

FAIR

Canadian Foundation *for*
Advancement *of* Investor Rights

September 6, 2012

British Columbia Securities Commission
Alberta Securities Commission
Saskatchewan Financial Services Commission
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
New Brunswick Securities Commission
Registrar of Securities, Prince Edward Island
Nova Scotia Securities Commission
Superintendent of Securities, Newfoundland and Labrador
Superintendent of Securities, Northwest Territories
Superintendent of Securities, Yukon
Superintendent of Securities, Nunavut

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RE: CSA Notice and Request for Comment – Implementation of Stage 2 of Point of Sale Disclosure for Mutual Funds

FAIR Canada is pleased to offer comments on the Request for Comment by the Canadian Securities Administrators (“**CSA**”) regarding the implementation of Stage 2 of Point of Sale Disclosure for Mutual Funds contained in the notice and request for comments dated June 21, 2012 (the “**Notice**”).

FAIR Canada is a national, non-profit organization dedicated to putting investors first. As a voice of Canadian investors, FAIR Canada is committed to advocating for stronger investor protections in securities regulation. Visit www.faircanada.ca for more information.

FAIR Canada Comments and Recommendations – Executive Summary:

1. FAIR Canada is generally supportive of the changes made to the 2011 Proposal which was published by the CSA on August 12, 2011. In our view, the CSA has been receptive to the concerns raised by investor advocates regarding certain elements of the Fund Facts document, and has significantly improved the document with its proposed revisions.
2. FAIR Canada is supportive of the CSA’s intention to test the proposed changes to the Fund Facts document with investors. FAIR Canada requests that the CSA make its investor testing findings publicly available, once the testing is complete.
3. FAIR Canada continues to urge the CSA to make the Fund Facts document available to investors prior to or at the point of sale as soon as possible in order for it to serve its intended purpose. It is not in the interests of investors to delay the implementation of such an important disclosure initiative on the basis that similar disclosure for other types of investment funds is not yet required.
4. We continue to be concerned about non-delivery of the simplified prospectus (“SP”) to investors. In FAIR Canada’s view, the SP provides important information that is not available in Fund Facts. We encourage the CSA to continue to require delivery of the SP following the sale of an investment fund, and to reform the SP into a more meaningful disclosure document for investors.
5. FAIR Canada supports the proposed addition of the worst three month return to the ‘Performance’ section of the Fund Facts document.
6. FAIR Canada also supports the stronger warning language about the risks of investing in mutual funds. However, we remain concerned that there will be inconsistent evaluations of risk among funds, as fund managers are not required to use the same methodology under the current proposals. This limits the use of the Fund Facts document for comparative purposes.
7. FAIR Canada believes that a GIC is an appropriate benchmark to compare to the fund’s performance. We recommend that the CSA consider comparing the mutual fund’s performance with a longer-term GIC rate, such as a five-year GIC, given the longer-term nature of investment fund investing.
8. FAIR Canada questions whether the language “[y]ou don’t pay these expenses directly. They affect you because they reduce the fund’s returns...” in the ‘Fund expenses’ section is clear enough to convey to investors that, as a result, fund investors’ returns are reduced. We recommend that the CSA’s investor testing include questions to determine whether investors understand the implications of reduced fund returns, and if not, to amend the language accordingly.

9. FAIR Canada fully supports the addition of a requirement to confirm whether trailing commissions are paid. FAIR Canada would suggest that, instead of language stating that the trailing commission is “paid out of” the MER, the language state that the trailing commission is “charged to you through” the management fee (MER).
10. FAIR Canada is supportive of the introduction of language informing investors of the potential for conflicts of interest resulting from trailing commissions. In our view, it is absolutely essential for the potential for conflicts of interest disclosure to be stated expressly and clearly in the Fund Facts document, as has been proposed by the CSA.
11. FAIR Canada is concerned, however, that the proposed changes direct investors to dealer representatives following the disclosure of the potential for a conflict of interest. FAIR Canada recommends that, instead of directing investors to their dealer representative, the CSA expand the existing mutual funds brochure for investors to include information explaining, among other things, compensation structures, different fee models, and any potential inherent conflicts of interest, and refer investors to this brochure following the conflicts disclosure in the Fund Facts document.
12. FAIR Canada does not believe that investment funds should be permitted to bind the Fund Facts document to the SP of the mutual fund or to documents incorporated by reference. Delivery of the Fund Facts document bound to the SP or other documents would defeat the purpose of providing a short and simple point of sale disclosure document.

