IIAC ACCVM
INVESTMENT INDUSTRY ASSOCIATION OF CANADA
ASSOCIATION CANADIENNE DU COMMERCE DES VALEURS MOBILIÈRES

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Via Email: comments@osc.gov.on.ca, consultation-en-cours@lautorite.qc.ca

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British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
Financial and Consumer Services Commission (New Brunswick)
Office of the Superintendent of Securities, Prince Edward Island
Nova Scotia Securities Commission
Office of the Superintendent of Securities, Newfoundland and Labrador
Office of the Superintendent of Securities, Northwest Territories
Office of the Yukon Superintendent of Securities
Office of the Superintendent of Securities, Nunavut

Attention: The Secretary
Ontario Securities Commission
20 Queen Street West, 22nd Floor
Toronto, Ontario M5H 3S8

Me Anne-Marie Beaudoin
Corporate Secretary
Autorité des marchés financiers
800, square Victoria, 22e étage
C.P. 246, tour de la Bourse
Montréal (Québec) H4Z 1G3

Dear Sirs / Mesdames:

Re: Canadian Securities Regulators (CSA) Request for Comments on a Summary Disclosure Document (“ETF Facts”) and Delivery Regime for Exchange-Traded Mutual Funds (ETFs)

The Investment Industry Association of Canada (the "IIAC") appreciates the opportunity to provide input on the proposed ETF Facts disclosure and delivery regime. The IIAC is the national association representing the investment industry’s position on securities regulation, public policy and industry

issues on behalf of our 148 investment dealer member firms ("IIAC Members") that are regulated by the Investment Industry Regulatory Organization of Canada ("IIROC"). These dealer firms are the key intermediaries in Canadian capital markets, accounting for the vast majority of financial advisory services, securities trading and underwriting in public and private markets for governments and corporations that is fundamental to economic growth.

The IIAC's Members share the CSA's goal of providing investors with key information about ETFs in a consistent manner. The IIAC recommends, however, that the CSA refine the proposed ETF Facts disclosure and delivery regime as indicated in the comments below, to ensure a positive investor experience, an efficient and cost effective implementation and to avoid negative market impact.

1) Disclosure Delivery Linked to Trade Confirmation Delivery

The IIAC urges the CSA to codify the ETF Facts disclosure and delivery regime in accordance with the exemptive relief granted to a group of dealers which permits the delivery of a summary disclosure document ("Summary Document") to purchasers in lieu of a prospectus when required, and extends the delivery of a Summary Document to secondary market ETF purchases (the "Exemptive Relief"). Dealers face the difficulty of identifying purchasers of ETFs for the purpose of delivering a Summary Document, unlike when delivering mutual fund disclosure ("Fund Facts") to purchasers of conventional mutual funds. This challenge is acknowledged and alleviated in the Exemptive Relief, by linking delivery of the Summary Document to those investors for whom a trade confirmation is required to be delivered. The Exemptive Relief also recognizes that investors are better served if the delivery of the Summary Document is provided together with, and triggered by, delivery of a trade confirmation. Requiring the delivery of a Summary Document only when the delivery of a trade confirmation is required aligns with the right given to a purchaser of an ETF security (under securities legislation in certain jurisdictions), to rescind the purchase within 48 hours after receiving confirmation of the purchase (the "Trade Confirmation Right of Rescission").

The proposed ETF disclosure and delivery regime does not link the requirement to deliver ETF Facts to the requirement to deliver a trade confirmation and has thus broadened the proposed scope of delivery for ETF Facts. This will pose a cost and operational burden on investment dealers that will have the same difficulty identifying purchasers of ETFs in cases when trade confirmations are not required to be delivered to purchasers. Dealers have been granted exemptive relief orders from the requirement to deliver trade confirmations in certain circumstances, including for managed accounts, employer-sponsored stock investment plans, contributions to a self-determined scholarship plan, and rebalancing of "model portfolios"[1]; and otherwise have been relieved from the obligation to deliver trade

