

CANADIAN REGULATORS RELEASE UPDATE ON MUTUAL FUND POINT OF SALE PROPOSALS

The Canadian Securities Administrators recently published a status report regarding the expected implementation of the point of sale disclosure initiative for public mutual funds. Importantly, the new disclosure regime is now proposed to be implemented in stages, commencing in early 2011 when mutual funds will be required to prepare Fund Facts documents and make them available to investors through website postings.

The publication of CSA Staff Notice 81-319 on June 16, 2010 [[available here](#)] follows the CSA's review of the comments provided on the proposed amendments to National Instrument 81-101 *Mutual Fund Prospectus Disclosure* and its companion policy, which were published for comment on June 19, 2009 along with other consequential amendments. The comment period on those amendments ended October 17, 2009. The CSA received a significant volume of comments from industry stakeholders, including Borden Ladner Gervais LLP [[BLG's comments are available here](#)]. With the publication of the Staff Notice, the regulators have reinforced their commitment to point of sale disclosure reforms and the use of the Fund Facts document in particular. Despite lingering concerns and questions from industry participants as to the practicality of the proposed regime, implementation of the point of sale initiative now seems inevitable. Industry participants should plan to prepare and publish Fund Facts documents in accordance with the timing described in the Staff Notice, while keeping an eye on the development of future delivery and timing requirements, which are yet to be finalized.

Readers will remember that the CSA's point of sale initiative was originally conceived of as a harmonization project to ensure that the regulatory regimes for mutual funds and segregated funds were consistent. The insurance regulators in conjunction with the Canadian Life and Health Insurance Association Inc. (CLHIA) completed their analysis and amended Guideline G2 – *Individual Variable Insurance Contracts Relating to Segregated Funds* (Guideline G2) in November 2009. The point of sale amendments to Guideline G2 take effect on January 1, 2011 and will require insurers to include in the information folder of an individual variable insurance contract a Key Facts executive summary and Fund Facts documents.



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Proposed Implementation at a Glance.

December 2010	CSA to publish final rule requiring preparation of mandatory Fund Facts documents.
Early 2011	Rules requiring Fund Facts documents to become effective, with transition period. Mutual funds will be required to prepare and file Fund Facts documents with the regulators and post the Fund Facts documents on the mutual fund's or manager's website. Initially, delivery to an investor will only be required upon request.
Mid-2011	CSA to publish proposals to permit delivery of Fund Facts documents in satisfaction of current prospectus delivery requirements (the Delivery Proposal). No changes proposed for the simplified prospectus and AIF, which would still be required to be prepared and filed with the regulators. The current prospectus delivery requirements will continue until the Delivery Proposal is finalized.
2011	CSA to publish Staff Notice describing the key terms and conditions of a standard exemption that would permit delivery of Fund Facts document in satisfaction of prospectus delivery requirements. Industry participants may apply for the standard exemptive relief from the current delivery requirement while the Delivery Proposal is being finalized.
Thereafter	The CSA will consider comments received in respect of the Delivery Proposal and publish any revised requirements for further comments. The CSA will also consider extending the point of sale requirements to other types of investment funds.

The Fund Facts Document

The Fund Facts document remains the cornerstone of the point of sale initiative. The CSA have revised and republished a sample Fund Facts document as part of Staff Notice 81-319 and have made minor revisions to the form to address industry comments. In particular, the sample Fund Facts document now includes the MER of a mutual fund calculated on a net basis after the waiver or absorption of fees on the part of the manager, and specifically identifies the mutual fund's trading expenses. Furthermore, the sample document includes language stating that investors should consider the risk level of the particular mutual fund in the context of their entire investment portfolio. Except for these minor revisions, the overall form of the Fund Facts document remains unchanged and the CSA have not addressed several key areas of concern raised by industry participants, including

- The necessity to prepare a Fund Facts document on a per series or class basis. While the Staff Notice is silent on this point, the sample Fund Facts attached to the Notice continues to contemplate series specific disclosure and, presumably, the Fund Facts requirements to be published later this year will require a Fund Facts document to be prepared for each series or class of a mutual fund.

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- The update does not change the 2 or 3 page limit for the Fund Facts document, which can be expected to be of particular concern for mutual funds that must include specific disclaimers and disclosure.
- The Fund Facts document still contemplates that certain data will be current to within 30 days of the date of the Fund Facts document. In particular, information regarding the portfolio assets of the mutual fund must be current to within 30 days of the date of the Fund Facts document, which may pose logistical and trading challenges.

