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April 10, 2012

VIA E-MAIL

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

Delivered to:

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Dear Sirs/Mesdames:

Re: Notice and Request for Comment on Proposed Multilateral Policy 31-202 *Registration Requirements for Investment Fund Managers* (MP 31-202) and Request for Comment on Proposed Multilateral Instrument 32-102 *Registration Exemptions for Non-Resident Investment Fund Managers* and Proposed Companion Policy 32-102CP *Registration Exemptions for Non-Resident Investment Fund Managers* (MI 32-102)

We are writing this letter on behalf of the Investment Management practice group of Borden Ladner Gervais LLP (BLG). As such, we are pleased to comment on the two distinct proposals from the CSA members (referred to below) concerning the registration of non-resident investment fund managers (IFMs), both published for comment on February 10, 2012. Our comments do not necessarily represent the views of other

lawyers, the firm or our clients, although we have incorporated feedback received to date from our clients into this letter.

Our overriding central concern with the aforementioned proposals is that the CSA have not presented a national uniform regulatory policy concerning the registration of investment fund managers. Therefore, we are submitting one letter which addresses both proposed instruments.

General

As we outline in more detail below, we are:

- Strongly opposed to proposed MI 32-102 that is premised on the regulatory assumption that an investment fund manager must be registered in multiple jurisdictions in Canada because the securities of the applicable funds managed by that investment fund manager are distributed in those jurisdictions.

- Generally in support of proposed MP 31-202, but have some comments on its provisions.

- Very dismayed that the CSA were unable to propose a national regime for the registration of non-resident IFMs, as we do not see a policy basis for having two different registration regimes apply to non-resident IFMs in Canada. That is, investors in investment funds in the provinces where MI 32-102 is proposed to be adopted are not fundamentally different from investors in the jurisdictions where MP 31-202 is proposed to be adopted, thereby justifying a different treatment of IFMs. The fractured regulatory regime proposed by the different CSA members can quite reasonably be expected to increase compliance costs to IFMs for little or no benefit either to the firms as registrants, to investors in investment funds or to the general investing public. As we point out in further detail below, the CSA's proposals can also quite reasonably be expected to adversely affect the investment choices available to Canadian investors.

Comments on MI 32-102

We strongly oppose the proposed approach taken with proposed MI 32-102. We do not believe the Rule Jurisdictions have made a definitive case explaining the appropriateness of proposed MI 32-102.

In our view, MI 32-102:

(a) ***Is not supported by, nor does it reflect, applicable legislation***

The legislation at issue in each of the provinces proposing MI 32-102 (collectively, the Rule Jurisdictions) requires an entity to be registered as an investment fund manager (IFM) in the province if it is "acting as an investment fund manager" in that province. For example, section 25(4) of the *Securities Act* (Ontario) states that unless a person or company is exempt, "the person or company shall not act as an investment fund manager unless the person or company is registered in accordance with Ontario securities laws as an investment fund manager". Using any reasonable plain language legislative

interpretation, an entity must carry out the functions of an IFM in order to be construed as "acting as an investment fund manager" in the particular jurisdiction. The Rule Jurisdictions' proposal confuses the concept of "acting as an investment fund manager" with those related to distribution of and trading in securities (i.e. dealer activities). This approach is inappropriate and, in fact, contrary to the approach the CSA took for portfolio managers in finalizing National Instrument 31-103 *Registrant Requirements, Exemptions and Ongoing Registrant Obligations* (NI 31-103). Merely distributing and trading in securities of an investment fund in one or more of the Rule Jurisdictions should not mean that the entity is "acting as an investment fund manager" in those provinces – just as an industrial issuer is not considered to be carrying on business in one of those jurisdictions just because one of its shareholders happens to be resident in that jurisdiction.