[1] *In the Matter of RBC Dominion Securities Inc. and RBC Investments Private Investment Management Program* (May 14, 2003); *In the Matter of Nigel Stephens Counsel Inc.* (November 28, 2003); *In the Matter of First Associates Investments Inc.* (January 20, 2005); *In the Matter of McLean Budden Limited* (January 27, 2005); *In the Matter of Raymond James Ltd.* (July 22, 2005); *In the Matter of Wellington West Capital Inc. And Wellington West Asset Management Inc.* (January 20, 2006); *In the Matter of Scotia Capital Inc.* (February 3, 2006); *In the Matter of CIBC World Markets Inc.* (August 25, 2006); *In the Matter of HSBC Securities (Canada) Inc*. (July 26, 2007); *In the Matter of Wellington West*

confirmations to Institutional Customers[2] when the trade must be matched[3] or for certain automatic plans[4] (the "trade confirmation relief"). Requiring the delivery of ETF Facts to investors in these situations would generally be inconsistent with the rationale for which the transactions received trade confirmation relief. There is no material benefit that outweighs the significant costs to deliver the ETF Facts to purchasers whose decision to invest would generally not be impacted by the information provided nor should require it for the exercise of investor rights (as with delivery of a Summary Document.

Contrary to the CSA's assertion that delivery systems are already in place and that compliance and staff costs in overseeing and maintaining the ETF Facts delivery regime should be the same for those dealers that rely on the Exemptive Relief, a requirement to deliver ETF Facts to all ETF investors regardless of whether trade confirmation relief applies, as currently proposed, will add significant new costs to the process, require the change of dealers' delivery systems that were built to comply with the terms of the Exemptive Relief, and result in new implementation and compliance difficulties that are not clearly resolvable or defensible under a cost-benefit analysis.

2) Prospectus Exemptions, Exception for Non-Individual Permitted Clients

As with a conventional mutual fund class or series that may be offered in reliance on a prospectus exemption and for which Fund Facts is not required to be delivered, if an ETF is offered by way of prospectus exempt distribution, ETF Facts should also not be required to be delivered. It would be understood that there would be no obligation to produce an ETF Facts document for delivery in the case of an ETF offered under a prospectus exemption. For example, the purchase of non-prospectus qualified ETF securities by an accredited investor (which includes a person acting on behalf of a managed account), ought not trigger a requirement to produce and deliver ETF Facts to the accredited investor, whether or not the transaction involves newly issued ETF Securities ("Creation Units"). This is consistent with securities law which recognizes that investor protection is not compromised by permitting certain categories market participants to transact in the exempt market. The IIAC requests that the CSA provide confirmation that production and delivery of ETF Facts is not required for prospectus exempt offerings of ETF securities so that dealers do not have to unnecessarily assume those costs of delivery.

Holdings Inc. (July 27, 2007); *In the Matter of Phillips, Hager & North Investment Management Ltd*. (August 17, 2007); *In the Matter of GMP Private Client LP* (December 7, 2007); *In the Matter of C.S.T. Consultants Inc*. (July 2, 2008); *In the Matter of CIBC Private Investment Counsel Inc.* (August 7, 2008); *In the Matter of TD Waterhouse Private Investment Counsel Inc.* (December 31, 2008); *In the Matter of CIBC World Markets Inc.* (May 8, 2009); In the Matter of HSBC Securities (Canada) Inc. (May 22, 2009); *In the Matter of ITG Canada Corp.* (August 27, 2009) - this relief expired on the day after National Instrument 31-103 - Registration Requirements, Exemptions and Ongoing Registrant Obligations ("NI 31-103") came into effect*; In the Matter of BMO Nesbitt Burns Inc., CIBC World Markets Inc., RBC Dominion Securities Inc., Scotia Capital Inc. and TD Securities Inc*. (November 24, 2011); *In the Matter of Merrill Lynch Canada Inc.* (October 31, 2012); *In the Matter of National Bank Financial Inc.* (December 14, 2012); *In The Matter Of Deutsche Bank Securities Limited* (May 16, 2013).

