting style requirements for the New SP be relaxed.

Relax formatting and drafting style requirements for the New SP

Currently, the SP is required to include only the information prescribed by Form 81-101F1 (and no other information), and the information must be provided in the order and using the headings prescribed by Form 81-101F1. There also are expectations that the SP be drafted as simply as possible since, prior to the introduction of fund facts, the SP was delivered to all investors as their primary source of information regarding the mutual fund in which they were making an

investment. In contrast, currently the AIF is permitted to include non-prescribed information, and it may provide its information in any order under any headings. Further, since the AIF includes a significant amount of technical information and is available to investors only upon request, the expectations for the simplicity of the AIF disclosure is lower.

Under the Proposals, a variety of technical information currently contained in the AIF will be moved to the New SP and become subject to the higher drafting standards that currently apply to the SP. This will require a significant amount of reformatting and rewriting of this information before it is relocated to the New SP, which will be unduly burdensome given that the New SP - like the current SP and AIF - will be available to investors only upon request.

Since the introduction of the fund facts regime, the role of the SP has diminished. The fund facts now are the primary source of information for investors about the mutual fund in which they are making an investment. This was a significant decision reached by the CSA after extensive public consultation and focus group testing. With the SP, AIF and New SP being only background documents, we recommend that the drafting requirements for the New SP be relaxed. This will reduce the current regulatory burden on the manner in which the SP is prepared, and avoid the future regulatory burden of rewriting and updating in the New SP a variety of technical information currently in the AIF that was never intended to be provided to investors in the first instance. In particular, we recommend that:

(a) section 4.1(2)(e) be removed from National Instrument 81-101 *Mutual Fund Prospectus Disclosure* ("**NI 81-101**") so that the New SP may include non-prescribed information, and

(b) paragraphs (6) and (12) of the General Instructions to Form 81-101F1 be modified so that they apply only to Items 3, 4, 5, 6 and 9 of Part B of Form 81-101F1 so that the template of the Part B information currently included in the SP is preserved.

Modernize the process for filing the New SP by adopting a prospectus regime based on the base shelf prospectus

In our view, the New SP should contain no material information that will become stale with the passage of time. For example, the investment objectives, strategies and risk factors of a mutual fund generally do not change materially from year-to-year.

Material information which can become stale with the passage of time now is contained in the annual and semi-annual financial statements and management reports of fund performance of the mutual fund (its "**Continuous Disclosure Documents**"), and in its fund facts. As indicated by their names, the Continuous Disclosure Documents are updated and filed at least semi-annually, and we propose that fund facts continue to be not more than one year old when used. Under current securities legislation, the Continuous Disclosure Documents and fund facts of a mutual fund are automatically incorporated by reference into its SP when filed, and this will continue to be the case with the New SP. Accordingly, we do not see a reason why the New SP needs to be renewed annually when the material time-sensitive information of the mutual fund will be

updated in its Continuous Disclosure Documents and fund facts and automatically incorporated by reference into its New SP.

Current annual renewal filings of mutual fund prospectuses account for a large volume of the prospectuses reviewed by CSA staff notwithstanding that (i) most aspects of the operations of mutual funds are heavily regulated so that key operational features do not differ materially between mutual funds, and (ii) the amount of material information in the SP and AIF which changes from year-to-year is relatively small. When compared to the prospectus review process for public companies that frequently raise capital by public offering, the level of scrutiny by CSA staff of mutual fund prospectuses, the extent of the technical comments made by CSA staff during those reviews, and the timespans for completing such filings appear unduly onerous, burdensome and inefficient.[2]

In our view, the prospectus filing and review process applicable to mutual funds has become obsolete and should be modernized. We note that a large number of public companies in Canada are eligible to use the shelf prospectus system[3] which is far more efficient and less onerous. It should be possible to update the prospectus filing process for mutual funds to achieve the same level of efficiency as is available to public companies using the shelf prospectus system. On this basis, the prospectus filing process for mutual funds should include the following features:

(a) comparable to a shelf prospectus of a public company, the New SP should be usable for at least 24 months before expiring and needing to be renewed;

(b) comparable to a short form prospectus (including a shelf prospectus) of a public company, the principal regulator reviewing a New SP should be required to provide its comments on the New SP within 3 business days[4] such that the refiling process can be completed within 10 business days;

(c) comparable to a short form prospectus, a New SP should be subject to a longer review period by the CSA only the New SP raises novel issues;

(d) comparable to a shelf prospectus, the review of a New SP should include a template for its fund facts. However, like a prospectus supplement to a shelf prospectus, the fund facts should not be reviewed by CSA staff when filed during the lifespan of the New SP unless the fund facts raise a novel issue; and

(e) comparable to a prospectus supplement for a shelf prospectus, a mutual fund should not be required to file an amendment to its New SP nor obtain a receipt when the mutual fund files fund facts during the lifespan of its New SP.

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[2] According to the *OSC Service Commitment: Our Service Standards & Timelines*, OSC staff seek to complete their reviews of mutual fund prospectuses containing no novel issues within 40 working days 80% of the time.

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

[4] 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.

This approach would enable a mutual fund to commence offering a new series of securities during the lifespan of its New SP simply by filing new fund facts for that series. A prospectus amendment would be needed only if the features of the new series are not already described in the New SP.

We believe it should be possible for a new mutual fund to be added to a New SP simply by filing an amendment to that effect, rather than requiring that the mutual fund follow the process of filing both a preliminary and final prospectus unless features of the new mutual fund raise a novel issue.

The streamlined prospectus filing regime described above would enable mutual funds to:

- update and refile their fund facts frequently without the burden, cost and delay of a review by CSA staff;
- add new series on a streamlined basis;
- launch new mutual funds on a streamlined basis; and
- undergo the prospectus renewal filing process only once every two years.

We believe these changes would not compromise investor protection since it would be adopting a prospectus filing process already in place for public companies in Canada. The main impact of these changes is that they would achieve a level of efficiency comparable to public companies.[5] We believe the same level of efficiency should be made available to all public mutual funds.

Investment funds not in continuous distribution

Currently, a public investment fund not offering securities by a prospectus is required, after a period of time, to file an AIF annually. The Proposals would replace the AIF document in these circumstances with abbreviated versions of the New SP (for mutual funds) and Form 41-101F2 (which, for convenience of reference, we are calling a "**Modified Prospectus**") for non-redeemable investment funds ("**NRIFs**"), in each case as modified by proposed section 9.4(2.1) of National Instrument 81-106 *Investment Fund Continuous Disclosure* ("**NI 81-106**"). As currently drafted, these Proposals will increase the regulatory burden on such investment funds - particularly non-redeemable investment funds ("**NRIFs**") - in two respects:

- The abbreviated New SP and Modified Prospectus include a significant amount of prescribed information not currently contained in the AIF[6]. As a result, non-distributing

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[5] For example, this approach would provide functional equivalence to financial institutions which are able to issue new non-principal protected notes providing exposure to one or more mutual funds simply by filing a prospectus supplement to their shelf prospectus.

[6] For example, for mutual funds which previously prepared an SP and AIF, it will need to include in its abbreviated New SP information that is derived from current Form 81-101F1, rather than current Form 81-101F2, such as Part A, Items 9(1) and 10, and Part B, Items 3, 4, 5, 9 and 10.

investment funds will need to significantly rewrite their AIFs into the form of the abbreviated New SP or Modified Prospectus, as applicable, and gather information not currently included in their AIFs. This will be particularly onerous for NRIFs since they typically will not have a recent prospectus which they can use as the starting point to prepare the Modified Prospectus.

- The formatting of the New SP and Modified Prospectus is more stringent than the AIF, as discussed earlier in this letter.

It is questionable whether reformatting and adding information to this annual filing will be of sufficient value to investors since investors no longer are purchasing additional securities of these investment funds. This additional information instead was available to them in the prospectus documents prepared at the time of their purchases.

We support these Proposals only if:

(a) Proposed sections 9.4(2.1)(b) and (h) are expanded as described below; and

(b) the CSA adopt our comments above and below that the formatting and style requirements of the New SP and Modified Prospectus be relaxed so that they are less onerous to prepare.

Otherwise, we recommend that Form 81-101F2 be preserved solely for its existing purpose in section 9.4(2) of NI 81-106.

Mutual funds

In our view, the following items in the New SP are not relevant to a mutual fund not currently distributing its securities for the reasons provided and should be added to proposed section 9.4(2.1)(h):

1. **Part A, Items 4.1(1)(d), 4.5 and 4.19(e):** Mutual funds not currently distributing their securities do not have a principal distributor.

2. **Part B, Items 7(3) and 7(4)**: The issue price, purchase options and dealer compensation are not relevant to a mutual fund that no longer is offering its securities.

3. **Part B, Item 11.2(3):** When a mutual fund ceases to offer its securities, there no longer is a concern about investors purchasing units near the end of the mutual fund's taxation year.

Non-redeemable investment funds

In our view, the following items in the Modified Prospectus are not relevant to a NRIF not currently distributing its securities for the reasons provided and should be added to proposed section 9.4(2.1)(b):

1. **Items 1 and 3 (face page disclosure and the prospectus summary)**: The Modified Prospectus will be a background document only, so we see no reason to require that it include face page disclosure or a summary portion. The AIF does not contain face page disclosure or a summary portion. These items should be replaced simply with cover page disclosure of the name and securities of the NRIF and the date of the Modified Prospectus.

2. **Item 7.1 (market overview):** This item is based on disclosure that managers found helpful to provide to potential purchasers about the context of a public offering. It typically included industry information, an indicative portfolio and a calculation of how the yield from the indicative portfolio would fund the anticipated distributions by the NRIF. This information is not necessary when securities are not being offered, and is not contained in the AIF. Commentary on fund performance is provided in the management reports of fund performance ("**MRFPs**") of the NRIF.