We note that the Rule Jurisdictions do not propose to amend securities legislation to clarify that IFM registration would be triggered not only when an IFM *acts* as an investment fund manager in one or more of the Rule Jurisdictions, but also if either the investment fund or the IFM *distributes* or *has distributed* investment fund securities in one or more of the jurisdictions. Rather, the Rule Jurisdictions propose to expand on existing legislation through a statement in the companion policy to MI 32-102 that states that registration is triggered if either the investment fund or the investment fund manager *distributes* or *has distributed* investment fund securities in one or more of the Rule Jurisdictions. In our view, a registration trigger must be set out in securities legislation where it will be subject to the legislative review process and not in a companion policy which does not have the force of law. Without such a registration trigger in the legislation, it is very unclear how the exemptions in proposed MI 32-102 would work. If as a fact, the firm is *not* acting as an IFM in one of the Rule Jurisdictions, how is it relevant that it does not have securityholders or the firm hasn't actively solicited in the province, as provided for in section 3 of MI 32-102?

(b) ***Is contrary to the CSA's position taken for portfolio managers***

Notwithstanding the statements to the contrary in the Notice accompanying the publication of MI 32-102, the Rule Jurisdictions' approach for IFMs, in our view, reverts back to the so-called "look-through" or "flow-though" approach to registration for advisers in the context of advising investment funds. Before NI 31-103 was finalized, some members of the CSA took the position that advice to an investment fund flowed through to the investors of the fund, which effectively required advisers to be registered in any jurisdiction where securities of the investment fund were sold. With the final publication of NI 31-103 in July 2009, the CSA acknowledged that the investment fund, rather than the individual security holders of the fund, is the client of the adviser. As a result, adviser registration in this context is only required in the province or territory where the adviser and the investment fund are located. We believe the same principles **must** apply to IFM registration.

(c) ***Is not justified given existing regulation of the investment fund industry***

We do not believe that regulatory oversight and investor protection would be enhanced by requiring an IFM to register in jurisdictions in which it does not carry out fund manager activities.

In our view, each provincial/territorial securities regulator currently has significant jurisdiction and control over the relevant entities associated with investment funds traded in their local jurisdictions, the most relevant for local residents being dealer registration requirements, prospectus and continuous disclosure requirements with respect to publicly offered investment funds, and the prospectus exemption regimes for privately placed investment funds.

(d) ***Will increase regulatory burden and costs***

Registration as an IFM in multiple jurisdictions is not without additional cost and administrative burdens, given that fees would be associated with this additional registration in each applicable jurisdiction, and in some cases, individual jurisdictions will have their own rules for IFMs to understand and comply with. Proposed MI 32-102 would simply add to the fee burden borne by IFMs, which ultimately will likely flow through to the fund investors, without, in our view, adding to the regulatory oversight of industry participants.

We also point out that the investment fund industry in Canada pays significant regulatory filing fees in each province and territory, some of which can be expected to be borne by investors as expenses of the funds and -- as we point out above – these fees can be expected to increase if MI 32-102 is adopted. The fact that the CSA have not come to a uniform position will also serve to increase costs to the investment fund industry, through higher compliance costs inherent in a fractured regulatory regime.

We note that the Request for Comments published by the Rule Jurisdictions does not address these issues in the section entitled "Anticipated Costs and Benefits". In fact, we suggest that the analysis in this section is woefully inadequate and would raise a concern that, if MI 32-102 were adopted, the Ontario Securities Commission (OSC) and perhaps the other Rule Jurisdictions would not have complied with applicable legislation relating to the making of rules.

(e) ***Will adversely impact the availability of investment choices to Canadian residents***

MI 32-102 would necessitate international IFMs, which would be required to register as IFMs in a Rule Jurisdiction, to comply with uniquely Canadian requirements, such as Canadian proficiency requirements for CCOs, Canadian bonding for the firm, Canadian-focused working capital tests and Canadian financial reporting. All of this adds significantly to the regulatory burdens, which can be expected to lead an international IFM to conclude that Canada is just "too much of a bother". This could serve to severely impact the availability of investment choices for Canadian investors.

Compliance with the proposed new requirements inherent with MI 32-102 can also be expected to be extremely variable, given the uniqueness of the proposed requirements in international regulation and the sheer numbers of investment funds distributing securities in the provinces in exempt transactions. In our view (and experience), international managers of investment funds distributed via private placement in a Canadian jurisdiction would not reasonably expect to be required to register as an IFM in Canada, and would

have a very difficult time understanding the different positions taken by the two groups of CSA members.