[2] As defined in IIROC Dealer Member Rule 1.1.

[3] See trade matching requirements under IIROC Dealer Member Rule 800.49 and National Instrument 24-101 - *Institutional Trade Matching and Settlements* (NI 24-101); and IIROC Dealer Member Rule 200.1(h) – Trade Confirmation Requirements.

[4] See section 14.13 of NI 31-103.

While accredited investors are entitled to invest in any security in the exempt market without a form of written disclosure document, it is not clear why these most sophisticated and wealthy investors are precluded from even a making a choice to waive delivery of a disclosure document in the case that the same security would be offered as a prospectus-qualified investment fund (including an ETF). There has been no particular higher risk or issue identified with ETF securities, that in any event trade primarily in the secondary market unlike conventional mutual funds, to justify inflexibly mandating disclosure delivery to those market participants who otherwise qualify to transact in the exempt market.

The CSA has already recognized, by providing exceptions under securities legislation to the requirement to provide other disclosures to non-individual permitted clients[5], whom dealers have generally identified, that these market participants are qualified to invest without requiring delivery of the same disclosure provided to other classes of market participants. Consistent with this principle, the CSA should also except non-individual permitted clients from the ETF Facts delivery regime, if not other accredited investors, who are in any event able to access the disclosure on the applicable ETF website, so that dealers do not have to unnecessarily assume those costs of delivery.

3) No Right of Withdrawal of Purchase

The IIAC supports the CSA's initial decision not to institute a Right of Withdrawal in connection with the delivery of the ETF Facts. As per the Exemptive Relief, a client purchasing ETF securities should not have a right to withdraw from the purchase agreement within two business days of receipt of disclosure[6]. The introduction of a Right of Withdrawal for ETF purchases would be inconsistent with the Exemptive Relief, securities law and may negatively impact market integrity.

As acknowledged in the request for comments, a Right of Withdrawal is not available under securities law for secondary market purchases, which is largely how ETF purchases are conducted. The grant of a Right of Withdrawal to purchasers of ETFs would entail a significant change to securities law that would apply inequitably to ETF securities and not to other securities purchased in the secondary market for which a Right of Withdrawal does not exist. Unlike with conventional mutual funds, a secondary market ETF trade cannot be reversed and an ETF purchaser's Right of Withdrawal will inappropriately provide price protection to the purchaser by shifting the risk of loss to the dealer if the market price of the ETF security declines in the withdrawal period. The Right of Withdrawal is impractical for ETFs as the dealer can only mitigate the loss by selling the ETF at the prevailing market price. Market integrity may also be impacted as the purchaser who has withdrawn will be at liberty to repurchase the ETF in the market at a lower price, creating an asymmetrical allocation of risk between buyers and sellers in a trade. In addition, the Right of Withdrawal will not practically exist in cases of pre-sale delivery of Fund Facts disclosure more than two days prior to the date of purchase, resulting in an inconsistent application of the Right of Withdrawal for investors of conventional mutual funds. In contrast, a Right of Withdrawal

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[5] For example, see ss. 14.2, 14.2.1, 14.14.1, 14.14.2, 14.17 and 14.18 of NI 31-103.

[6] This is also consistent with practice in the U.S. where there is no equivalent "cooling off" concept and investors purchasing ETF securities do not have the right to withdraw within two days from the purchase.

for ETFs would apply to all purchases although not essential to investor protection. Unlike with conventional mutual funds, ETF purchasers can sell their investments at any time on a marketplace at the prevailing market price, and can do so without the fees and penalties associated with conventional mutual funds. Accordingly, there is no compelling policy rationale to support the extension of a Right of Withdrawal to ETF purchases[7].