3. **Item 9 (management discussion of fund performance):** This item 9 is irrelevant as management's discussion of fund performance is provided in the NRIF's MRFPs. For this reason, it is not contained in the AIF.

4. **Item 11 (annual returns and management expense ratio):** The information is contained in the financial statements and MRFPs of the NRIF and should not be repeated in the Modified Prospectus. It is not contained in the AIF.

5. **Item 16 (consolidated capitalization):** This item 16 is intended to provide an update of the NRIF's capitalization at the time it is raising capital, including a pro forma calculation of its post-closing capital. This information is irrelevant when the NRIF is not offering securities, and is not contained in the AIF.

6. **Item 17.2 (trading price and volume):** This item will be a new ongoing requirement for NRIFs and is not contained in the AIF. This information is available through the websites of the stock exchanges where securities of NRIFs are listed, and will quickly become stale if included in the Modified Prospectus.

7. **Item 33 (experts):** This disclosure is relevant to expertized opinions included in an offering prospectus as it limits the liability of various parties for misrepresentations in those opinions. This disclosure is irrelevant when the NRIF is not offering securities, and is not contained in the AIF.

In addition, General Instruction (7) to Form 41-101F2 requires that all information be disclosed n the prescribed order under the prescribed headings. There are no equivalent restraints on the formatting of an AIF. Since the Modified Prospectus will be a background document only, we do not see a reason for requiring that NRIFs not currently offering securities adhere to that level of stringency. We therefore recommend that General Instruction (7) be included in proposed section 9.4(2.1)(b).

Workstream Two:

Investment Fund Designated Website

Extend notice-and-access to reduce regulatory burden

The Notice points out that currently "there is no regulatory requirement to mandate that an investment fund establish and maintain a website for the purpose of posting regulatory disclosure". We believe that the reason no such requirement currently exists is because the CSA have been reluctant to accept notice-and-access as an acceptable means for delivering documents to investors, even though Workstream Two is introduced with the words "Given the widespread use of Internet-based technology in communications…". Since current obligations to post regulatory disclosures are triggered only if the investment fund or its manager voluntarily maintain a website, there has not been a reason for the CSA to regulate such websites.

Despite the CSA's expectation that Workstream Two will trigger only minimal additional costs, it will increase rather than reduce regulatory burden. For Workstream Two to reduce regulatory burden, the CSA need to add to it an offsetting reduction to other regulatory requirements, specifically that posting regulatory disclosure on those websites will satisfy delivery of those documents to investors using notice-and-access principles. For these reasons, it is our recommendation that websites not be made mandatory until the CSA extends the notice-and-access approach to provide an offsetting reduction of regulatory burden.

Limit application of compliance requirements to regulatory disclosures

Workstream Two proposes that the entirety of a website maintained by an investment fund or its manager be subject to compliance systems maintained pursuant to section 11.1 of National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* ("**NI 31-103**"). This constitutes a significant new regulatory burden on investment fund managers. Currently, managers have the flexibility to decide which information is voluntarily posted on their websites and the manner of its presentation. Under the Proposals, all voluntary content on a manager's website will be subject to regulation and potential sanctions by the CSA. We disagree with the CSA's statement that this guidance is consistent with the guidance currently provided under section 4.5 of Companion Policy 81-106 and section 6.11 of National Policy 51-201 because: (i) current section 4.5 only states that documents should be posted for a reasonable length of time and does not comment further on websites, and (ii) National Policy 51-201 is non-binding guidance directed at public companies. The proposed addition of Part 11 of 81-106 will introduce significant new mandatory requirements for investment fund managers.

In our view, the CSA's objectives will be achieved if the proposed guidance is limited to pointing out that the manager's policies maintained under section 11.1 of NI 31-103 will need to ensure that regulatory disclosures required to be posted on a website are made. We do not believe investment funds and their managers should be required to implement equivalent procedures and be exposed to potential regulatory sanctions for additional voluntary information posted on their websites. Such obligations and risks could prompt investment funds and

managers to instead post less, rather than more, voluntary information on their websites in order to avoid such risks.

We also believe that the CSA should not expand its regulatory oversight to the design and maintenance of websites. We are not aware of any other securities legislation in Canada that imposes obligations on how website and designed and maintained, and we do not believe this should be imposed on mutual funds.

Guidance from regulators of registrants

The Proposals state that the guidance for maintaining a website will be part of a registrant's obligations under section 11.1 of NI 31-103. However, it is not clear whether this guidance reflects the views of the branches of the CSA that specifically regulate registrants, or if such branches may have different or additional views. If the latter, then the new burdens on registrants could be greater than those reflected by the Proposals.

Accordingly, we request confirmation that the branches of the CSA which regulate registrants will have no additional expectations for how registered firms meet their obligations under section 11.1 of NI 31-103 with respect to their websites.

Clarify "designation" process

Though the proposed definition of "designated website" states that it is the website designated by the fund under subsection 16.1.2(1) of NI 81-106, neither the latter section nor the proposed changes to CP 81-106 indicate how "designation" occurs, nor how a fund may change this "designation" in the future. Accordingly, we request that the Proposals add clarification that "designation" occurs by the manager of the fund selecting the website.

<u>Workstream Three</u>:

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

Generally, we have no comments on the content of the notice to be sent to securityholders under the codified notice-and-access regime, nor on the timelines for various events under that regime. With one exception (noted below), the Proposals reasonably codify the terms of exemptive relief previously granted to investment funds. Our comments relate mainly to remedying some aspects of the regime that we believe are unnecessary or do not operate fairly. We also believe that the CSA should make greater efforts to encourage investors to locate electronic copies of documents on the internet, rather than request paper copies of those documents. This would more accurately reflect the reality of how Canadians today research and obtain information and documents of all kinds, and the CSA should not lag behind those trends.

1. **Section 12.2.1(g)(ii)(A):** This section proposes that use of the notice-and-access regime be conditional upon (among other matters) posting of documents on the investment fund's "designated website". This, in turn, is dependent upon Workstream Two being implemented. We have provided comments above on Workstream Two. If, for any

reason, implementation of Workstream Two is delayed or abandoned, this section should be modified to refer to a website of the investment fund or its manager so that Workstream Three can proceed.

2. **Section 12.2.1(i)(ii):** This section proposes to continue a requirement that, for up to a year following a meeting of securityholders, the investment fund is obligated to send a paper copy of the materials relating to the meeting to any investor that requests them within 10 calendar days after receiving the request. We believe this feature of the regime is outdated and unnecessary. Once a meeting of securityholders has passed, there is no urgency to provide the materials relating to that meeting to investors. The meeting documents become historical information only, and can be retrieved by investors from SEDAR in the same way that other historical documents are available. We therefore recommend that this requirement be deleted.

3. **Section 12.2.1(m):** This section proposes to continue a condition from the current exemptive relief that the manager of an investment fund, rather than the investment fund itself, pay the cost of sending paper copies of documents to registered and beneficial owners requesting them. We see no merit in requiring that the manager, in all circumstances, bear this cost. The only circumstances where NI 81-102 requires that the manager of an investment fund pay the costs associated with a meeting of securityholders is in the context of certain investment fund mergers. We do not see why the notice-and-access regime shifts some of those costs to the manager when NI 81-102 does not. While this issue is moot for investment funds where the manager has agreed to pay all of the operating expenses of the investment fund in return for a fixed administration fee, many investment funds do not use such a model. In our view, it is unfair to require that a manager bear some of the costs of a meeting of securityholders in order for the investment fund to be saved those costs under the notice-and-access regime.

4. **Section 12.2.2(1)(b):** This section prohibits using the name and address of a requester for any purpose other than sending the information circular and financial statements of the investment fund. While we understand the concern with supporting privacy legislation in Canada, we do not believe that securities legislation should duplicate that role. Further, the prohibition in this section potentially frustrates the ability of the investment fund or manager to comply with other legislation. For example, a request for documents from a securityholder may be relevant in determining whether the securities of that holder are unclaimed property that needs to be remitted to a relevant government agency. The address provided by that securityholder also may need to be used by the investment fund or its manager for purposes of giving notice of potentially unclaimed property. For these reasons, we believe that section 12.2.2(1)(b) should be deleted or, alternatively qualified to allow disclosure and use of the information where otherwise required or permitted by law.

5. **Section 12.2.6:** We disagree with including this section in the Proposals. Generally, the CSA should not be encouraging procedures that perpetuate the ability of investors to default to receiving documents in hard copy. Instead, section 12.2.6 should be providing

investment funds with an ability to override the standing instructions of an investor under National Instrument 54-101 *Communication with Beneficial Owners of Securities of a Reporting Issuer* ("**NI 54-101**") if the investment fund or its manager has obtained a standing instruction from the securityholder to not deliver paper copies of documents. We also believe it should be possible for a new investment fund, or new class or series of securities of an existing investment fund, to require that its securityholders not request paper copies of any documents.

6. **Use of notice-and-access regime for routine continuous disclosure:** Section 5.4(10) of Companion Policy 54-101 confirms that a public company may use notice-and-access for delivering its annual financial statements and annual MD&A since these documents typically are delivered with the materials for the annual meeting of shareholders of the public company. Since investment funds typically do not hold annual meetings of securityholders, the Proposals do not provide investment funds with the same opportunity to use the notice-and-access regime for delivering the annual financial statements and annual management reports of fund performance of the fund. We strongly recommend that Workstream Three be modified to expressly permit annual and interim financial statements and MRFPs to be delivered to securityholders using the notice-and-access regime.