In our view, MI 32-102 is not justified given the current regulatory regime applicable to distribution of international funds (via prospectus exemptions and through registered dealers) in Canada. In particular for international IFMs, it is also important to note that in most developed regulatory regimes around the world where the funds being distributed are domiciled and managed, the fund managers and the functions of fund management are highly regulated, such that Canadian regulation will not add anything substantial by way of investor protection.

(f) ***Does not reflect exemptions from registration and certain fund structures***

MI 32-102 causes difficulties for entities that may be relying on an IFM exemption in one jurisdiction, where its funds are distributed in more than one jurisdiction. For example, MI 32-102 does not recognize the exemption from IFM registration provided for in section 35.1 of the *Securities Act* (Ontario) and therefore could result in an Ontario based IFM not being required in its principal jurisdiction where it does carry on business but being required to register in one of the other Rule Jurisdictions due to the residency of a security holder in one of its funds.

MI 32-102 also raises issues for certain entities that are managing "pension master trusts"– where the master trust is formed and managed in one province, but is invested in by pension funds that are operated in other provinces. In our view, the managers of pension master trusts should be exempt from registration as an IFM in any jurisdiction, given that these vehicles are not the same kind of vehicle nor do they raise the same kinds of risks, as more traditional mutual funds or closed end investment funds. We urge the CSA to consider implementing this form of overall exemption that would apply to entities that manage master pension trusts. We would be pleased to discuss this issue, which is very important in the pension community with members of the CSA.

(g) ***Does not provide for a grandfathering provision***

Although the Request for Comment does not mention of it, the CSA's October 2010 Proposal included a "grandfathering" provision which has been dropped in the Rule Jurisdictions' proposed approach. The exemption set out in section 4 of MI 32-102 would not be available because the relevant IFM would not have submitted a Form 32-102F1 or Form 32-102F2 or would not in all likelihood have notified the permitted client of the matters set out in section 4(2)(e).

Accordingly, if implemented in its current form, an IFM of an investment fund for which investors were solicited and securities were sold in the Rule Jurisdictions potentially many years ago in compliance with all laws applicable at this time would be required to be registered as an IFM. This is true even if all of the investors in the fund are permitted clients. This result strikes us as surprising, arbitrary, wholly impractical and unfair. It would likely also be unenforceable by the Rule Jurisdictions as the non-resident IFM would be beyond their jurisdiction and there would seem to be no effective remedy that would not adversely affect the innocent investors in the relevant fund.

(h) ***Provides for meaningless or ineffective exemptions***

We have already alluded to our confusion about the application of section 3. When would any IFM *need* to rely on this exemption in one of the Rule Jurisdictions, given that not having investors in a province and/or not soliciting in a jurisdiction seems to us to be solid indicia (even using the Rule Jurisdictions' criteria) of *not* acting as an IFM in the jurisdiction. The purpose and application of section 3 is not adequately described in the Request for Comments.

The exemption provided for in section 4 requires a grandfathering provision, as we describe above. We also question the required written notices to be given to permitted clients and to the applicable regulator which are to include certain prescribed details. These notices are similar to those required when an entity is relying on the exemptions from the dealer and adviser registrations that are available for international dealers or advisers. However there are two significant conditions to this IFM exemption. First, there is a requirement to provide the applicable regulator by December 1 in each year with the total assets under management in the local jurisdiction. Second, there is a requirement to provide the applicable regulator with a Notice of Regulatory Action and any changes thereto. These two notices are not required for international dealers or advisers relying on the applicable comparable exemptions in NI 31-103. We do not consider that it is necessary to impose these new requirements on otherwise exempt from registration, international IFMs. The Rule Jurisdictions provide no explanation of these requirements; accordingly it is impossible for us to understand the regulatory policy behind these proposed requirements in order to properly comment on these proposals.

