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September 30, 2010

Via Email

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
Registrar of Securities, Northwest Territories
Registrar of Securities, Yukon Territory
Registrar of Securities, Nunavut

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Dear Sirs/Mesdames:

Re: Proposed Amendments to National Instrument 31-103 *Registration Requirements and Exemptions* (NI 31-103), National Instrument 33-109 *Registration Information* (NI 33-109) and to Related Policies and Forms which were published for comment on June 25, 2010

We are pleased to provide the members of the Canadian Securities Administrators (CSA) with comments on the above-noted proposed instruments (the Proposed Rule, the Proposed Policy and collectively, the Proposals).

These comments are those of lawyers in Borden Ladner Gervais LLP's Securities and Capital Markets practice group and do not necessarily represent the views of individual lawyers, the firm or our clients, although we have incorporated feedback received to date

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from certain of our clients into this letter. Our comments include substantive comments, as well as some drafting comments.

COMMENTS ON PROPOSED AMENDMENTS TO NI 31-103

1. Section 3.4 – Proficiency – initial and ongoing

We support the proposal to include a "know-your-product" requirement for dealing and advising representatives. However, we believe the proposed addition to section 3.4, which is a principle-based provision, is redundant since that section implicitly includes the concept of knowing-your-product within the requirement to perform registrable activities competently.

Currently the know-your-product concept is discussed in Companion Policy 31-103CP (the **Companion Policy**) in the context of the suitability assessment. We believe that suitability assessment is the appropriate place for a specific know-your-product requirement and that it will support the general principle-based proficiency requirement in section 3.4. We suggest that it be included as an amendment to section 13.2 of NI 31-103, as an essential element of assessing suitability, similar to the "know-your-client" requirement, for example:

> "A dealing representative, and an advising representative, must take reasonable steps to ensure that he or she has sufficient information and understanding of the products which he or she is advising on or dealing in to enable him or her to meet his or her obligations under section 13.3 or, if applicable, any suitability requirement imposed by an SRO".

Corresponding changes would be required in section 13.3 of the Companion Policy where the know-your-client concept is currently discussed.

2. Section 4.1 – Restriction on acting for another registered firm

The proposed amendment to section 4.1 causes an unnecessary restriction in a situation where a registrant is owned by two shareholders, each holding 50% of the registrant. In this case the registrant is not an affiliate of either shareholder which means that under the proposed amendment to section 4.1 neither shareholder, if also a registrant, could appoint one of their registered representatives to be a director of the jointly owned registrant. There does not seem to be a justifiable policy basis for such a restriction.

The discussion of section 4.1 in the Companion Policy states that exemptive relief will be considered in certain circumstances to allow an individual to be a registered representative of two firms but there is no similar statement with respect to a registered individual of one registered firm acting as a director of another registered firm. The Companion Policy directs the reader to the discussion in section 13.4 of the Companion Policy concerning conflicts of interest resulting from individuals acting as directors. There could be many situations where the conflicts of interest that arise when a registered individual acts as a director of a jointly controlled registrant are not significant and could be easily managed through policies and procedures. For

example, the shareholder though registered has only one client. The jointly controlled registered firm for which the shareholder acts as director is a portfolio manager but only advises its pooled funds and the shareholder does not recommend those pooled funds to its client. This is a scenario in which the conflicts could easily be managed through policies and procedures.

We believe the proposed amendment is too broad and we recommend that the wording in paragraph 4.1(1)(a) be revised to allow a registered individual of a registered firm to act as an officer, partner or director of another registered firm that is an affiliate or under joint control of the first-mentioned registered firm.

3. Sub-section 7.1(2) – Dealer Categories (drafting comment)

We note that in the published document the paragraph formatting for sub-section 7.1(2) is incorrect.

4. Section 8.6 – Adviser – non-prospectus qualified investment fund

We support the proposed change to extend the dealer exemption for advisers to prospectus qualified funds as well as non-prospectus qualified funds.

5. Sub-section 8.18(2) – International Dealer

The CSA states in the Notice and Request for Comments concerning the Proposals that the proposal to repeal sub-paragraphs (e) and (f) of sub-section 8.18(2) is required because those provisions are redundant given sub-paragraphs (b), (c) and (d) of sub-section 8.18(2) which deal with permitted clients, which includes by definition, an investment dealer.

We believe that sub-paragraphs (e) and (f) of sub-section 8.18(2) are not redundant and their removal results in a substantive change in the business an international dealer will be able to conduct. Under this proposed change, an international dealer would no longer be entitled to, for example,

(i) trade in a foreign security with a Canadian registered investment dealer where the trade is made during a distribution of the security under a prospectus that has been filed in Canada, nor

(ii) trade in a Canadian security with an investment dealer that is acting as principal.

We do not see a policy reason for a substantive change of this nature for an international dealer and suggest that this is an unintended consequence of this proposed amendment.

We also believe that the proposed wording in sub-section 8.18(5) is unclear and request that the CSA clarify whether the notice is intended to cover the calendar year in which the December 1 filing is made or the calendar year following the December 1 filing. The same comment applies to the proposed wording in sub-section 8.26(5).