1. General Comments

- 1.1. FAIR Canada is generally supportive of the changes made to the 2011 Proposal which was published by the CSA on August 12, 2011. In our view, the CSA has been receptive to the concerns raised by investor advocates regarding certain elements of the Fund Facts document, and has significantly improved the document with its proposed revisions.
- 1.2. FAIR Canada is also supportive of the CSA’s intention to test the proposed changes to the Fund Facts document with investors (this is discussed further below, at section 7). FAIR Canada requests that the CSA make its investor testing findings publicly available, once the testing is complete. We recommend that, if the results of the investor testing prompt substantial changes to the document, the CSA work with investors and investor advocates to ensure that any resulting changes meet the needs of retail investors.
- 1.3. Recognizing that cross-referencing within a document such as Fund Facts is not ideal, FAIR Canada supports the CSA’s revision of and reference to the “Understanding mutual funds” brochure. It is our expectation that the Fund Facts document will encourage retail investors to ask more questions about their investments, and we endorse the CSA’s provision of an unbiased brochure for more information. As discussed below in section 5.6, FAIR Canada recommends that the CSA expand this brochure to include information explaining compensation structures, different fee models, and any potential inherent conflicts of interest.

- 1.4. While we understand that the CSA is taking a phased approach, we encourage the use of the Fund Facts document for its intended purpose (that is, to provide a plain language document that would assist investors in their decision-making process **prior to** purchasing a mutual fund) as soon as possible. According to the Joint Forum of Financial Market Regulators, “[t]he information must be given to investors when they are making their decision to buy a fund – in other words, before the investor gives instructions to buy the fund.”¹ As the CSA is well aware, “[i]nvestors want to receive the Fund Facts sheet prior to the sale or have their financial adviser go over it with them. **It would not be useful to receive it after the sale.**”² [emphasis added] Furthermore, investors’ behavioural biases also “...decrease the likelihood that they will... exercise their right to cancel their purchase even after receiving information that tells them their original purchase decision was unwise.”³
- 1.5. It is essential that Stage 3 of the point of sale initiative be implemented as soon as possible in order for the Fund Facts document to serve its intended purpose. It is not in the interests of investors to delay the implementation of such an important disclosure initiative on the basis that similar disclosure for other types of investment funds is not yet required. Given the length of time it has taken to get to these Stage 2 proposals, it seems ridiculous to make consumers continue to wait for information that should have always been available to them, irrespective of disclosure shortcomings of other products. We recommend that the CSA proceed with Stage 3 forthwith, and seize the opportunity to refine the Fund Facts document for its intended purpose concurrently with its efforts to implement a point of sale regime for other products.
- 1.6. We continue to be concerned about non-delivery of the SP to investors. In FAIR Canada’s view, the SP provides important information that is not available in the Fund Facts document. Fund Facts is not intended to be a comprehensive disclosure document; instead, it is meant to highlight key information that is important to investors. We encourage the CSA to continue to require delivery of the SP following the sale of an investment fund, and to reform the SP into a more meaningful disclosure document for investors, which will compliment the key information provided in the Fund Facts document. We take issue with the CSA’s response to evidence that investors do not read the SP. Instead of responding by no longer requiring delivery of the SP, we would prefer to see the CSA take steps to make the SP a more useful and easily readable document for investors.

2. Presentation of Risk

CSA Has Improved Risk Disclosure

- 2.1. FAIR Canada supports the change whereby risk information is presented prior to performance information in the Fund Facts document. We believe it is helpful to have the risk disclosure

¹ Joint Forum of Financial Market Regulators, “Proposed framework 81-406: Point of sale disclosure for mutual funds and segregated funds” (June 15, 2007), prepared by: Canadian Securities Administrators and Canadian Council of Insurance Regulators, at page 2.

² Research Strategy Group, “Fund Facts Document Research Report” (October 25, 2006), prepared for the Ontario Securities Commission, at page 68, online: <http://www.jointforum.ca/en/init/point_of_sale/Appendices_4-5.pdf>.