Workstream Four:

Minimize Filings of Personal Information Forms

We agree with and support the Proposal to eliminate the requirement for individuals to submit a personal information form ("**PIF**") if they already have submitted a Form 33-109F4.

When an investment fund lists one or more classes or series of its securities on a Canadian stock exchange such as the Toronto Stock Exchange or the Aquitas NEO Exchange Inc., the stock exchange typically requires that the directors and executive officers of the manager of the investment fund (as well as certain other individuals) submit PIFs. This requirement of the stock exchanges is duplicative and, if left unchanged, will effectively eliminate the intended burden reduction of Workstream Four for any investment fund with a listed class or series of securities.

We have discussed this issue with individuals at the Toronto Stock Exchange and the Aquitas NEO Exchange Inc. and each has expressed an interested in eliminating their PIF requirements in these circumstances. However, both have cited a potential need for information sharing between the CSA and the exchanges for those individuals who no longer would submit PIFs. We therefore encourage the CSA to commence discussions with these stock exchanges with a view to finding an accommodation that enables these exchanges to eliminate their corresponding PIF requirements.

<u>Workstream Five</u>:

Codify Exemptive Relief Granted in Respect of Conflicts Applications

Eliminate or streamline conflict of interest prohibitions

While we support initiatives to codify exemptive relief in respect of conflict of interest prohibitions contained in securities legislation of some jurisdictions, NI 81-102 and NI 31-103 (the "**COI Prohibitions**"), we believe that the CSA should also be looking to either eliminate or at a minimum streamline these COI Prohibitions, as this would significantly reduce industry participants' regulatory burden when it comes to making determinations as to whether a given transaction or issuer is caught by the COI Prohibitions.

As it currently stands, the COI Prohibitions apply either to certain investment funds (and indirectly to their portfolio managers)[7] or to registered advisers (including in respect of investment funds for which they act as adviser),[8] and sometimes attempt to prohibit the same type of activity. For example, section 4.1(2) of NI 81-102 prohibits certain investment funds from investing in the securities of certain issuers, based essentially on whether an individual within the investment fund complex is also a partner, director or officer of the issuer. Section 13.5(2)(a) of NI 31-103 contains a similar prohibition, except the prohibition applies to a registered adviser. In addition, section 111 of the *Securities Act* (Ontario) and other similar (but not identical) provisions of the securities legislation of some (but not all) jurisdictions prohibit certain investment funds from investing in securities of certain issuers, based essentially on whether the fund or persons involved in its management or distribution have a significant interest in the issuer. As the language of these prohibitive sections and the defined terms they use are not identical, the determination as to whether a particular investment is prohibited must be examined through all three COI Prohibitions and can be very onerous.

With the proposed addition of a clear duty for registered firms to avoid material conflicts of interest when they cannot be addressed in the best interest of the clients[9], we believe that the prescriptive COI Prohibitions are no longer warranted and should be eliminated. Going forward, any registered adviser that does not properly address conflicts of interest (including those related to investment decisions or trades) will be open to sanctions by the CSA for failing to do so. Adding a layer of prescriptive restrictions that presume the presence of a conflict of interest when this may not be the case (as evidenced by the frequent need for discretionary relief) does not add protection to investors, but does impose a significant burden on industry participants.

If the CSA cannot implement the above proposal, we recommend, at a minimum, that any COI Prohibition which deals with investment decisions only be applicable to registered advisers. In our view, there should not be an additional layer of COI Prohibitions if the adviser's client

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[7] Such as Part XXI of the *Securities Act* (Ontario) and Part 4 of NI 81-102.

[8] Such as Part 13, Division 2 of NI 31-103.

[9] See proposed section 13.4 of NI 31-103 in the Notice of Amendments published on October 3, 2019, scheduled to come into force on December 31, 2020.

happens to be an investment fund, such as a “mutual fund in Ontario: or a “dealer-managed investment fund” (as these terms are defined in securities legislation). If the CSA are of the view that certain advisers that currently benefit from a registration exemption should be bound by a COI Prohibition, such a requirement can be imposed as a condition of the exemption. In our view, section 111 of the *Securities Act* (Ontario) and other similar provisions of the securities legislation of other jurisdictions were not intended to be the framework for regulating investments by investments funds in other investment funds. According to the *Report of the Canadian Committee on Mutual Funds and Investment Contracts: Provincial and Federal Study 1969* (the “**Mutual Funds Report**”), the primary goal of these restrictions was to prevent mutual funds from exercising control over public companies.[10] Attempting to apply these restrictions to investments by mutual funds in other investment funds, rather than in public companies created significant burden.[11] Instead, more specific restrictions were included in Part F of OSC Policy Statement 11.1 *Mutual Funds - General Prospectus Guidelines*, which were adopted and expanded in section 2.04(11) of National Policy No. 39 *Mutual Funds*, and which were adopted and further expanded in section 2.5 of NI 81-102.

A sufficiently detailed code of restrictions for investments by investment funds in other investment funds now exists such that these COI Prohibitions now can be deleted. Similarly, section 13.5(2)(a) of NI 31-103 was not designed specifically to prohibit investment funds from investing in other investment funds. We therefore recommend, at a minimum, that these two COI Prohibitions be further clarified to specifically exclude situations where an adviser is deciding, for a client (including an investment fund) to invest in securities of another investment fund, if in the adviser’s opinion, the investment is suitable for the client (including the investment fund) and the adviser has complied with its new duty to avoid material conflicts of interest when they cannot be addressed in the best interest of the client.

Approach to codification

Notwithstanding whether the above COI Prohibitions are eliminated or streamlined, we support initiatives to codify exemptive relief. However, we do not believe that the Proposals will reduce regulatory burden significantly since a large proportion of industry participants already have obtained this (or more extensive) relief in the past. Accordingly, we view Workstream Five as a “housekeeping” matter, rather than achieving burden reduction. As well, due to the scope of the codification, many industry participants may need to continue relying on their current exemptive relief.

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[10] See section 12.64 of the Mutual Funds Report where the authors stated that the goals of these restrictions was to prevent a mutual fund from acquiring control over a portfolio company as well as to prevent undue concentration of portfolio investments. In section 12.80 of the Mutual Funds Report, the authors concluded that more specific restrictions would be needed to regulate investments by mutual funds in other mutual funds.

[11] See, for example, the Ontario Securities Commission 1995 *Regulating Conflicts of Interest in the Management of Mutual Funds: The Current Regime* at page 5 where the author states that the publication “…focusses on some of the practical problems of application and interpretation that have been experienced with these provisions by the [Ontario Securities] Commission and various industry participants. In some cases, uncertainties in the interpretation of the text are accompanied by uncertainties as to what the appropriate policy result should be and this has caused compliance and administrative problems for the affected parties.”

In order to reduce regulatory burden, we instead recommend that the CSA adopt the following:

1. **Codify exemptive relief sooner:** Once the CSA grant exemptive relief that is not unique to the applicant, we believe the CSA should anticipate that other market participants will seek similar relief, which will require that those market participants incur the costs and delays associated with separately applying for the same relief.[12] In these circumstances, the CSA should proceed to extend the relief to other market participants as quickly as possible, whether through codification, a blanket exemption order[13], or some form of "no-action" letter equivalent to what was done in the context of OSC Staff Notice 91-703.

2. **Avoid future iterations of the same relief:** It is fairly common for the scope and terms of exemptive relief to expand in subsequent orders as the analysis of the legal basis for the relief evolves, and the relief commences being used for fact patterns beyond those initially anticipated. This can result in the same applicant reapplying for the same relief several times, each time seeking a slight modification to the scope of the relief it previously obtained. As a result, applicants incur repeated costs for technical amendments. To avoid these repetitive technical applications, we recommend that the CSA either:

   - codify relief in a manner that uses a more principles-based approach in order that the natural evolution of exemptive relief can be accommodated within the scope of the codified relief, or

   - the CSA adopt an approach that quickly extends this relief for market participants using any of the techniques described above (e.g. quicker codification, blanket exemptions orders and/or a "no-action" approach).

3. **Adopt principles-based approach for overly technical requirements:** Certain aspects of Workstream Five are very prescriptive and attempt to specify detailed technical requirements involving trading activity. Such an approach is flawed because it inevitably fails to (i) reflect the complexity of the capital markets, and (ii) anticipate future changes to the operations of the capital markets. This is most apparent when the codified relief attempts to prescribe the prices at which various types of non-arm's trades in securities

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[12] For example, the CSA could have anticipated that all managers of public mutual funds would request relief from section 15.3 of NI 81-102 to permit disclosure of ratings and rankings by Lipper, Inc. and Fundata Canada Inc. once that relief was granted to one such manager. More recently, in *Re Franklin Templeton Investments Corp.* (September 6, 2018), relief was granted to permit certain cross-border inter-fund trades, which other market participants are likely seek. However, neither of these examples is being codified.

[13] We note that the Ontario Legislature recently introduced Bill 138 which includes an amendment to the *Securities Act* (Ontario) that will give the OSC authority to make blanket exemption orders. We encourage the OSC to use this new power to extend exemptive relief industry-wide at as early a stage as possible. We also encourage the OSC to proceed quickly to codify any such blanket exemption orders. Otherwise, the 18-month sunset clause that will be included in every such blanket exemption order may, depending on the nature of the relief, discourage industry participants from changing their business practices if there is uncertainty whether the exemption will remain available beyond the initial 18-month period.

must take place since these prescriptive requirements must attempt to take into account: (i) the type of security, (ii) the market on which such securities trade, (iii) the liquidity of that market, (iv) pricing transparency, and (v) the nature of the relationship between the parties to the trade.

