CSA/ACVM Canadian Securities Administrators Autorités canadiennes en valeurs mobilières

MANDATING A SUMMARY DISCLOSURE DOCUMENT FOR EXCHANGE-TRADED MUTUAL FUNDS AND ITS DELIVERY

CSA NOTICE OF AMENDMENTS TO NATIONAL INSTRUMENT 41-101 *GENERAL PROSPECTUS REQUIREMENTS* AND TO COMPANION POLICY 41-101CP TO NATIONAL INSTRUMENT 41-101 *GENERAL PROSPECTUS REQUIREMENTS* AND RELATED CONSEQUENTIAL AMENDMENTS

December 8, 2016

Introduction

The Canadian Securities Administrators (the CSA or we) are making amendments to mandate a summary disclosure document for exchange-traded mutual funds (ETFs). The amendments are to:

- National Instrument 41-101 *General Prospectus Requirements* (the Instrument); and
- Companion Policy 41-101CP to National Instrument 41-101 *General Prospectus Requirements* (the Companion Policy).

New Form 41-101F4 *Information Required in an ETF Facts Document* (Form 41-101F4) is part of the Instrument. We are also making related consequential amendments to National Instrument 81-106 *Investment Fund Continuous Disclosure* and related changes to Companion Policy 81-106CP to National Instrument 81-106 *Investment Fund Continuous Disclosure* (the Consequential Amendments). We refer to the amendments to the Instrument, the changes to the Companion Policy and the Consequential Amendments together as the Amendments.

The Amendments are part of Stage 3 of the CSA's implementation of the point of sale disclosure project (the POS Project).

The Amendments will require ETFs to produce and file a summary disclosure document called "ETF Facts", which must be made available on the ETF's or the ETF manager's website (the ETF Facts Filing Requirement). The Amendments also introduce a new delivery regime which will require dealers that receive an order to purchase ETF securities to deliver an ETF Facts to investors within two days of the purchase (the ETF Facts Delivery Requirement). Delivery of the prospectus will not be required, but there will be a requirement for the prospectus to be made available to investors upon request, at no cost.

We think the introduction of the ETF Facts will help provide investors with access to key information about an ETF, in language they can easily understand. Delivery of the ETF Facts to investors will also help improve the consistency with which disclosure is provided to investors of ETFs, and help create a more consistent disclosure framework between conventional mutual funds and ETFs. However, delivery of the ETF Facts will be on a post-sale basis while delivery of the Fund Facts is on a pre-sale basis. The CSA expects to consider the feasibility of requiring pre-sale delivery of the ETF Facts. Any proposals in this regard will be subject to the consultation process.

The text of the Amendments follows this Notice and is available on the websites of members of the CSA.

We expect the Amendments to be adopted in each jurisdiction of Canada. While no legislative amendments are needed to implement the ETF Facts Filing Requirement, some jurisdictions will need to seek legislative amendments to implement the ETF Facts Delivery Requirement, as well as investor rights related to failure to deliver the ETF Facts. As of the date of publication of the Amendments (Publication Date), Alberta, Manitoba, New Brunswick, Nova Scotia, Ontario[1], Québec[2], and Saskatchewan have either obtained the necessary legislative amendments, or have determined that legislative amendments are not required. It is anticipated that the remaining jurisdictions will seek to obtain any needed legislative amendments in advance of the expiry of the transition period that will apply to the ETF Facts Delivery Requirement.

Subject to Ministerial approval requirements for rules, the Amendments come into force on March 8, 2017 (In-Force Date), which is 3 months after the Publication Date. The Amendments, as they pertain to the ETF Facts Delivery Requirement, will come into force on a later date in those jurisdictions that require legislative amendments in order to implement the ETF Facts Delivery Requirement.

Background

CSA Staff Notice 81-319 *Status Report on the Implementation of Point of Sale Disclosure for Mutual Funds*[3] outlined the CSA's decision to implement the POS Project in three stages.

The third and final stage of the POS Project consists of three separate workstreams:

1. <u>Pre-sale delivery of the fund facts document (Fund Facts) for conventional mutual funds</u> – Since July 2011, every conventional mutual fund has been required to prepare a Fund

[1] In Ontario, legislative amendments have been passed and are awaiting proclamation upon the effective date of the Amendments.
[2] In Québec, legislative amendments to the *Securities Act* (Québec) have been in force since May 18, 2016.
[3] Published on June 18, 2010.