³ *Supra*, note 1 at page 6.

information appear on the first page, and hope that this will lend weight to this consideration in investors' decision-making processes.

- 2.2. FAIR Canada notes that the CSA has proposed several improvements with respect to risk disclosure in the Notice. Specifically, FAIR Canada is pleased to see the proposed addition of the worst three month return to the 'Performance' section of the Fund Facts document. We endorse this change; it provides a good indication of the risks of the fund in a format and measurement that will resonate with investors.

Inconsistent Evaluation of Risk

- 2.3. FAIR Canada also supports the stronger warning language about the risks of investing in mutual funds. However, we remain concerned that there will be inconsistent evaluations of risk among funds, as fund managers are not required to use the same methodology under the current proposals. This limits the use of the Fund Facts document for comparative purposes.
- 2.4. Furthermore, FAIR Canada continues to be concerned about the appropriateness of the risk calculation methodology used by a majority of fund managers to select the risk classification level for an investment fund.
- 2.5. **Our understanding is that a majority of fund managers currently use the risk methodology developed and recommended by the Investment Funds Institute of Canada⁴, the investment fund lobby group (the "IFIC Methodology").** We have previously raised concerns with the CSA that the IFIC Methodology, which measures the standard deviation of a fund over three- and five-year periods, does not capture a retail investor's perception of 'risk'. This methodology was developed by IFIC without public consultation and without regulatory oversight.
- 2.6. **Standard deviation measures volatility, and is not necessarily a substitute for an overall risk assessment, nor is it a proxy for retail investors' use of the term 'risk'.** According to a retail investor report prepared for the Investor Advisory Panel of the Ontario Securities Commission, "[t]he perception of risk appears more closely tied to the questions [retail investors] were asked for their KYC form, rather than to any underlying notion of investment volatility."⁵ **The strongest criterion for an investor deciding not to buy a particular investment "is simply the Chances of losing money."**⁶ [emphasis added]
- 2.7. Furthermore, a short-term measurement of volatility is not an appropriate measure of risk for investments that investors are encouraged to hold for the longer term. According to an IFIC investor report, "[e]ighty-two percent of mutual fund owners say their funds are for

⁴ Referred to by IFIC as the IFIC Volatility Risk Classification Report.

⁵ Lori Bottrell & Ed Weinstein, "Focus Groups with Retail Investors on Investor Rights and Protection" (April 7, 2011) prepared for the Investor Advisory Panel of the Ontario Securities Commission, at page 6, online: <https://www.osc.gov.on.ca/documents/en/Securities-Category1-Comments/com_20110427_11-765_ananda.pdf>.

⁶ The Brondesbury Group, "Investor behaviour and beliefs: Advisor relationships and investor decision-making study" (2012), prepared for the Investor Education Fund, at page 23.

retirement”⁷ and this percentage was higher than average for the age groups 18-44 and 45-64, which indicates that mutual fund investors are investing for the long term.

- 2.8. As noted in Kenmar Associates’ submission in response to the Notice, dated June 27, 2012, “retail investors view risk as the likelihood of a decline in investment value, or the failure to meet a benchmark, *over a long-term time horizon.*” Most Canadian investors self-identify as conservative when it comes to investment risk and “Canadians more often indicate a preference for investment options that involve a lower return and less downside risk than ones that carry a higher possible return, and higher downside risk.”⁸ Retail investors are worried primarily about the risk of loss of their capital, and secondarily about the risk that their investments may not perform as expected.
- 2.9. Standard deviation does not differentiate between movements above or below an average; risk-adverse investors (that is, most Canadian investors, and particularly seniors and retirees) feel the effects of negative movements more acutely than positive movements, but measures of standard deviation do not account for this.
- 2.10. Furthermore, it is our understanding⁹ that the IFIC methodology uses three- and five-year time periods. In FAIR Canada’s view, this is inappropriate, given that investors are typically encouraged to hold mutual funds for the long term.
- 2.11. Investors need to be able to put mutual fund risk and performance in proper context in order to make an informed assessment. FAIR Canada believes that the proposed addition of the benchmark to the performance section (see our comments below in section 3) will assist in this regard, but that the risk scale should either: (1) provide investors with an indication of the risks of the fund more generally, or (2) explain more clearly the limitations of the risk rating provided.
- 2.12. FAIR Canada believes that it is essential that the CSA prescribe a standard risk assessment methodology to be applied by fund managers in assessing the fund’s risk and determining the appropriate category in the Fund Facts risk scale, which was the approach taken by the Committee of European Securities Regulators (“CESR”) in creating the ‘Methodology for the

⁷ Pollara, “Canadian Investors’ Perceptions of Mutual Funds and the Mutual Fund Industry (2011), prepared for the Investment Funds Institute of Canada, at page 28.