Rather than continue to follow this prescriptive approach, we recommend that all pricing requirements[14] in Workstream Five and in related existing regulations be changed to the principle that the trade must occur at a price that is fair to both parties. It then will become the responsibility of the manager to have adequate policies and procedures under section 11.1 of NI 31-103 for establishing such a fair price which takes into account the criteria summarized above as well as adapt for future changes to the capital markets.

Eliminate the current reporting requirements

Section 117 of the *Securities Act* (Ontario) and equivalent legislation in other jurisdictions requires that reports be prepared and filed for the trades that are described therein. The description of included trades does not identically match the types of trades that are restricted or prohibited under Part XXI of such Act, which creates confusion regarding the scope of trades to be reported.

Additional reporting obligations are proposed in new sections 6.3(1)(f) and 6.4(1)(i) of NI 81-107 *Independent Review Committee for Investment Funds* ("**NI 81-107**"). However, equivalent existing reporting obligations in other circumstances such as existing section 6.1(2)(g) and proposed section 6.5(1)(g) of NI 81-107, only require that records of the relevant information be maintained for a period of time.

We do not see a policy reason for requiring that industry participants do more than maintain the required records for inspection by the CSA when necessary. The reporting requirement also exposes industry participants to the risk of late filing fees. We note that in some cases exemptive relief from a reporting requirement has been granted.[15]

To reduce the burden of preparing and filing reports in order to avoid the risk of late filing fees, we recommend that Workstream Five replace all such reporting requirements with a requirement to maintain appropriate records of the transactions for a period of five years.

Eliminate the "print" requirement in the "market integrity requirements"

The trades currently permitted by section 6.1 of NI 81-107 as well as the relief that will be codified require that the transaction be subject to "market integrity requirements", which is

[14] These include: proposed sections 6.3(1)(d), 6.4(1)(h) and 6.5(1)(e) of NI 81-102; current section 6.1(2)(e) of NI 81-107 (which references the "current market price of the security" as defined in section 6.1(1)(a) of NI 81-107); and the pricing parameters prescribed in current sections 4.3(1)(a) and (b) of NI 81-102.

[15] See, for example, *Re Desjardins Global Asset Management Inc.* (August 24, 2018) which granted relief from reporting certain activity otherwise required under section 117 of the *Securities Act* (Ontario).

defined in section 6.1(1)(b)(i)(A) of NI 81-107 to include a requirement that the transaction be "printed" on a marketplace.

This "print" requirement precludes certain types of cross-trades, and results in these types of transactions incurring more cost than necessary. We also do not see the benefit of reporting such trades to the relevant marketplace since the trades occur at a priced determined by the marketplace rather than the portfolio manager deciding to execute the trade. Accordingly, we recommend that Workstream Five include an amendment which deletes section 6.1(1)(b)(i)(A) of NI 81-107.

Specific comments on the codification proposals

Schedule A to this letter contains our specific comments on the codification proposals of Workstream Five.

Workstream Six:

Broaden Pre-Approval Criteria for Investment Fund Mergers

We support the concept of Workstream Six as we believe that broadening the circumstances where mergers of investment funds can be implemented without the need to apply to the CSA for approval of those mergers will reduce the costs associated with those mergers. However, we have several specific comments on those Proposals, as drafted, which are set out below.

1. **Conform one of the thresholds for pre-approval**

As currently drafted, proposed sections 5.6(1)(a)(ii)(B) and 5.6(1)(b)(ii)(C) would require that the manager believe that the merger is "in the best interests of securityholders". This is a higher standard than currently required when mergers are approved by the CSA under section 5.5(1)(b) of NI 81-102, which instead requires that the manager believe that the merger is "beneficial to" securityholders[16]. The proposed threshold therefore differs from, and is potentially higher than, the threshold currently required to be achieved before a merger is approved under section 5.5(1)(b). We request that these words be conformed to the past approvals by requiring that it be the manager's belief that the transaction is beneficial to securityholders.

2. **Confirm that use of notice-and-access does not disqualify pre-approval of a merger**

We note that in at least one recent example, an order of the CSA approving a merger cited the failure to send the current simplified prospectus or fund facts as a reason why the merger did not qualify for pre-approval under section 5.6[17] of NI 81-102. The order also cited reliance on notice-and-access relief, and we assume that the reason the simplified prospectus or fund facts

[16] See, for example: *Re Counsel Portfolio Services Inc.* (August 7, 2019); *Re TD Asset Management Inc.* (August 16, 2019); and *Re Franklin Templeton Investments Corp.* (October 8, 2019).

[17] See *Re Counsel Portfolio Services Inc.* (August 7, 2019) cited above.

were not sent was due to reliance on that relief. Other recent orders have not cited this fact as a reason that a merger was not pre-approved.

In our view, reliance on notice-and-access relief - particularly after Workstream Three codifies this relief - should not disqualify a merger from otherwise being pre-approved under section 5.6. Such an approach would effectively frustrate the goal of Workstream Three. We therefore recommend that Companion Policy 81-102 expressly confirm that reliance on notice-and-access is sufficient for satisfying the condition in section 5.6(1)(f)(ii) of NI 81-102.

3. **Extend Workstream Six to the related securityholder approval requirement**

We agree with the Proposal to add the types of fund mergers described in Workstream Six to the circumstances where the merger is pre-approved by the CSA under section 5.6(1) of NI 81-102. However, in our view, these types of fund mergers also should be added to section 5.3(2) of NI 81-102 as further circumstances where securityholder approval is not required. Securityholders remain adequately protected by the fact that:

- the manager must conclude that the merger is beneficial to securityholders;
- the IRC of the relevant fund must approve the merger under section 5.2(2) of NI 81-107; and
- securityholders must be given at least 60 days' advance notice of the merger, which will provide securityholders with ample time to redeem their investments should they not wish to participate in the upcoming merger.

Making this additional change will result in significant cost savings for both investors and managers as it will provide managers with greater ability to reorganize funds so that they remain viable in the long-term and can seek greater economies of scale.

4. **Remove "bigger-into-smaller" assumption**

Section 7.3(2) of Companion Policy 81-102 continues to state that it is the belief of the CSA that merging a bigger terminating fund into a smaller continuing fund generally is a material change for the smaller continuing fund that triggers a requirement for approval by the securityholders of the smaller continuing fund. In our view, this position is incorrect, and triggers an unnecessary securityholder approval requirement that increases the cost to the manager for structuring the merger in the manner most advantageous for investors. This could occur, for example, where the smaller fund has significant loss carryforwards that could shelter future income of the fund for a period of time and therefore is the better candidate to be the continuing fund in the merger.

We point out that:

(a) section 5.6(1)(d) of NI 81-102 already requires that the portfolio securities received by the smaller continuing fund must be acceptable to its portfolio adviser and consistent with its investment objective; and

(b) to the extent that portfolio securities are liquidated to ensure that this requirement is satisfied, section 7.2 of Companion Policy 81-102 expressly stipulates that the costs associated with such portfolio realignment must be borne by the manager.

With these safeguards in place regarding the types of portfolio securities that can be received by the smaller continuing fund, the relative sizes of the merging funds is irrelevant since all the assets received by the continuing fund will be suitable for it. Accordingly, we recommend that section 7.3(2) of Companion Policy 81-102 be deleted.

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

We agree with the proposed withdrawal of sections 5.5(1)(a), (a.1) and (c) of NI 81-102 currently requiring the CSA's approval of a change of manager, change of control of a manager, or a change of custodian that occurs in connection with a change of manager. Our further comments on these Proposals are provided below.

1. **Confirm scope of future reviews under NI 31-103**

Based on the Notice, we understand that in the future the CSA intend to rely on the registration processes and requirements set forth in NI 31-103 and National Instrument 33-109 *Registration Information* ("**NI 33-109**") to assess whether an investment fund manager or its shareholders have sufficient integrity, proficiency and solvency to adequately carry out their functions.

We request confirmation that there will be no change to (i) the information that will be required in the future in connection with a notice filed under section 11.9 or 11.10 of NI 31-103, and (ii) the criteria considered by the CSA when providing its non-objection under section 11.9 or 11.10, as applicable.

2. **Repeal OSC Staff Notice 81-710**

We also recommend the repeal of OSC Staff Notice 81-710 *Approvals for Change in Control of a Mutual Fund Manager and Change of a Mutual Fund Manager under National Instrument 81-102 Mutual Funds* ("**Notice 81-710**"). Notice 81-710 significantly restricts the basis on which mergers & acquisitions transactions may occur in the investment fund manager industry because it has been relied upon by CSA staff to effectively require that the purchaser commit to making no material changes in the foreseeable future to the business and operations of an investment fund manager it acquires. For example, when applying Notice 81-710, CSA staff typically seek representations from the purchaser that it has no current intention to change some or all of the following aspects of the acquired manager's business:

- how the acquired manager operates or manages its funds

- the portfolio advisers to any of the acquired manager's funds
- amalgamate the acquired manager with the purchaser
- change the investment objectives, strategies or valuation procedures of the acquired manager's funds
- implement mergers involving the acquired manager's funds
- rationalize personnel or systems of the acquired manager
- change to the fund accounting and other administrative service providers of the purchaser
- change the trustee or custodian of the acquired manager's funds.

If the purchaser is unable to make these commitments, CSA staff treat the acquisition as if it is a change of the manager of the investment funds managed by the acquired manager, which triggers a requirement for the transaction to be approved by the securityholders of those investment funds. Such a requirement

(a) increases the cost of the transaction by requiring that a potentially large number of meetings of securityholders be convened;

(b) delays the ability of the parties to complete the transaction in order to accommodate the timeline for convening the meetings of securityholders described above; and

(c) introduces a risk that the parties may not be able to complete the transaction since there is no guarantee that securityholders of all the relevant funds will approve the transaction.