Facts for each class and series. Since June 2014, every dealer has been required to deliver the Fund Facts instead of the prospectus in connection with the purchase of conventional mutual fund securities. On December 11, 2014, the CSA published final amendments implementing the pre-sale delivery of Funds Facts for conventional mutual funds, which became effective on May 30, 2016.

2. CSA mutual fund risk classification methodology – The CSA has developed a mutual fund risk classification methodology (the Risk Methodology) to be applied by fund managers in determining a fund's investment risk level on the scale in the Fund Facts and the ETF Facts. Final rules implementing the Risk Methodology were published today contemporaneously with the Amendments.

3. ETF summary disclosure document and a new delivery model – The Amendments will require the preparation and filing of an ETF Facts and delivery of the ETF Facts within two days of an investor purchasing securities of an ETF.

The ETF Distribution Model

Individual investors seeking to purchase an ETF generally cannot subscribe directly for ETF securities. Instead, they must purchase ETF securities over an exchange. A purchase, however, only results in a distribution when it is a trade in securities of the ETF that have not been previously issued (the Creation Units).

Since the prospectus delivery requirement under securities legislation is triggered by a distribution, prospectus delivery would generally only apply to an investor's purchase if the order is filled with Creation Units. Creation Units are issued by ETFs to dealers that are authorized to purchase newly issued securities directly from the ETF. The dealers, in turn, re-sell these Creation Units on an exchange.[4]

The first re-sale of a Creation Unit on an exchange or another marketplace in Canada will generally constitute a distribution, which triggers the requirement to deliver a prospectus. If, however, the ETF investor's purchase order is filled through a secondary market trade of previously issued existing ETF securities, the prospectus delivery requirement would not apply. However, investors have no way of knowing whether they have purchased Creation Units when they purchase ETF securities.

Exemptive Relief and the Delivery of an ETF Summary Disclosure Document

To deal with issues arising from the ETF distribution model, in Fall 2013, the CSA granted exemptive relief (the Exemptive Relief) to ETF managers and a group of dealers from the existing prospectus delivery requirements under securities legislation in order to permit the delivery of a summary disclosure document (Summary Document) in place of the prospectus.[5]

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[4] This initial re-sale from a "creation unit" on an exchange would be considered a trade in the securities of an issuer that have not been previously issued and a purchase and re-sale by the dealer in the course of or incidental to a distribution.

[5] *In the Matter of BMO Nesbitt Burns Inc. and BMO Investorline Inc.* (July 19, 2013); *In the Matter of CIBC World*

The Exemptive Relief requires dealers that are parties to the relief to deliver to investors a Summary Document within two days of the investor buying an ETF, whether or not the investor's purchase order is filled with Creation Units.[6] This delivery obligation applies to dealers acting as agents of the purchaser on the "buy" side of the transaction, rather than to dealers acting in a distribution on the "sell" side of the transaction, as currently required under securities legislation.

The Amendments, along with related legislative amendments, codify the concepts of the Exemptive Relief, to make it applicable to all dealers who act as agent of the purchaser of an ETF security.

Substance and Purpose

Consistent with the principles of the POS Project, we think the Amendments will provide investors with the opportunity to make more informed investment decisions, by giving investors access to key information about an ETF, in language they can easily understand.[7] Furthermore, investors in conventional mutual funds and ETFs will be treated more equally with respect to the disclosure available in connection with a purchase of securities.