⁸ Ipsos Reid, “CSA Investor Index 2009”, prepared for the Canadian Securities Administrators Investor Education Committee (October 5, 2009), online: <http://www.securities-administrators.ca/uploadedFiles/General/pdfs/CSA%20Investor%20Index%202009%20Final_EN.pdf?n=6519> at page 38.

⁹ The IFIC Methodology is not publicly available. Retail investor advocates and investors have had a difficult time obtaining a copy of the methodology used by a fund despite the obligation for the fund managers to provide this information in accordance with the rules. While we appreciate that the CSA has responded to this concern stating that it expects fund managers to make the IFIC Volatility Risk Classification Report available upon request, we note that the IFIC Methodology causes confusion with respect to the ultimate responsibility for the risk methodology used for a particular fund. IFIC merely recommends the use of the methodology to rate a fund’s risk, while fund managers point to the IFIC Methodology, which is an informal, unapproved document, in response to questions about the methodology they use.

calculation of the synthetic risk and reward indicator'.¹⁰ While we are not recommending the CSA following the methodology chosen by the CESR, we recommend following their approach of prescribing a standardized methodology.

- 2.13. We suggest that, in order for the risk scale to have real meaning to retail investors, it is imperative not only that a uniform methodology be used, but also that the CSA provide guidance to assist investors in understanding the risk rating of a given fund. FAIR Canada believes that it would be helpful for the risk scale to show where commonly recognized investments, such as GICs, would fall on the scale, given that it is merely illustrative of a spectrum of risk and the categories used for the risk ratings are relative terms.

Other Specific Risks

- 2.14. FAIR Canada supports the addition of the requirement to include a list of no more than four main risks of the fund. We suggest that investment funds be required to make it clear in the Fund Facts document that these specific risk factors are not necessarily reflected in the risk scale. FAIR Canada recommends that investor testing focus on the disclosure of other specific risks in order to determine whether or not they are understood by investors and whether further explanatory material (either within the Fund Facts document or in a related document) would assist investors' understanding.

3. Benchmark – Five-Year GIC

- 3.1. It is essential that investors be provided with benchmarking information to provide them with the appropriate context in assessing the historical performance of a fund. A simple benchmark also provides an indication of the risk associated with the fund.
- 3.2. FAIR Canada believes that a GIC is an appropriate benchmark to compare to the fund's performance. We endorse the CSA's proposal to require the performance chart to compare the fund's return with the return of a GIC. It is our understanding that most investors know what a GIC is and we believe that providing historical GIC performance will highlight the risk of investing in a given fund, in addition to providing context to its historical performance. FAIR Canada recommends that the CSA consider comparing the mutual fund's performance with a longer-term GIC rate, such as a five-year GIC, given the longer-term nature of investment fund investing (as mentioned in section 2.7 above). The five-year GIC performance is as easy to understand as the one-year GIC, with the advantage of incorporating a longer investment period. We believe that the five-year GIC is, at this time, the most appropriate benchmark to illustrate this comparison. The five-year GIC is simple and easy to understand.
- 3.3. FAIR Canada encourages the CSA to specifically test the language provided under the sub-heading "a) Worst return" to determine whether investors understand the intended meaning of the language "dropped in value". We understand this measure to be intended to provide

¹⁰ Committee of European Securities Regulators, "CESR's guidelines on the methodology for the calculation of the synthetic risk and reward indicator in the Key Investor Information Document (1 July 2010), online: <http://www.esma.europa.eu/system/files/10_673.pdf>.

investors with the number of years of the past 10 years that the fund provided negative returns. We are concerned that the language “dropped in value” may be confusing to investors. If investor testing suggests that this language is not clear to investors, FAIR Canada recommends that the language be changed to “provided a negative return” or such similar language that may be clearer to investors.