The Exemptive Relief also recognizes that it is not practicable for dealers to provide purchasers of Creation Units with a prospectus and accordingly did not make the Right of Withdrawal available to the purchaser of Creation Units (as with securities purchases in the secondary market). The Exemptive Relief was granted on the basis that the Trade Confirmation Right of Rescission and other rights and remedies for misrepresentation in the disclosure documents are sufficient and appropriately address any investor protection concerns.

4) No Right of Action for Failure to Deliver

As noted, the IIAC believes that the proposed ETF Facts disclosure and delivery regime should adhere to the terms of the Exemptive Relief, which did not incorporate a purchaser's right of action for failure to deliver the Summary Document (the "Right of Action"), acknowledging the inability to determine whether purchases of ETFs involved Creation Units or secondary market transactions. As such, investor rights would not be diminished without the Right of Action in the case of ETF securities purchases, as with other securities transactions in the secondary market[8]. The Right of Action is unnecessary as the Trade Confirmation Right of Rescission provides appropriate relief, which the Exemptive Relief acknowledged, without requiring disclosure delivery as a precondition for its exercise. To the extent that the Trade Confirmation Right of Rescission is not applicable across the country, however, investors would benefit from harmonization to enjoy consistent rights.

In addition, negative market impact may be an unintended consequence of providing a Right of Action (and Right of Withdrawal). Market integrity may be harmed if investors are granted asymmetric rights and price exposure is left with the dealer. Dealers saddled with ETF distribution costs would also be bearing the costs associated with the Right of Action (and Right of Withdrawal) in the absence of compensating revenue streams of sales charges, trailers and redemption fees like with conventional mutual funds. In an active volatile market, dealers will face significant risk which ETF market makers may determine to offset by restricting liquidity provision. This may result in larger bid-ask spreads for ETF securities, driving up their cost and deviating significantly from the ETF's Net Asset Value (NAV) to the potential detriment of investors. The IIAC therefore recommends that the proposed Right of Action in the ETF Facts disclosure and delivery regime be withdrawn and not be enacted in the securities legislation of the provinces and territories.

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[7] It should also be noted that potential future changes to settlement cycles (from T+3 to T+2) in the US and Canada would have an impact on the Right of Withdrawal and Trade Confirmation Right of Rescission to the extent that they may be exercised after settlement of the trade.

[8] Notably, the Right of Action is also not available in the U.S.

5) No Future Pre-sale Delivery of ETF Facts

While the proposed ETF Facts disclosure and delivery regime aspires to develop a more consistent disclosure framework between conventional mutual funds and ETFs, the IIAC strongly advocates against a future pre-sale delivery requirement for ETF Facts given that ETFs have the attributes of equities, trade on a marketplace throughout the day and retail investors generally conduct ETF trades in the secondary market. Unlike conventional mutual funds which have charges, fees and penalties, do not trade on a marketplace, often have hold periods and are generally intended to be long-term investments, ETF investors tend to be active and have a higher transaction turnover given low transaction costs. Investors of ETF securities require flexibility to enter the market quickly as the trading price for ETF securities changes throughout the day and in cases that they are appropriate as short-term investments. The investor would in any event be entitled to a Trade Confirmation Right of Rescission as applicable. Requiring delivery of the ETF Facts before the dealer can execute the trade would have an impact on the price at which the trade may be executed and in the circumstances would effectively bring the ETF business to a halt. The Fund Facts regime itself allows an exception to pre-sale delivery of Fund Facts in certain circumstances where the CSA has recognized that there is no policy rationale for, or it would be impracticable to, require delivery of Fund Facts before the investor completes a purchase, and this would be the case for pre-sale delivery of ETFs.

In view of the fundamental difference in the attributes of, and manner in which ETFs and conventional mutual funds typically trade, the IIAC stresses that pre-sale delivery of ETF Facts would not be feasible or achieve any benefit for ETF investors should any such future further proposed “harmonization” with the Fund Facts regime be contemplated. The post-sale delivery of ETF Facts together with a Trade Confirmation Right of Rescission strikes the appropriate balance for investor protection in the circumstances.