The ETF Facts has been tested with investors and the content of the ETF Facts is also informed by the results of investor testing that was conducted in respect of the Fund Facts. The ETF Facts will allow investors to review key information about the potential benefits, risks and costs of

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Markets Inc. and CIBC Investor Services Inc. (July 19, 2013); *In the Matter of ITG Canada Corp.* (November 18, 2014); *In the Matter of National Bank Financial Inc. and National Bank Direct Brokerage Inc.* (July 19, 2013); *In the Matter of RBC Dominion Securities Inc. and RBC Direct Investing Inc.* (July 19, 2013); *In the Matter of Scotia Capital Inc. and DWM Securities Inc.* (July 19, 2013); *In the Matter of TD Securities Inc. and TD Waterhouse Canada Inc.* (July 19, 2013); *In the Matter of Timber Hill Canada Co.* (November 5, 2014); *In the Matter of Blackrock Asset Management Canada Limited et. al.* (July 19, 2013); *In the Matter of BMO Asset Management Inc. et. al.* (July 19, 2013); *In the Matter of First Asset Investment Management Inc. et. al.* (July 19, 2013); *In the Matter of FT Portfolios Canada Co. et. al.* (July 19, 2013); *In the Matter of Horizons ETFs Management (Canada) Inc. and AlphaPro Management Inc. et. al.* (July 19, 2013); *In the Matter of Invesco Canada Ltd. et. al.* (July 19, 2013); *In the Matter of Purpose Investments Inc. et. al.* (August 6, 2013); *In the Matter of Questrade Wealth Management Inc. et. al.* (January 23, 2015); *In the Matter of RBC Global Asset Management Inc. et. al.* (July 19, 2013); and *In the Matter of Vanguard Investments Canada Inc. et. al.* (July 19, 2013). The Exemptive Relief was subject to a sunset clause and was re-issued in Fall 2015.

[6] Similar to delivery of the Fund Facts, delivery would only be required in instances where the investor has not previously received the latest Summary Document of the ETF.

[7] This is consistent with the International Organization of Securities Commission (IOSCO) Principles on Point of Sale Disclosure published in February 2011. See, for example: Principles on Point of Sale Disclosure, Final Report, Technical Committee of the IOSCO, February 2011; G20 High-level principles on Financial consumer protection, Organization for Economic Co-operation and Development (OECD), October 2011; and Regulation of Retail Structured Products, Consultation Report, IOSCO, April 2013.

Principle 2 of the IOSCO Principles on Point of Sale Disclosure specifies: "*key information should be delivered, or made available, for free, to an investor before the point of sale, so that the investor has the opportunity to consider the information and make an informed decision about whether to invest.*"

investing in an ETF in an accessible format. It also highlights for investors where they can find further information about an ETF. Although delivery can take place within 2 days of purchase, we encourage advisors and investors to use ETF Facts as a tool in their conversations prior to any purchase decision.

Summary of Written Comments Received by the CSA

Proposed amendments introducing the ETF Facts and its delivery were first published for comment by the CSA on June 18, 2015 (the 2015 Proposal). The proposed ETF Facts published in the 2015 Proposal was tested with investors and its content was informed by the results of the testing. The testing results are set out in the final report, "*CSA Point of Sale Disclosure Project: ETF Facts Document Testing,*" which is available on the websites of the Ontario Securities Commission and the Autorité des marchés financiers at www.osc.gov.on.ca and www.lautorite.qc.ca, respectively. Copies are also available from any CSA member.

We received 20 comment letters on the 2015 Proposal. Generally, commenters were supportive of the codification of the Exemptive Relief, the introduction of the ETF Facts and the delivery requirement for the ETF Facts. Commenters also expressed support of providing a consistent disclosure framework between conventional mutual funds and ETFs. However, we were asked to re-consider the quantitative data in the proposed ETF Facts. Specifically, commenters told us that the Average Premium/Discount to NAV metric is difficult for investors to understand and is calculated using end of day values which may not be reflective of investor experience during the majority of the trading day. As a result of stakeholder feedback, we have removed the requirement to disclose the Average Premium/Discount to NAV from the "Pricing Information" section and the "Trading ETFs" section (formerly, the "How ETFs are Priced" section).

Some commenters also noted that the ETF Facts Delivery Requirement differs from the delivery requirement of the Summary Document under the terms of the Exemptive Relief. The ETF Facts will be required to be delivered to every purchaser of ETF securities, subject to certain exceptions, whereas the Summary Document was only required to be delivered to every investor who received a trade confirmation. While the Amendments do not require the ETF Facts to be delivered with trade confirmations, they do not prevent the ETF Facts from being delivered with the trade confirmation referencing the purchase of the ETF securities. The Exemptive Relief was intended as an interim measure until such time that relevant rule-making and legislative amendments could be implemented.