4. Fund Costs/Expenses

- 4.1. FAIR Canada recommends that the Fund Facts cost information be presented prior to the performance information, as costs are a certainty while past performance cannot predict how a fund will perform in the future.¹¹
- 4.2. FAIR Canada questions whether the language regarding fund expenses is sufficiently clear to investors. Specifically, we are concerned that the language “[y]ou don’t pay these expenses directly. They affect you because they reduce the fund’s returns...” may not be sufficiently clear to convey to investors that, as a result, fund investors’ returns are reduced. We recommend that the CSA’s investor testing include questions to determine whether investors understand the implications of reduced fund returns. If they do not, FAIR Canada recommends that the language be revised to make it clear that fund expenses reduce investors’ returns and that investors pay these expenses, albeit indirectly.
- 4.3. We are unclear as to why the *Sample Fund Facts Document* that follows the Notice includes in the ‘Fund expenses’ section language stating that “XYZ Mutual Funds waived some of the fund’s expenses. If it had not done so, the MER would have been higher.” The methodology used to determine the amount of the MER charged to the fund is not relevant to consumers (to the extent that some expenses are passed on directly to investors and others are not) and such language could potentially be confusing or misleading to investors. We recommend that the annual rate of the MER be presented without language indicating that the MER could have been higher; alternatively, we would suggest adding language to the effect that, had the fund waived more of the expenses or managed the fund more economically, the MER would have been lower.
- 4.4. FAIR Canada supports the requirement to disclose under ‘Other Fees’ any requirement to participate in a fee-based arrangement with their dealer in order to be eligible to purchase the particular class or series of the mutual fund. This will make it clear to the investor that although the stated MER of the fund is, for example, 1.25 percent, the client is paying 1 percent of his or her assets under management to the dealer in order to be eligible for that series of the fund.

5. Trailing Commissions and Conflicts of Interest

- 5.1. FAIR Canada wholeheartedly supports the addition of specific information regarding trailing commissions to the Fund Facts document.

¹¹ CSA Investor Brochure “Understanding mutual funds”, online: <http://www.osc.gov.on.ca/en/Investors_res_mutual-funds.htm> states “How a fund has performed in the past can’t predict how it will perform in the future.”

Confirmation of Trailing Commissions Paid

- 5.2. **FAIR Canada fully supports the addition of a requirement to confirm whether trailing commissions are paid. Retail investors have a very low awareness of trailing commissions¹², and, as a result, we believe it is essential that the Fund Facts document for each fund clearly discloses whether or not trailing commissions are paid.** FAIR Canada recommends that, instead of language stating that the trailing commission is “paid out of” the MER, the language state that the trailing commission is “charged to you through” the management fee (MER).

Disclosure of Conflicts of Interest

- 5.3. We believe that disclosure regarding the potential conflicts arising from the payment of trailing commissions is an essential piece of information that should be highlighted for investors, particularly in light of empirical evidence that indicates that “investors have little or no idea about how advisors can get paid.”¹³ It is critical that investors are explicitly warned of the potential for a conflict of interest, given that studies have shown that seven out of ten investors believe that their advisor has a legal duty to put the client’s best interests ahead of his or her own personal interest.¹⁴ We expect that, if this information is presented in a way that causes investors to take pause and consider the ‘advice’ they are being given, this will greatly benefit investors. In particular, we expect it may encourage retail investors to ask the dealing representative about other investments that might be suitable for them or to undertake their own research with respect other potential investments, and thereby lead to greater financial awareness on the part of the investor and more informed investment decisions.
- 5.4. **FAIR Canada is highly supportive of the introduction of language informing investors of the potential for conflicts of interest resulting from trailing commissions.** We support the disclosure of this information to investors and view it as a very positive, pro-investor addition to the Fund Facts document. In our view, it is absolutely essential for the potential for conflicts of interest disclosure to be stated expressly and clearly in the Fund Facts document, as has been proposed by the CSA; as noted in one investor study, “[i]ssues of potential conflict of interest are particularly difficult [for investors] to consider, since they are counter to the high level of trust that underpins their advisor relationship.”¹⁵
- 5.5. FAIR Canada is concerned, however, that the proposed changes direct investors to dealer representatives following the disclosure of the potential for a conflict of interest. We question the propriety of directing investors to the conflicted parties and are concerned that this direction could dilute the preceding warning. **Research has shown that disclosure of a conflict of interest often has unintended consequences, including inducing added trust in the individual disclosing**

¹² *Supra* note 6 at page 27.