We do not understand the rationale for imposing on a purchaser an obligation to not make any material post-closing changes to the business and operations of the acquired manager even though the acquired manager is permitted to make almost all of those changes at any time prior to closing without the need for approval by the securityholders of its investment funds.

In our view, a manager should have the same flexibility to change its business and operations, regardless of whether those changes are made in the context of a purchase transaction. NI 81-102 already protects securityholders of investment funds by prescribing a list of changes in section 5.1 of NI 81-102 that cannot be implemented unless securityholder approval is first obtained. We believe that list of changes should not be expanded - particularly through the exercise of discretionary authority by the CSA when approving a purchase transaction - simply because the manager was recently acquired.

Notice 81-710 substantively changed section 5.1 of NI 81-102. Prior to Notice 81-710, the CSA had approved various acquisitions of managers where either pre-closing changes occurred in

order for the transaction to proceed as a change of control of the manager rather than a change of the manager, or post-closing changes to the acquired manager of the nature described above were anticipated.[18] Notice 81-710 was published by OSC staff without any prior public consultation or cost-benefit analysis. The new requirement it imposes (e.g. that a purchaser commit to not making any material changes to the acquired manager in the foreseeable future) has a particularly strong negative impact on smaller merger & acquisition transactions since the goal of smaller transactions often is to achieve economies of scale by combining the assets under management of the purchaser and the acquired manager while retaining the overhead of only the purchaser. If, instead, the purchaser is required to continue operating the acquired manager on a standalone basis for a period of time, the purchaser is not able realize the targeted economies of scale, and the business rationale for the transaction may no longer be viable.

Accordingly, due to:

- the substantive change it makes to the plain reading of section 5.1 of NI 81-102;
- the negative impact it has on smaller acquisition transactions; and
- the absence of public consultation regarding this change before it was implemented through publication,

we recommend that Notice 81-710 be repealed.

Workstream Eight:

Codify Exemptive Relief Granted in Respect of Fund Facts Delivery Applications

We agree with the proposed codification of certain prospectus delivery relief which has been granted into the past. However, we believe this Proposal should reflect the broader principle on which this relief has been based, namely that no purpose is served by delivering fund facts to an investor in circumstances where the investor is not giving any instruction to proceed with the trade. This already is reflected in the existing prospectus delivery exemption for pre-authorized purchase plans contained in section 3.2.03 of NI 81-101 as well as in the Proposal to modify the existing exemption in section 3.2.4 of NI 81-101 so that delivery is not required for managed accounts where a person other than the investor is making the investment decision.

In our view, these exemptions and the Proposals should be expanded to simply say that there is no obligation to deliver the fund facts in any circumstance where the investor is not required to specifically authorize the particular purchase. By doing so, the exemption would reduce regulatory burden by:

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[18] See, for example, *Re Skylon Advisors Inc.* (December 7, 2005) where management agreements were assigned to an affiliate prior to closing, which affiliate then was sold to the purchaser in order that the transaction would be a change of control of the affiliate manager, rather than an assignment of the management agreements to an unaffiliated manager. See also *Re Clarington Funds Inc.* (December 21, 2005) where it was represented that the operations of the acquired manager could be merged into the purchaser post-closing.

- creating a prospectus delivery exemption for other current comparable circumstances such as (i) model portfolio programs[19], (ii) trades between series when a deferred sales charge schedule expires[20], and (ii) trades occurring as part of implementing a merger of mutual funds that does not requiring the approval of its securityholders[21]; and

- anticipating future circumstances where a fund facts delivery exemption should exist.

We also believe that in each circumstance where no fund facts are required to be delivered to the investor, there should be a corresponding exemption from the requirement to deliver a trade confirmation relating to the purchase. Such an exemption already exists, in a limited scope, in section 14.13 of NI 31-103 for pre-authorized purchase plans and pre-authorized withdrawal plans, as well as in the exemptions which have been granted for model portfolio programs. The same exemption from delivering trade confirmations should be available in all other circumstances where NI 81-101 does not require the delivery of fund facts to the investor.

Below we also provide specific comments on this Proposal.

1. **Scope of "portfolio rebalancing plan"**

Certain portfolio rebalancing plans may involve the selection by the investor of a portfolio of securities of two or more mutual funds where the target weighting of one or more such mutual funds may initially be set at zero. As a result, we suggest for clarity that paragraph (a)(ii) of the proposed new definition of "portfolio rebalancing plan" in NI 81-101 be revised so that it reads "target weightings ranging from 0% to 100% for each of those mutual funds".

2. **Scope of "automatic switch program"**

The proposed definition of "automatic switch program" contains several features which are either ambiguous or unduly restrictive. If this definition is not changed, it will lead to confusion regarding the manner in which these programs must operate in order to fall within the definition, and will unnecessarily exclude versions of automatic switch programs without a policy basis for that exclusion, likely leading to more exemptive relief applications in the future.

"that were subject to the automatic switch"

These words appear to suggest that an automatic switch program can trigger an automatic switch for failing to satisfy the minimum investment amount of the high net worth class or series only if those securities previously were switched from the non-high net worth class or series. In other words, if an investor initially qualifies for and purchases the high net worth class or series of securities but later fails to satisfy the minimum investment amount for any reason, those high net

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[19] See, for example, *Re National Bank Investments Inc.* (September 8, 2016). Similar prospectus delivery exemptions have been granted to other fund groups that offer a model portfolios program.

[20] See, for example, *Re Sentry Investments Inc.* (May 30, 2016).

[21] According to section 5.3(2)(a)(v) of NI 81-102, in these circumstances securityholders only receive notice of the merger and not the fund facts for the securities of the mutual fund into which they are being merged.

worth securities cannot be automatically switched to the non-high net worth class or series because they were not the subject of a previous automatic switch.

We disagree that an investor who initially purchased high net worth securities never can be automatically switched out of those securities for failing to satisfy the minimum investment amount in the future. If this was not the intention of the CSA, then these words should be deleted.

"in whole or in part"

It is not clear to what this phrase refers. It appears to suggest that, as long as a redemption of high net worth securities previously occurred, the investor may be automatically switched out of the high net worth securities for failing to satisfy the minimum investment amount. However, it is unclear when the redemption must occur, or how large the redemption must be, to result in the investor failing to satisfy the minimum investment amount.

"because securities of the class or series were previously redeemed"

We also do not understand the policy rationale for requiring a prior redemption of securities to occur before an investor can be automatically switched out of the high net worth series securities. Changes in the market value of the securities held by the investor due to positive or negative performance of the mutual fund also impact the investor's eligibility to hold high net worth securities. Under the proposed definition, an investor who initially did not qualify to hold high net worth securities nonetheless can receive the benefit of an automatic switch into those securities if, due solely to positive performance of the mutual fund, the value of those securities later satisfies the minimum investment amount. Yet, according to the proposed definition, if the investor later ceases to meet the minimum investment amount due solely to negative performance of the mutual fund, the investor cannot be automatically switched out of the high net worth securities. If the reason an investor became eligible to hold high net worth securities was due to positive performance, then it is equally fair that the investor can lose that eligibility due to negative performance. We see no logic in using fund performance as a potential trigger for automatic switches into, but not out of, the high net worth securities of a mutual fund.

This part of the proposed definition also requires that the mutual fund have the operational capability to generate reports that can identify whether a previous redemption by the investor was a contributing reason why the investor no longer satisfies the minimum investment amount. Not all mutual funds have this capability. Some mutual funds and the service providers only can generate reports on a specific date that identify the original cost ("book value") and current net asset value ("market value") of the securities held by the investor. For these mutual funds, their automatic switch program must function using only these two parameters on the predetermined date for triggering automatic switches. If, on such date, both the market value and book value of the investor's securities are below the minimum investment amount, the mutual fund cannot determine whether a redemption previously occurred to contribute to the disqualification.

An automatic switch program is beneficial to investors because it likely results in investors that hold non-high net worth securities and later qualify for the high net worth securities being

switched to the high net worth securities sooner than if the switch requires an instruction from the investor through their dealer to the mutual fund. Automatic switch programs also assist dealers with meeting their suitability obligations under securities legislation because it automates the process for switching investors to a more suitable class or series of securities, thereby reducing the risk of non-compliance by dealers.

Given these benefits, we do not see a policy objective served by limiting the scope of proposed section 3.2.05 to mutual funds that have more sophisticated operational capabilities beyond measuring market value and book value on the predetermined dates for automatic switches. In particular, we do not see a benefit in continuing to require that fund facts continue to be delivered to investor if the only reason for the delivery is to notify the investor of the switch that occurred without their further instructions. Investors will instead continue to be notified of such transactions through trade confirmations and/or account statements.

A better test

In our view, the CSA does not need to prescribe in this codification the business parameters of each automatic switch program as long as those parameters are set out in the mutual fund's prospectus. Instead, the ambiguities described above will be eliminated, and the benefits of automatic switch programs will be extended to the broadest range of investors, if paragraphs (a) and (b) of the proposed definition of "automatic switch program" are replaced simply with the following:

> "satisfying, or failing to satisfy, the minimum investment amount of that class or series of securities of the mutual fund."

IV. RESPONSES TO SPECIFIC QUESTIONS

Our comments below respond to the correspondingly numbered questions in Schedule 1 of Appendix A to the Notice.

1. Below is a discussion of two key areas means by which regulatory burden can be lessened without reducing investor protection.

   Discontinue creating new regulation outside the rule-making process.