Copies of the comment letters have been posted on the Ontario Securities Commission website at www.osc.gov.on.ca and on the Autorité des marches financiers website at www.lautorite.qc.ca. You can find the names of the commenters and a summary of comments and our responses to those comments in Annex C to this Notice.

Summary of the Amendments

After considering the comments received, we have made some changes to the 2015 Proposal. See Annex B to this Notice for a summary of the key changes made to the 2015 Proposal. Those revisions are reflected in the Amendments that we are publishing as Annexes to this Notice. As these changes are not material, we are not republishing the Amendments for a further comment period.

Application

The Amendments apply only to ETFs.

ETF Facts

The creation of a summary disclosure document that highlights key information that is important for investors to consider when they purchase an investment product has been a central component of the POS Project. As was the case for the Fund Facts, the ETF Facts is a critical element of the new delivery regime for ETFs.

The starting point for the development of the ETF Facts was the Fund Facts, which was the result of extensive research, consultation and testing. Like the Fund Facts, the ETF Facts is required to be in plain language, no more than two pages double-sided and highlights key information that is important to investors, including risks, past performance, and the costs of investing in an ETF.

Although ETFs are substantially similar to conventional mutual funds, they are different in one significant aspect. Individual investors cannot subscribe for ETF securities directly from the fund. Instead, ETF securities are bought and sold over an exchange like stocks. Therefore, we have included additional content in the ETF Facts that speaks to trading and pricing characteristics of ETFs. For example, we have included information related to market price, volume and bid-ask spread. We have also included content that explains some of the issues to consider when trading ETFs.

The form requirements for the ETF Facts are set out in the Amendments as Form 41-101F4. A separate ETF Facts is required for each class or series of securities of an ETF. For illustrative purposes, a sample ETF Facts is set out as Annex A to this Notice. While we have removed the requirement to disclose average premium/discount to NAV and we have made some changes to the information provided in respect of trading ETFs, no substantive changes have been made. A more detailed discussion of these changes is provided in Annex B to this Notice.

The CSA has developed a mutual fund risk classification methodology (the Risk Methodology) for use in the Fund Facts and the ETF Facts. The "risk rating" in the ETF Facts must be determined according to the Risk Methodology, which will come into effect on the same date that the ETF Facts Filing Requirement comes into effect. The ETF Facts also incorporates disclosure changes that were made to the Fund Facts as a result of the Risk Methodology.

Filing Requirements

The ETF Facts must be filed concurrently with the ETF's prospectus. The certificate page for the ETF, which verifies the disclosure in the prospectus, applies to the ETF Facts just as it applies to all documents incorporated by reference into the prospectus.

If a material change to the ETF relates to a matter that requires a change to the disclosure in the ETF Facts, an amendment to the ETF Facts must be filed. If ETF managers want to update information in the ETF Facts at their discretion, they may choose to amend the ETF Facts at any time. In all instances, an amendment to an ETF Facts must be accompanied by an amendment to the ETF's prospectus. In cases where the ETF prospectus would not have any changes, it would be sufficient to simply file an updated certificate page.

Any ETF Facts filed after the date of the prospectus is intended to supersede the ETF Facts previously filed. Once filed, the ETF Facts must be posted to the ETF's or the ETF manager's website.

No changes have been made to the ETF Facts Filing Requirement from what was contained in the 2015 Proposal.

Delivery of the ETF Facts Instead of the Prospectus

The Amendments require delivery of the most recently filed ETF Facts to a purchaser within two days of purchase of ETF securities, pursuant to the ETF Facts Delivery Requirement. The ETF Facts Delivery Requirement shifts the current prospectus delivery obligation under securities legislation from the dealer acting as underwriter in an ETF distribution (the "sell" side of an ETF transaction) to the dealer when acting as agent of the purchaser of an ETF security (the "buy" side of an ETF transaction). The ETF Facts Delivery Requirement also provides a carve-out from the existing prospectus delivery requirement for ETF securities.

Consistent with securities legislation in some jurisdictions today, the Amendments do not require delivery of the ETF Facts if the purchaser has already received the most recently filed ETF Facts.