¹³ *Ibid.* at page 25.

¹⁴ *Ibid.* at page 31.

¹⁵ *Ibid.* at page 33.

the conflict.¹⁶ Furthermore, a considerable body of empirical evidence shows that investors rely heavily, and often blindly, on their advisor’s advice and trust them completely.¹⁷

- 5.6. While we expect that the majority of dealing representatives would appropriately discuss the implications of trailing fees, we are concerned that this will not adequately protect the clients of the salespeople who are most influenced by trailing commissions. **FAIR Canada recommends that, instead of directing investors to their dealer representative, the CSA expand the existing “Understanding mutual funds” brochure for investors, explaining, among other things, compensation structures, different fee models, and any potential inherent conflicts of interest, and refer investors to this brochure following the conflicts disclosure in the Fund Facts document.** The brochure could also provide some sample questions that investors should ask their dealer representative with respect to trailing commissions.

6. Transition Period

- 6.1. **In FAIR Canada’s opinion, the CSA’s proposed six-month transition period to allow mutual funds a reasonable amount of time for implementation of systems to facilitate the delivery of Fund Facts is appropriate.**

7. Investor Testing

- 7.1. **FAIR Canada supports the testing of Fund Facts with investors to better inform the steps it will take in Stage 2. FAIR Canada requests that the CSA make its investor testing findings publicly available, once the testing is complete.**
- 7.2. FAIR Canada believes it is essential that the CSA test the Fund Facts document for its intended purpose – that is, to provide investors with clear, meaningful, and effective disclosure and to provide a plain language document that would assist investors in their decision-making process **prior to** purchasing a mutual fund. As noted by the Joint Forum, “[i]nvestors have certain behavioural biases that decrease the likelihood that they will... read disclosure if they receive it after they have made their purchase decision...”¹⁸ FAIR Canada urges the CSA to test the Fund Facts document with a view to investors using the document prior to or at the point of sale of mutual funds and to proceed with Stage 3 as soon as possible.
- 7.3. In FAIR Canada’s view, an essential benefit of the Fund Fact documents is that they will allow investors to compare the risks, costs, benefits, and other characteristics of different mutual funds in order to make informed investment decisions. We encourage the CSA to design its testing with this in mind.

¹⁶ Daylian M. Cain, George Loewenstein & Don A. Moore, “The Dirt on Coming Clean: Perverse Effects of Disclosing Conflicts of Interest” (2005) 34(1) J. Legal Stud. 1, online: <http://sds.hss.cmu.edu/media/pdfs/loewenstein/DirtOnComingClean.pdf> at pages 5 and 6.

¹⁷ *Supra* note 6 at page 20 (“[t]he advisor’s opinion dominates all other sources as a factor in buying decisions”) and see also *supra* note 5 at page 1 (“[o]verwhelmingly, participants put unconditional confidence and trust in their advisor” and “a good proportion [of investors] blindly trust the advice they are given. There is a real belief among participants that their advisor always acts in their best interest”).

¹⁸ *Supra*, note 1 at page 6.

8. Delivery - Binding

- 8.1. **FAIR Canada does not believe that investment funds should be permitted to bind the Fund Facts document to the SP of the mutual fund or to documents incorporated by reference. Delivery of the Fund Facts document bound to the SP or other documents would defeat the purpose of providing a short and simple point of sale disclosure document.** “Information overload and dense, complex language are two of the reasons why investors do not read the disclosure documents.”¹⁹ Additionally, the Fund Facts document will only temporarily be permitted to be delivered to the investor after the point of sale so it could cause confusion for investors to begin to receive it bound with the SP. As discussed above, we encourage the provision of the SP to the investor, but disagree that the CSA should permit the Fund Facts document to be bound to the SP.

We thank you for the opportunity to provide our comments and views in this submission. We welcome its public posting and would be pleased to discuss this letter with you at your convenience. Feel free to contact Ermanno Pascutto at 416-214-3443 (ermanno.pascutto@faircanada.ca).

Sincerely,



Canadian Foundation for Advancement of Investor Rights

¹⁹ *Ibid.*