   In our view, a significant amount of regulatory burden results from the CSA creating new requirements for the investment funds industry without using the rule-making process. This occurs by a variety of means including;

   (a) comments made by CSA staff in the course of reviewing prospectuses;

   (b) comments made by CSA staff during or following desk and field audits of specific issues;

   (c) CSA staff notices;

(d) informal publications such as the OSC *Investment Funds Practitioner*; and

(e) positions taken during enforcement proceedings.

Though sometimes described as "guidance", the expectation of CSA staff generally is that industry participants are aware of, and comply with, the positions stated by CSA staff in the contexts described above, which effectively creates new regulation for the investment funds industry. This imposes significant burden on industry participants because:

- there is a wide range of sources of this new regulation that must be monitored;
- a large amount of guidance is provided through these channels, which results in industry participants being in a perpetual state of change when trying to remain current with all the latest guidance; and
- regulatory change is imposed on industry participants in an uneven and haphazard manner.

This approach also can produce flawed new regulation as it does not provide an opportunity for industry to comment on proposals before they are issued. It also avoids an important check & balance in the process as it does not require any form of cost-benefit consideration before taking effect.

In order to produce better regulation which (i) takes into account issues which may not have been considered by CSA staff, (ii) is proportional to the protection provided to investors by considering relative costs and benefits, and (iii) is implemented fairly by applying to all industry participants at the same time and in the same manner, we strongly encourage CSA staff to discontinue the practice of effectively creating new regulations through positions and guidance issued outside the rule-making process.

Clarify that "guidance" is non-binding and non-exclusive

While we do not support the creation of new regulation outside the rule-making process, we endorse and encourage the dissemination of true "guidance". In our view, a statement by CSA staff that limits the possible interpretation of a securities law requirement is effectively amending those securities laws. Similarly, guidance which states that an industry participant will be treated as non-compliant if it does not adopt the procedures described in the guidance is effectively creating new securities legislation.

In our view, "guidance" only should provide industry participants with confirmation when various practices are sufficient to meet the requirements of securities legislation. It should not preclude other possible interpretations of securities law requirements, nor trigger adverse consequences for industry participants that choose not to follow that guidance. To implement this distinction, we recommend that guidance be accompanied by a statement of substantially the following:

> *"Industry participants that choose to adopt the procedures described in this publication will be treated by CSA staff as complying with the securities law requirements to which the procedures relate. However, this guidance does not preclude industry participants from reaching a different conclusion regarding the requirements of securities laws or adopting different procedures than those described herein to meet those requirements."*

2. A considerable amount of time will be required to rewrite existing prospectus documents as the New SP. Accordingly, we suggest that the requirement for prospectuses to be filed in the New SP format not be mandatory until at least six months after it comes into effect.

3. We agree with the existing prescribed prospectus disclosure that was not included in the New SP. However, we believe much more prescribed information can be eliminated or moved to the financial statements and MRFPs. Please see our detailed comments on Workstream One earlier in this letter.

4. We believe much more prescribed information can be eliminated or moved to the financial statements or MRFPs. Please see our detailed comments on Workstream One earlier in this letter.

5. Please see our reply above to question 4, and our detailed comments on Workstream One earlier in this letter.

6. We believe the introduction of a new requirement to describe liquidity risk management policies should be pursued through a detailed public consultation that begins with a description by CSA staff of the reason for seeking this disclosure and includes, at an appropriate stage, a cost-benefit analysis of any proposed changes.

7. We would be supportive of a proposal to amend the New SP only by means of an amended and restated document if our other comments on Workstream One are adopted. Otherwise, such an approach could require that mutual funds update a significant amount of time-sensitive information each time the New SP is amended and restated, which would be more burdensome than current securities legislation.

8. We believe that material change reports are irrelevant in the context of mutual funds and should be eliminated. The prescribed information for a material change report is the same as its related press release so that the information is repetitive. Unlike a public company that files a short form prospectus and incorporates by reference its material change reports into its short form prospectus, there is no equivalent incorporation by reference in a mutual fund prospectus since the mutual fund prospectus is, instead, amended following each material change.

   We also believe that certain positions stated by the CSA regarding the scope of a material change for an investment fund are incorrect and should be changed. In particular:

(a) **Change to portfolio adviser**:[22] 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 CSA staff delete this general statement and defer to the manager whether a change of the portfolio adviser to a mutual fund is considered to be material in the circumstances. This will reduce the number of amendments made to prospectus documents when non-material changes to portfolio advisers are made.

(b) **Change to risk rating:** Notwithstanding the CSA's articulated position[23], 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 management expense ratio. 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.[24] This is consistent with the views expressed by the Supreme Court of Canada in the *Danier 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.[25]

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

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

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

[24] 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, management expense ratio and/or risk rating and should be treated as a "material change" when it occurs.

[25] [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 not 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…".

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 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.

9. Various mutual funds that offer one or more series of securities listed on a stock exchange have obtained exemptive relief from various requirements under NI 41-101 on the condition that those securities are distributed using an SP and AIF.[26] These exemptions should continue to be available once the SP and AIF are replaced by the New SP. Various mutual funds also may have obtained relief from other requirements of securities legislation on a condition that certain disclosure regarding that relief is included in the AIF. These exemptions should continue to be available if the required disclosure is included in the New SP. Further, it should clear that any previous exemptive relief from a requirement in the SP continues to be available for any substantially similar requirement in the New SP. In order to address these concerns, we recommend that the final version of the Proposals include a confirmation that (i) any exemptive relief previously granted from a requirement prescribed by Form 81-101F1 or Form 81-101F2 continues to apply to any substantively similar requirement prescribed in the New SP, and (ii) any exemptive relief previously granted from a requirement in securities legislation that is subject to a condition prescribing disclosure in the AIF continues to be available if that disclosure is contained in the New SP, and (iii) any exemptive relief previously granted to a mutual fund under NI 41-101 that is subject to a condition that the mutual fund files an SP and AIF continues to be available if the mutual fund files a New SP.

10. Please see our comments above on Workstream One.

11. We agree that there is no reason for imposing on mutual funds a 90-day deadline for filing a final prospectus following a preliminary prospectus, and this requirement should be removed. This requirement was applied to mutual funds a long time ago because a similar requirement applies to public companies making public offering through underwriters where expressions of interest are solicited during the "waiting period" between the preliminary and final prospectus filings. Mutual funds do not use a similar approach to a public distribution of securities, and therefore there is no need for a similar time constraint on the "waiting period".

    Of more concern to us is the current OSC service standard whereby OSC staff seek to complete their reviews of mutual fund prospectuses containing <u>no</u> novel issues within 40 working days 80% of the time. (See our comments above on Workstream One.) Form 81-

[26] See, for example, *Re PIMCO Canada Corp.* (August 4, 2017).

101F3 and Form 41-101F4 currently require that prescribed time-sensitive information be not more than 60 days' old. This requirement was extended from 30 days after consultation between industry participants and the CSA during which it was agreed that a 60-day requirement was desirable in order to avoid a need for the time-sensitive information to be prepared twice: at the initial prospectus filing, and updated before the final prospectus filing. During those consultations, it was determined that this goal was achievable on the assumption that (i) mutual fund renewal prospectuses typically are filed slightly more than 30 calendar days' prior to their lapse dates in order to meet the deadlines set out in section 2.5(4)(a) of NI 81-101 and section 62(2)(a) of the *Securities Act* (Ontario), and (ii) the review of those prospectuses by CSA staff typically do not require more than 30 calendar days to complete. If, however, CSA staff instead target completing these reviews within 40 working days - or approximately 60 calendar days - it would require that all the time-sensitive information in the fund facts and ETF facts be updated and replaced before the final prospectus materials are filed. This is unnecessarily burdensome on the industry. We therefore request that, until our other comments on Workstream One are implemented, the CSA adopt a service standard to complete their reviews of mutual fund prospectuses containing no novel issues within 30 calendar days.

12. Please see our comments above on Workstream One where we recommend a number of changes to the New SP and Form 41-101F2 when used in these circumstances or, failing such changes, continued use of existing Form 81-101F2. Our comments apply not only to investment funds currently not offering their securities, but such future funds as well.

13. We support a proposal that investment funds not currently distributed their securities should only be required to post on their designated website, as background, the information contained in the AIF, subject to our comments above on Workstream One.

14. We defer to comments from industry participants on other technologies that may be used in these circumstances.

15. Please see our specific comments above on Workstream Two where we request clarification of the means by which a website is "designated", and how that designation can be changed.

16. Please see our specific comments above on Workstream Two where we comment that the CSA should not expand its regulatory oversight to the design and maintenance of websites. We believe that exposing investment funds and their managers to potential regulatory sanctions for the design of their websites and all the content thereon is unnecessarily burdensome.

17. The maintenance of private portions of websites where access is limited to existing securityholders or dealing representatives is for purposes of complying with the requirements of section 15 of NI 81-102 relating to sales communications. We do not see the maintenance of public portions of websites as changing that approach.

18. We believe that participation rates are likely to remain unchanged. Voting by securityholders is very low, and often only a handful of proxies are returned. Instead, investors who do not agree with a change proposed by an investment fund are more likely to redeem their investment rather than vote against it. We do not believe that the notice and access regime will change securityholder reaction to proposed changes.

19. Please see our specific comments above on Workstream Five where we recommend that the pricing requirements be replaced with a single principles-based requirement that the trade occur at a fair price, with a related expectation that the manager will have adequate policies and procedures for establishing such a fair price.