The Amendments restrict the documents that may be combined with the ETF Facts on delivery.

We have not made any changes to an ETF's obligation to file its prospectus. There will be a requirement to provide investors with a copy of the prospectus upon request, at no cost.

The method for delivery of the ETF Facts is expected to be consistent with the method for delivery of a prospectus under securities legislation. For example, it could be in person, by mail, by fax, electronically or by other means. Access will not equal delivery, nor will a referral to the website on which the ETF Facts is posted.

No changes have been made to the ETF Facts Delivery Requirement from what was contained in the 2015 Proposal.

Investor Rights

Right for failure to deliver the ETF Facts

If the investor does not receive the ETF Facts, the investor has a right to seek damages or to rescind the purchase. The rights of the investor for failure of delivery of the ETF Facts has been or will be enacted by legislative amendments and will be consistent with the rights under securities legislation today for failure to deliver the prospectus within two days of purchasing securities of an ETF.

Right for withdrawal of purchase

The Amendments do not extend the current right of withdrawal of purchase to investors of ETF securities. Currently, under securities legislation, investors have a right for withdrawal of purchase within two business days after receiving the prospectus. This right only applies in respect of a distribution for which prospectus delivery is required. As indicated, not all ETF purchases are distributions. Only purchase orders filled with Creation Units trigger a prospectus delivery requirement and would therefore also be subject to a withdrawal right. As a result, this right does not today apply to all ETF investors, nor is there a way for an ETF investor today to know whether they have received Creation Units and are therefore eligible for a withdrawal right.

In some jurisdictions, investors have a right of rescission with delivery of the trade confirmation for the purchase of mutual fund securities, including ETF securities.[8] This right remains unchanged under the Amendments.

Right for misrepresentation

The ETF Facts is incorporated by reference into the prospectus which means that the existing statutory rights of investors that apply for misrepresentations in a prospectus will also apply to misrepresentations in the ETF Facts. Furthermore, as most ETF purchases occur on the secondary market, investors may also have a right of action for civil liability for secondary market disclosure.

Transition

The Amendments have two transition periods. The first transition period relates to the ETF Facts Filing Requirement and the second transition period relates to the ETF Facts Delivery Requirement. We anticipate the Amendments will be proclaimed into force on the In-Force Date.

The transition period timeline in the Amendments is illustrated below:

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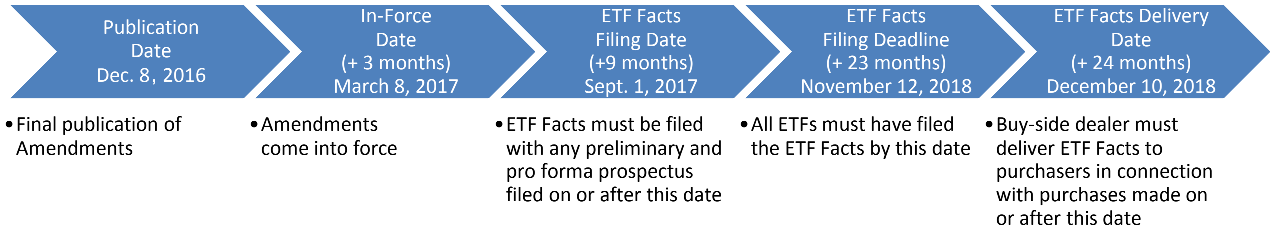
[8] See for example section 137 of the *Securities Act* (Ontario). In Ontario, this right only applies in respect of purchases that are less than $50,000. An investor that exercises this right is entitled to receive the lesser of their original investment amount and the net asset value of the shares/units at the time of exercise. The investor would also be entitled to receive all costs incurred in connection with their purchase.
In Québec, sections 109.8 and 109.9 of the *Securities Act* (Québec) apply.



Due to the coming into force of the Québec legislative amendments on May 18, 2016, the Autorité des marchés financiers will issue a blanket order exempting ETF managers and dealers from the application of some sections of the Québec *Securities Act* and the Instrument so that they can benefit from similar transition periods and effects as those provided by the amendments to the Instrument in the other Canadian jurisdictions.