(i) ***If adopted, may not have been made in accordance with applicable rule-making requirements***

We note that there is a requirement (under at least Ontario securities laws – see section 143.2(2)5 of the *Securities Act* (Ontario)) to discuss all alternatives to proposed MI 31-102 that were considered by the Rule Jurisdictions as the reasons for not proposing the alternatives considered. Despite this requirement, the Request for Comments states "No alternatives to the Multilateral Instrument were considered". Does this mean that the Rule Jurisdictions did not even consider the approach of the Policy Jurisdictions? If not, why not? If so, we would suggest that the Rule Jurisdictions have not followed the process properly to make MI 32-102 as a rule of the applicable regulators.

Both MP 31-202 and MI 32-102 were published for comment on the same day – February 10, 2012, but were published separately and posted on separate websites. The same April 10, 2012 deadline for comment letters was established for both proposals. We note that Ontario securities legislation requires at least a 90-day comment period for new rules, which would include MI 32-102. We assume that the OSC considers that MI 32-102 is simply a reformulation of the previous proposals which were to amend NI 31-103 in ways similar to MI 32-102, therefore the shorter 60-day comment period is appropriate, although this issue is not discussed in the Notice. We recommend that the Rule Jurisdictions consider this issue further and expand on the rationale for a shorter comment period.

We point out another rule-making issue which would be, in our view, associated with any making of MI 32-102above (see our discussion under paragraph (d) above).

Comments on MP 31-202

We consider that proposed MP 31-202 reflects the correct interpretation of the applicable legislative requirements to register as an IFM in the provinces and territories of Canada.

However we are concerned about some of the indicia of "acting as an IFM" described in MP 31-202, since we are believe that these indicia, if interpreted broadly (or incorrectly) may cumulatively result in the same conclusions as with MI 32-102, namely that registration as an IFM is necessary if enough of these indicia are present. Our specific concerns include the concepts suggested as follows:

- "Arranging for a distribution channel" - from a practical perspective, all investment funds *must* have a distribution channel, which *may* have been arranged for by the IFM in the applicable provinces and territories. How does dealing or trading activity become "IFM activity"? This needs further explanation.

- "Marketing the funds" – all investment funds are in some way marketed in applicable provinces and territories. How does this dealing or trading activity become "IFM activity"? "Marketing the fund" relates to distribution of and trading in securities, which applies to registered dealers and not to the function of an IFM. "Marketing the fund" may also relate to advertising of a fund or fund family which has traditionally not been seen as triggering a dealer registration requirement or adviser registration. This latter point is clarified in the Companion Policy to NI 31-103. We recommend that that the Policy Jurisdictions clarify that wholesaling or marketing a fund in a particular jurisdiction or by advertising a fund to the general public is *not* be a factor to consider in determining whether the IFM registration requirement is triggered.

- "Retaining and liaising with service providers and portfolio managers of the funds", which are located in a particular province. Generally, the actual oversight is being conducted from the IFM's head office location and not in the province where the service provider or portfolio manager happens to be located, although meetings may take place in the service providers or portfolio managers' province, as part of the due diligence and oversight regime carried out by the IFM. We do not consider this to be indicia of IFM activity in the province or territory where the service provider is located. An IFM that operates outside Canada will need additional clarity about any investment funds that it may have established under the laws of a jurisdiction in Canada but which are managed outside Canada particularly where the IFM engages a Canadian service provider.

- "Delivery of unitholder reports" – this should be clarified to *not* include "delivery" in the sense that the reports are mailed *from* one province (generally the head office location) *to* a unitholder resident in another province. We consider that the appropriate phrasing should recognize that the reports are compiled and delivered from the head office location. The mere fact that the

reports are *received* in a particular province should not be determinative of the question of whether IFM activity is being carried out in that province.

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We thank you for allowing us the opportunity to comment on the proposed instruments. As we have indicated, we consider that the approach taken by the Policy Jurisdictions is the better approach and one that can be supported by regulatory policy and legislation.

Please contact the following lawyers in our Toronto office if any members of the CSA would like further elaboration of our comments. We, together with other BLG lawyers who contributed to this letter, would be pleased to meet with you at your convenience.

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Yours truly,

Borden Ladner Gervais LLP