20. We have no further additional disclosure that we recommend for information circulars in these circumstances.

21. We do not believe the Proposals in Workstream Seven reduce investor protection. NI 81-102 already enumerates a comprehensive list of changes to a mutual fund which cannot occur unless securityholders approve the change, or are given advance notice of the change (depending on the nature of the change). Any manager of a public investment fund must be registered in applicable jurisdictions as an investment fund manager and have adequate policies and procedures under section 11.1 of NI 31-103 for its operations. Accordingly, securityholders of an investment fund will not be prejudiced merely by a change of manager, or change of control of a manager. Investors will remain protected if the review by the CSA of a change of manager or change of control of a manager continues to focus on the matters outlined in sections 11.9 and 11.10 of NI 31-103.

    We do not see a change of the custodian of an investment fund ever adversely affecting securityholders of the investment fund. NI 81-102 prescribes the categories of companies qualified to act as the custodian of an investment fund's assets and limits the options to large Canadian financial institutions. Changing the selected Canadian financial institution following a change of control of a manager will not prejudice investors. As well, in almost all cases, the custodian of Canadian investment funds is independent from the manager of those funds.

22. We disagree with the suggestion that investors should be permitted to redeem their investment without paying any deferred sales charge since it could be used by investors that wish to withdraw cash from the investment fund, regardless of whether they agree or disagree with the proposed change. It also will place managers in a conflict of interest since the manager may be forced to choose between (i) recommending a change to securityholders that the manager believes is in the best interests of the fund, and (ii) avoiding the potential financial consequences of recouping upfront distribution costs through ongoing management fees and redemption fees.

23. We have no further additional disclosure that we recommend for information circulars in these circumstances.

24. We disagree with this proposal. Reviewing information circulars is likely to lead to the creation of new substantive requirements by the CSA outside the rule-making process. (Please see our response above to question 1.) In our view, the CSA should expect that managers will prepare information circulars in compliance with securities legislation, failing which securityholders will have recourse against the manager and the CSA will have an opportunity for disciplinary action. There is no need for the CSA to review and comment on information circulars before they are delivered to securityholders.

25. We support an initiative to create a prescribed form of information circular designed for investment funds. A number of items currently prescribed in Form 51-102F5 are irrelevant to investment funds. We believe it is not possible to design a new form of information circular within the comment period for the Proposals, but encourage such a project in a new initiative. At this stage, we comment that we do not believe it is necessary to create a format that facilitates comparability as we do not believe investors or their advisers compare disclosure across multiple information circulars. We also believe it is unnecessary to prescribe a summary or use other plain language objectives since the number of information circulars requested by investors under the notice-and-access regime is extremely low. As an alternative, in such a future project, the CSA may consider slightly expanding the disclosure contained in the notice sent pursuant to proposed section 12.2.1(a) of NI 81-106.

26. We agree with the proposal that mutual funds be given the option to prepare consolidated fund facts where the only differences between the series are the fees and expenses of those series, and the eligibility requirements to hold such series. We also believe that mutual funds should be given the option to prepared consolidated fund facts where the differences between the series are one or more of the following:

    (a) whether or not the series hedges its foreign currency exposure;

    (b) distribution policies (e.g. fixed period distributions v. variable less frequent distributions); and

    (c) purchase options available for the series.

    In each case described above, a consolidated fund facts could facilitate comparability between series and assist investors with selected a series of securities.

    We note that individual variable insurance contracts (segregated funds) offered by Canadian life insurance companies are permitted to consolidate in the fund facts of a segregated fund multiple classes or series providing different levels of guarantees within the same fund facts.[27] We therefore believe it is reasonable to provide mutual funds with somewhat more flexibility to consolidate their fund facts than currently exists.

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[27] See Guideline G2 *Individual Variable Insurance Contracts Relating to Segregated Funds* of the Canadian Life and Health Insurance Association Inc. (specifically, Part H of Form 1) and the sample fund facts for segregated funds prepared in August 2010.

V. COMMENTS ON QUANTITATIVE COST-BENEFIT ANALYSIS

We support the attempt by OSC staff to provide a quantitative cost-benefit analysis (a "**CBA**") in Appendix C to the Notice. A meaningful CSA is an important step in confirming that proposed changes to securities legislation do not trigger costs that exceed the anticipated benefits of the change. Otherwise, the costs of compliance with new securities regulations that are ultimately passed on to investors could exceed the benefits those investors receive from the new regulations.

In our view, the CBA provided in Appendix C contains a number of materially incorrect assumptions and cursory analysis. We do not consider Appendix C as meeting the objectives of a meaningful CBA, and suggest that a more comprehensive CBA be provided in connection with future proposed changes to securities legislation.

However, since most of the Proposals reduce existing regulations rather than impose new ones, in this instance we believe there is less need for a probative CBA to support the Proposals, and we support the implementation of the Proposals (subject to our comments earlier in this letter) without further cost-benefit analysis.

For future reference, our comments on the CBA follow.

Workstream One

The CBA underestimates the one-time cost associated with redrafting all existing SPs and AIFs in the form of the New SP. As well, the hourly rate of $243.12 selected from the Canadian Lawyer's 2018 Legal Fees Survey is low as it does not reflect that external counsel performing this work typically are specialists in securities legislation and located in a major urban centre of Canada (to a large extent, Toronto, Montreal and Vancouver).

We estimate that the one-time cost for external counsel to redraft an existing SP and AIF containing approximately ten mutual funds in the form of the New SP, including the cost of related translation of the New SP, is likely to be close to $100,000. While there will be incremental cost savings for managers that currently use more than one SP and AIF to distribute their mutual funds, that incremental savings is likely to be in the magnitude of 25% to 50%.

Workstream Two

We disagree with the assumed one-time industry-wide cost of $100,000. To implement this change as drafted, each manager with an existing website will need to review the content and format of its website in its entirety, and create policies and procedures for monitoring its website according to the CSA's proposed guidance and standards. We are unable to quantify the total one-time cost for this adoption, but we estimate the legal component of the change could be approximately $25,000 per manager.

We also disagree that the annual cost of maintaining a website will be $720. This estimate fails to take into account the work involved in applying the policies and procedures of the manager on

an ongoing basis to maintain the website compliant with CSA guidance and standards, including changes to that guidance and standards that are likely to occur on a regular basis. We estimate the legal component of the annual maintenance likely to be closer to $10,000 per manager.

Workstreams Three, Four, Five and Eight

We have no comments on this portion of the CBA, other than to state that the assumed hourly rate of $243.12 is low for the reasons specified above.

Workstream Six

In addition to our comment above on the low assumed hourly cost of industry labour, we would repeat that the impact of this Proposal on regulatory burden reduction will not be known until it can be determined to what extent, if any, the requirements previously considered as part of the approval process under NI 81-102 resurface as part of the approval process under section 11.9 or 11.10 of NI 31-103. If those requirements reappear as part of the review process under NI 31-103, then the assumed industry labour savings of 25 hours per application will largely disappear.

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 members of our firms Investment Funds Practice Group:

Yours truly,

"Fasken Martineau DuMoulin LLP"

SCHEDULE A
WORKSTREAM FIVE: TECHNIAL COMMENTS

(a) ***Fund-on-Fund Investments by Investment Funds that are not Reporting Issuers***

(i) Subsection 1.2(2.1) of NI 81-102: The reference in this subsection should be to section 2.5.1, instead of section 2.5. Prohibiting investment funds that are not reporting issuers ("**Pooled Funds**") from investing in other investment funds unless the conditions of section 2.5 are met would be a significant encroachment into how these funds are currently managed: for instance, if the Proposals were adopted as currently drafted, a balanced Pooled Fund could no longer invest in underlying equity and fixed income Pooled Funds as is commonly the case. We understand from discussions we have had with staff of some CSA members that this was not the CSA's intention.

(ii) Notwithstanding the above, we strongly disagree with the approach taken by the CSA to provide relief in an instrument which otherwise does not apply to Pooled Funds from certain COI Prohibitions that are also not contained in NI 81-102 (namely, subsection 13.5(2)(a) of NI 31-103, subsections 111(2) and (3) of the *Securities Act* (Ontario) and similar prohibitions contained in the securities legislation of certain other jurisdictions). We recommend that, to the extent these COI Prohibitions are not eliminated as recommended under Workstream 5 above, relief from these prohibitions be included in NI 31-103.

(iii) As for specific comments on the conditions attached to this relief in section 2.5.1, to the extent these COI Prohibitions are not eliminated or streamlined as recommended under Workstream 5 above:

(A) There should be no distinction between a Pooled Fund investing in a reporting investment fund or in a Pooled Fund and therefore condition (b) should be eliminated and condition (b.1) should apply to both types of underlying investment funds. It is irrelevant for a Pooled Fund to determine whether it is a mutual fund, an alternative mutual fund or a non-redeemable investment fund and have its investments in investment funds constrained to the same type of investment fund (or limit the percentage of its net asset value that can be invested in other types of investment funds). If it were relevant, it should also be relevant for Pooled Funds investing in other Pooled Funds. For example, a Pooled Fund would normally not qualify as an "alternative investment fund" (since a Pooled Fund would not typically include into its investment objectives permission to invest in physical commodities, or specified derivatives in a manner not permitted to other mutual funds under NI 81-102). As such, with condition (b) as currently drafted, the Pooled Fund would be prohibited from investing in a

reporting investment fund that is an alternative mutual fund beyond 10% of its net asset value.

(B) Three-tier investing should not be prohibited so long as there are no duplication of fees. It is typical for the manager of a family of Pooled Funds to have fund-on-fund-on-fund structures. For example, a balanced Pooled Fund could be invested in an equity Pooled Fund and a fixed income Pooled Fund, and the equity Pooled Fund in turn could be invested in a Canadian equity Pooled Fund, a US equity Pooled Fund and an international equity Pooled Fund. Usually, a manager will use this structure when it provides the Pooled Fund with better diversification and/or reduces costs (both for the Pooled Fund and the manager). Three-tier investing should not be prohibited solely as a result of one or more related Pooled Funds being a substantial security holder of an underlying Pooled Fund.