ETF Facts Filing Requirement

The ETF Facts Filing Requirement will take effect on September 1, 2017, which is approximately 9 months after the Publication Date (the ETF Facts Filing Date). ETF managers will have 6 months from the In-Force Date to make any changes to compliance and operational systems that are necessary to produce the ETF Facts.

As of the ETF Facts Filing Date, an ETF that files a preliminary or pro forma prospectus must concurrently file an ETF Facts for each class or series of securities of the ETF offered under the prospectus and post the ETF Facts to the ETF's or ETF manager's website. Until such time, ETF managers that are subject to the Exemptive Relief will continue to prepare and file the Summary Document.

In order to fully implement the Amendments within a reasonable time period, an ETF manager must, if it has not already done so, file an ETF Facts for each class or series of securities of the ETF by November 12, 2018, which is approximately 14 months of the ETF Facts Filing Date. Based on the prospectus renewal cycle for ETFs, we anticipate that it would take approximately 13 months for ETF Facts to be filed for all ETFs. This final deadline date, however, will ensure that ETF Facts for all ETFs will be available prior to the effective date of the ETF Facts Delivery Requirement.

ETF Facts Delivery Requirement

The ETF Facts Delivery Requirement will take effect on December 10, 2018, which is approximately 24 months after the Publication Date.

During the transition period, dealers that are subject to Exemptive Relief will be required to deliver either the most recently filed ETF Facts or, until the initial ETF Facts is filed, the most recently filed Summary Document. The sunset provisions of the Exemptive Relief will generally expire by the end of the transition period for the Amendments. We do not anticipate that there will be any significant issues related to the transition from the delivery of the Summary Document to delivery of the ETF Facts.

Dealers that are not subject to the Exemptive Relief will have 21 months from the In-Force Date to make any changes to compliance and operational systems that are necessary to effect ETF Facts delivery.

Anticipated Costs and Benefits

We think the introduction and delivery of the ETF Facts, as set out in the Amendments, would benefit both investors and market participants by helping address the “information asymmetry” that exists between participants in the ETF industry and investors. Unlike industry participants, investors often do not have key information about an ETF and may not know where to find the information. We also know that many investors do not use the information in the prospectus because they have trouble finding and understanding the information they need. The CSA designed the ETF Facts to make it easier for investors to find and use key information, which should help bridge this information gap.

The Amendments would also improve the consistency with which disclosure is provided to investors of ETFs and help create a more consistent disclosure framework between conventional mutual funds and ETFs.

The earlier publications related to the POS Project outlined some of the anticipated costs and benefits of implementation of the point of sale disclosure regime for mutual funds. We consider the costs and benefits set out in prior publications to still be valid and we consider them to be equally applicable to ETFs.[9] You can find these documents on the websites of members of the CSA.

Overall, we continue to believe that the potential benefits of the changes to the disclosure regime for ETFs as contemplated by the Amendments are proportionate to the costs of making them.

Local Matters

Annex H to this Notice is being published in any local jurisdiction that is making related changes to local securities laws, including local notices or other policy instruments in that jurisdiction. It also includes any additional information relevant to that jurisdiction only.

Some jurisdictions may require amendments to local securities legislation, in order to implement the Amendments. If statutory amendments are necessary in a jurisdiction, these changes will be initiated and published by the local provincial or territorial government.

Unpublished Materials

In developing the Amendments, we have not relied on any significant unpublished study, report or other written materials.

Contents of Annexes

[9] The costs and benefits of pre-sale delivery are not applicable as the Amendments only contemplate delivery of the ETF Facts within two days of purchase of ETF securities.

The text of the Amendments is contained in the following annexes to this Notice and is available on the websites of members of the CSA:

Annex A – Sample ETF Facts Template

Annex B – Summary of Changes to the 2015 Proposal

Annex C – Summary of Public Comments and CSA Responses

Annex D – Amendments to National Instrument 41-101 *General Prospectus Requirements*

Annex E – Changes to Companion Policy 41-101CP to National Instrument 41-101 *General Prospectus Requirements*

Annex F – Amendments to National Instrument 81-106 *Investment Fund Continuous Disclosure*

Annex G – Changes to Companion Policy 81-106CP to National Instrument 81-106 *Investment Fund Continuous Disclosure*

Annex H – Local Information

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