6) Content of ETF Facts – Qualitative not Quantitative Disclosure

The IIAC’s comments on areas of the content of the ETF Facts disclosure include responses to questions posed in the request for comments:

- The IIAC agrees with the CSA that the ETF Facts should contain pertinent information that is easy to understand and useful to investors considering the purchase of ETF securities. To most effectively serve that end, however, ETF Facts should concentrate on qualitative disclosure respecting relevant factors that may materially impact the particular ETF’s liquidity and price (such as performance and nature of the ETF’s underlying assets, factors concerning currency, exchange rate and trading hours in foreign markets), that provide more meaningful insight for investors into what would have an impact on future price volatility and liquidity of an ETF. Quantitative disclosure can be misunderstood or be misleading to investors, in that it is generally complex, backward looking and potentially stale, may only provide a point-in-time indication, may not contain the full context underlying the data, and may be inconsistently interpreted or applied. The use of quantitative disclosure may also cause negative market impact if as a result investors unduly favour lower priced

ETFs with smaller spreads, or established ETFs with more active secondary markets and higher trade volume and this causes new entrants and innovative ETF products to be dissuaded from coming to market. It is also questionable whether ETF providers are best placed and able to provide investors with technical quantitative information that they have never previously provided in a prospectus and in the absence of any consistent protocols for collecting this data.

- If the range of market prices is to be incorporated in the ETF Facts it should exclude odd lot trades. This is consistent with the fact that odd lot trades do not impact the last sale price, closing price or other common benchmarks, as they are excluded from the information displayed on orders or trades from each protected marketplace.

- In regard to disclosure of the average bid-ask spread of the ETF, this does not include the relevant bid-ask spreads of the ETF's underlying securities and therefore does not provide the arbitrage context for analysis of the ETF's liquidity and distorts this concept in relation to ETFs. Given the complexity and breadth of quantitative information that would have to be included in the ETF Facts in this regard, it should instead be excluded as investors have already indicated they find this difficult to understand. Rather, it may be beneficial to include a disclaimer that there can be no assurance that a liquid market will be maintained for the ETF security.

- Disclosure of the premium or discount to NAV has a deficit in that it is only captured at the end-of-day and does not indicate what fluctuation in the premium or discount occurred throughout the trading day as a result of the fluctuation in the price of the ETF's underlying securities, which is more relevant to actual investor experience. Moreover, there are variations in NAV measurement methodologies which may not correspond directly with the market price of the ETF security at the end of the trading day which may mislead investors as to the actual value of the ETF compared to the underlying. As a result, it is recommended that this complex metric be excluded from the ETF Facts.

- In respect of the risk rating section of the ETF Facts disclosure, the IIAC recommends that the CSA conclude consultation on the risk classification methodology for the purposes of ETF Facts in addition to the Fund Facts and align the final rule with implementation of ETF Facts. In this manner, the CSA's fund risk classification methodology can be adopted at the implementation stage of ETF Facts rather than having to change the disclosure for a new methodology after the ETF Facts have already been prepared and filed, which could potentially be disruptive for ETF manufacturers and dealers in the sale process and confusing for investors as they consider their investment choices.

7) Transition Period

The preference of IIAC Members is to follow the prospectus renewal cycle rather than having a single switch-over date. In regard to the transition from the delivery of the Summary Document to delivery of the ETF Facts, it notably took nearly 18 months for dealers to be able to implement delivery of the Summary Document with the advantage of linking delivery of disclosure to delivery of trade

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confirmations; the period provided for transition may therefore be insufficient if implementation issues arise as a result of the introduction of new delivery requirements and rights under the ETF Facts disclosure and delivery regime that deviate from those under the Exemptive Relief.

Thank you for considering our submission. We would be pleased to discuss our comments on the ETF Facts disclosure and delivery regime and welcome the opportunity for ongoing dialogue on this important initiative.

Yours sincerely,

“Naomi Solomon”

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