Unfortunately, the CSA is not expected to issue further guidance on these issues until the detailed Fund Facts requirements are published in final form in December 2010.

The CSA also indicate that they do not propose to make any changes to the simplified prospectus and annual information form requirements in conjunction with implementing the Fund Facts requirements, although we understand that they may undertake this review once the Delivery Proposal is completed. These documents will still be required to be prepared and filed with the regulators and made available to investors on request. We believe these documents should be modified and streamlined to take account of the Fund Facts documents.

Application of Point of Sale Reforms to Segregated Funds

The CLHIA's Guideline G2 – *Individual Variable Insurance Contracts Relating to Segregated Funds* was amended on November 25, 2009, with such amendments taking effect January 1, 2011. Pursuant to these amendments, insurers will be required to make Fund Facts continuously available to contractholders on their websites and to provide printed copies upon request without charge. The amendments also provide that the delivery of the information folder of an individual variable insurance contract includes delivery of the Fund Facts. Insurers will also be required to include a new Key Facts executive summary of the contract in the information folder. The CLHIA has indicated that the issue of the delivery of Fund Facts for subsequent transactions will be addressed when the CSA completes its review and consideration of the issues related to point of sale delivery.

Application of Point of Sale Reforms to all Investment Funds

In the Staff Notice, the CSA state that they will consider extending the point of sale disclosure requirements beyond mutual funds to other types of publicly offered investment funds. This would represent a significant change to the disclosure regime for such funds, which do not currently fall within the ambit of National Instrument 81-101 *Mutual Fund Prospectus Disclosure*. However, the CSA also note that any application of

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the new point of sale disclosure rules to the broader array of investment funds will not occur, if at all, until the CSA have had the opportunity to complete their review and to consider the issues related to point of sale delivery requirements. Furthermore, the CSA have clarified that they are not considering applying the new disclosure rules to other securities issuers at this time.

International Developments

The Canadian point of sale disclosure project is similar in many respects to disclosure reform initiatives currently underway in other international markets. The commitment of the CSA to timely implementation of the Canadian reforms may, in part, be intended to ensure that Canada keeps pace with comparable developments in the international arena. UCITS IV, set to be introduced in Europe in 2011, will require investment funds to deliver a “key investor information” document for each applicable class or series of the funds to investors, which is meant to provide a summary of relevant product information in a readable and easily understood format. Likewise, in March 2009, the United States Securities and Exchange Commission finalized its “Summary Prospectus” initiative, which requires key information about a mutual fund to be presented in plain English in a standardized format at the front of the otherwise required mutual fund prospectus. Similar to the anticipated Canadian proposals, the SEC will permit delivery of the Summary Prospectus in lieu of the standard mutual fund prospectus. The Hong Kong Securities and Futures Commission also recently finalized product key facts statements which will form part of the offering documents for several different types of investment funds. In general, these international developments, including the proposed Canadian reforms, reflect a regulatory shift towards the use of very concise, plain language disclosure documents that are designed to be easily understood and compared by retail investors. While the brevity and format of the Fund Facts document presents challenges that are yet to be fully resolved, there can be no doubt that the move towards summary disclosure documents is gaining momentum worldwide.

BLG’s Investment Management Group has previously provided bulletins on the progress of the CSA’s Point of Sale Disclosure project. To follow the development of the initiatives and our commentary thereon, please refer to our Investment Management Advisory *Point of Sale Proposals for Canadian Mutual Funds Released for Comment* July 2009 Borden Ladner Gervais LLP [[available here](#)]. This Advisory provides a link to our earlier Advisories written in 2008 and 2007.

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If you would like more information about this initiative and how it will apply to you, please contact your usual lawyer in **BLG's Investment Management Group**, any of the authors of this Bulletin or any of the **Investment Management Group leaders** noted below.

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The Investment Management Group at Borden Ladner Gervais LLP consists of a team of over 50 lawyers located in offices across Canada who understand the business, regulatory and administrative issues that face participants in the Canadian investment management industry. We have the largest and most experienced investment management practice in Canada, having provided legal services to Canadian and international industry participants for over 50 years. Our clients, both Canadian and international, include open and closed-end investment fund complexes, providers of alternative investment, pooled and private equity products, investment advisers and dealers, financial institutions, service providers, securities regulators, self-regulatory organizations and industry trade associations. Our lawyers have long-standing working relationships with the Canadian securities regulators and other government officials, as well as with The Investment Funds Institute of Canada and key industry leaders.

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