(C) The underlying investment fund should not have to comply with section 2.4 of NI 81-102 so long as the manager has adequate measures to ensure that (i) its net asset value determination is fair and reasonable at all relevant times and (ii) it can satisfy any redemption request in accordance with the redemption rights it has given its security holders (including the top Pooled Fund), under all reasonable circumstances.

(D) It is not clear from the current wording of condition (f) if all subsections of section 14.2 of NI 81-106 must be complied with or only subsections (1) through (1.4). We believe that it should be the latter as we see no policy reason to force Pooled Funds who wish to rely on this relief to comply with frequency, currency and publication requirements.

(b) ***Investment Funds that are Reporting Issuers to Purchase Non-Approved Rating Debt Under a Related Underwriting***

As currently drafted, subsection 4.1(4) of NI 81-102 provides a statutory exemption for investments made by dealer managed investment funds that are reporting issuers in a class of debt securities of any issuer from the restriction set forth in subsection 4.1(1) of NI 81-102 preventing dealer managed investment funds from making investments in a class of securities of an issuer during, or for 60 days after, the period in which the dealer manager of the investment funds, or an associate or affiliate of the dealer manager of the investment funds, acts as an underwriter in the distribution of securities of that class of securities, except as a member of the selling group distributing 5% or less of the securities underwritten. In addition, recently issued exemptive relief from subsection 4.1(1) of NI 81-102 by the CSA have not required that non-approved debt securities in

which dealer managed investment funds seek to invest be issued by reporting issuers to allow investment funds to invest in non-approved rating debt securities underwritten by a related underwriter. The proposed addition of the term "reporting" next to "issuer" in the first sentence of subsection 4.1(4) of NI 81-102 reduces the scope of both the existing statutory exemption and the codification of recent relief by limiting it to investments in debt securities of reporting issuers. We invite the CSA to explain why the term "reporting" added to the proposed revised wording of subsection 4.1(4) of NI 81-102 considering (i) the fact that this was not a condition to previous exemptive relief granted in similar circumstances and (ii) the existence of high-quality debt securities issued by non-reporting issuers.

(c) ***In Specie Subscriptions and Redemptions Involving Related Managed Accounts and Mutual Funds***

(i) Subsection 1.2(2.1) of NI 81-102: The references in this subsection should be to subsections 9.4(7) and (8) and 10.4(6) and (7), instead of sections 9. 4 and 10.4 altogether. Having Pooled Funds be subject to all of sections 9.4 and 10.4 would be a significant encroachment into how these funds are currently managed: for instance, if the Proposals were adopted as currently drafted, a Pooled Fund would be required to pay the redemption proceeds for securities that are the subject of a redemption order within two business days; several Pooled Funds can provide for longer payment processing schedules, as agreed to between securityholders and the investment fund manager and we see no policy reasons for Pooled Funds to be prohibited from determining the terms upon which subscriptions and redemptions are made with their securityholders. We understand from discussions we have had with staff of some CSA members that this was not the CSA's intention.

(ii) Notwithstanding the above, we again strongly disagree with the approach taken by the CSA to provide relief in an instrument which otherwise does not apply to Pooled Funds from a COI Prohibition that is also not contained in NI 81-102 (namely, subsection 13.5(2)(b) of NI 31-103). We recommend that, to the extent this COI Prohibition is not eliminated as recommended under Workstream 5 above, relief from this prohibition be included in NI 31-103.

(iii) As for specific comments on the conditions attached to this relief in subsections 9.4(7) and (8) and 10.4(6) and (7), to the extent this COI Prohibition is not eliminated or streamlined as recommended under Workstream 5 above:

(A) The relief should not be limited to mutual funds. Some Pooled Funds may not be mutual funds, as defined under securities legislation, because the redemption rights they offer their security holders are not "on demand or within a specified period after demand". For example, we understand that the CSA take the view that investment funds that only offers yearly redemptions do not qualify as mutual funds, while investment funds that offer

quarterly redemption rights would. Also, we see no policy reason why investment funds that do not offer redemption rights would not be permitted to rely on this relief for subscriptions.

(B) Investment funds carrying out *in specie* subscriptions or redemptions should not have to comply with section 2.4 of NI 81-102 (unless they are investment funds to which NI 81-102 applies) so long as the manager for the underlying fund has adequate measures to ensure that its net asset value determination is fair and reasonable at all relevant times. Subscriptions and redemptions *in specie* can often be offered to security holders in a Pooled Fund when the Pooled Fund invests a significant portion of its assets in illiquid assets. For example, if a client of a portfolio manager has a portion of its portfolio invested in debts that are secured by mortgages ("mortgages") and the portfolio manager determines that the client's diversification would be better achieved by being invested in the portfolio manager's Pooled MIE (as defined in CSA Staff Notice 31-323, and assuming the Pooled MIE qualifies as an investment fund) then so long at the portfolio manager values the mortgages as if they were portfolio assets of the Pooled MIE, we do not see why the portfolio manager should be prohibited from carrying out an *in specie* subscription simply because the mortgages held by the Pooled MIE are illiquid assets, as defined under NI 81-102.

(C) We also disagree with the condition that illiquid assets included in the payment for securities of an investment fund (or in the payment of redemption proceeds) be transferred on a pro-rata basis. In our view, the only criteria that is relevant is that the assets are acceptable to the receiving fund's portfolio manager (or for the receiving managed account) and consistent with the receiving fund's investment objectives (or the investment policy applicable to the receiving managed account). In other words, the portfolio manager should not need to sell the illiquid assets after acquiring them. If accepting a subscription (or redemption) with an illiquid asset creates an overweight or over-exposure to the asset class for the fund (or the managed account), the portfolio manager should reject the *in specie* subscription (or redemption), but if it remains within the target allocation for that asset class, the portfolio manager should be allowed to accept the subscription (or redemption). In addition, forcing the portfolio manager to breakup an illiquid asset in two (i.e. keep a portion for the fund and transfer the ownership of another portion to the unitholder, or vice versa_ may prove to be too difficult and render the relief useless when illiquid assets are involved in *in specie* transactions.

(d) ***Inter-Fund Trades of Portfolio Securities between Related Reporting Investment Funds, Investment Funds that are not Reporting Issuers and Managed Accounts at Last Sale Price***

The codification proposed under subsection 6.1(2) of NI 81-107 allows a portfolio manager to carry out inter-fund trades between (i) a managed account of the portfolio manager (so long as it is not an account of a responsible person) or an investment fund for which the portfolio manager acts as such and (ii) any other investment fund for which the portfolio manager acts as such, except if the investment fund is managed by another "manager" (which in NI 81-107, refers to the investment fund manager, not the portfolio manager).

We see no policy concern which justifies preventing an inter-fund trade between two investment funds managed by different investment fund managers but with a common portfolio manager, so long as the independent review committee of each investment fund involved in the trade has approved the trade. The CSA has in the past granted such relief[28] and, in our view, should codify the less restrictive relief.

(e) ***Investment Funds that are Not Reporting Issuers to Invest in Securities of a Related Issuer Over an Exchange***

The proposed additional wording to the current section 6.2 of NI 81-107 allowing investment funds that are not reporting issuers to benefit from the current statutory exemption from COI Prohibitions in order to authorize them to invest in securities of related issuers respect the conditions contained is consistent with exemptive relief that has been granted by the CSA to non-reporting issuer investment funds. We welcome proposed commentary 2 to section 6.2 of NI 81-107, where the CSA mention that investment fund managers of investment funds that are non-reporting issuers and their IRCs may tailor the IRC's responsibilities toward investment funds that are not reporting issuers in order for the IRC's mandate to be limited at a minimum to the obligations set forth in sections 3.7 and 3.9 of NI 81-107. This measure will allow investment fund managers of investment funds that are not reporting issuers to limit the costs relating to the appointment and functioning of their IRC.

(f) ***Reporting Investment Funds and Investment Funds that are not Reporting Issuers to Invest in Debt Securities of a Related Issuer in the Secondary Market***

The proposed new section 6.3 of NI 81-107 allowing all investment funds to benefit from a statutory exemption from COI Prohibitions in order to invest in debt securities of a related issuer in the secondary market is consistent with exemptive relief that has been granted by the CSA to investment funds in similar circumstances and we welcome such codification.

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[28] See, for example, *Re Picton Mahoney Asset Management* (March 25, 2019), where the investment funds covered by the decision include reporting issuer funds and investment funds that are not reporting issuers for which the Filer either acts as manager and/or portfolio advisor.

(g) ***Reporting Investment Funds and Investment Funds that are not Reporting Issuers to Invest in Long-Term Debt Securities of a Related Issuer in Primary Market Distributions***

The proposed new section 6.4 of NI 81-107 allowing all investment funds to benefit from a statutory exemption from COI Prohibitions in order to make or hold an investment in long-term debt securities of related issuer in primary market distributions is consistent with exemptive relief that has been granted by the CSA to investment funds in similar circumstances and we welcome such codification.

(h) ***Reporting investment funds, investment funds that are not reporting issuers and managed accounts to trade debt securities with a related dealer***

The proposed new section 6.5 of NI 81-107 allowing portfolio managers acting on behalf of investment funds or managed accounts to benefit from a statutory exemption from COI Prohibitions in order to trade in debt securities issued by any issuer with a dealer related to the portfolio manager is consistent with exemptive relief that has been granted by the CSA to portfolio managers of investment funds or managed accounts in similar circumstances and we welcome such codification.