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6. Section 12.1 – Capital requirements

In the transition to the new capital requirements, we understand that several registrants would have had to maintain working capital far in excess of any risks to their business and affairs, due to guarantees they have provided to related parties – in most cases a parent company or a wholly owned subsidiary. Many of these registrants have been granted relief and we urge the CSA to amend NI 31-103 to recognize these exemptions and to allow registrants to guarantee the debt of related parties without the consequences of the current rules. NI 31-103, as drafted, makes no distinction between a registrant guaranteeing the liabilities of a third party and a registrant guaranteeing the liabilities of a related-party. We believe that this is an unduly conservative and onerous result for the reasons set out below.

The excess working capital test established by Form 31-103F1 is a solvency test very similar to the test established for registered investment dealers by the Investment Industry Regulatory Organization of Canada (IIROC). In our view, it is inappropriate for the other categories of registrants, given that all other categories of registrants typically have a lower risk profile than an investment dealer. This is particularly the case for investment fund managers, who do not control or have custody over the assets held by the funds they manage. The assets of funds are held by a custodian on behalf of the funds and are not part of the assets of the manager and are therefore remote from bankruptcy or insolvency risk.

We believe that third-party guarantees and related party guarantees should be distinguished. Third-party guarantees are inherently riskier than related party guarantees for a number of reasons including concerns surrounding: asymmetrical information, conflicting interests and the potential for abuse. Related party guarantees, especially guarantees between a wholly owned subsidiary and its parent (or vice versa) that are made for valid business purposes, reflect practical business realities and permit organizations as a whole to access capital at a lower total cost. It should be noted that under Canadian Generally Accepted Accounting Principles and under International Financial Reporting Standards, related-party guarantees are treated as contingent liabilities, which are not recorded on the financial statements of the guarantor and show only in the notes to the financial statements. We submit that it is unreasonable that the excess working capital calculation should include a related-party guarantee when the likelihood of the guarantee being called is generally highly improbable.

The cost (a higher cost of capital) of the excess working capital requirement, as it is currently drafted, to registrants and their related parties, including related shareholders outweighs the potential benefit (a small reduction in the cost and/or probability of insolvency). We recommend that the excess working calculation be amended to account for:

(a) the size of the guarantee

(b) the registrant's category of registration

(c) the risk that the guarantee will be called; and

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(d) the nature of the guarantee (third-party guarantees versus related-party guarantees). Related party guarantees that are highly unlikely to be called should not be included in the calculation of excess working capital unless and until the circumstances warrant it.

7. Section 12.1 – Capital requirements (drafting comment)

The proposed amendment adding sub-section (6) to section 12.1 should be further amended to reflect the non-cumulative nature of the capital requirements for a firm holding the multiple registrations set out in proposed clauses 12.1(6)(a)(i) and (ii).

8. Section 13.5 – Restrictions on certain managed account transactions - Cross-Trading/Inter-fund Trading

The issues of "inter-fund" trading, which we view as internal trading of securities between two or more investment funds, and "cross-trades", which we consider as being trades made by a portfolio manager of securities between two of its managed portfolios, including two or more investment funds where those trades are placed with a registered dealer who carries out those trades on an exchange or other marketplace, continues to be a very significant issue for the investment fund and portfolio management industry. In our view, this issue requires further focused consideration and consultation from the CSA to ensure that the regulatory regime reflects a consistent policy objective which is intended to resolve appropriate regulatory concerns.

Section 13.5 of NI 31-103 is a continuation of a prohibition that was originally included in securities legislation in certain jurisdictions, which was repealed when NI 31-103 came into force. We note that this earlier prohibition was of a different form than that currently in NI 31-103 and arguably did not have the same application. However, the Companion Policy discussion about section 13.5 suggests that the CSA is of the view that the earlier prohibition was intended to apply to both inter-fund trades and cross trades, which was not our understanding, nor was it the understanding of many in the industry. In our view, the scope of the provision in section 13.5 of NI 31-103 continues to be unclear. For example, it is drafted to apply to only registered advisers, which would not capture all inter-fund trades and cross trades between funds – e.g. trades by international advisers relying on the international adviser exemption are not subject to section 13.5 – nor has the underlying policy concerns ever been appropriately articulated in either of NI 31-103 or NI 81-107.

We strongly recommend that the CSA conduct additional consultation with the investment management industry on inter-fund trading and cross-trading to address ongoing concerns with the current requirements and to identify the problems with these practices that are deserving of a regulatory solution. We would be pleased to provide the CSA with further feedback, including our clients' experience with NI 81-107 and the inter-fund trading rules contained in that instrument. In our experience, there is much confusion amongst the industry and also within the CSA on the appropriate interpretation of section 13.5 and its relationship with section 6.1 of NI 81-107.

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9. Section 13.12 – Restriction on lending to clients

Section 13.12 prohibits registrants from lending money, extending credit or providing margin to a client. As drafted, this provision applies to all registrants including portfolio managers and investment fund managers. However, as drafted, this section (we believe inadvertently) captures loans that investment fund managers, who may also be portfolio managers, commonly make to the funds they manage. Such loans play an important role in enabling a fund to temporarily pay for unitholder redemptions and fund expenses. As a result, we recommend that section 13.12 should be amended to explicitly allow for these activities, which are referenced in National Instrument 81-102 (Part 2).

We also request that the CSA clarify whether or not section 13.12 is intended to prohibit a registrant providing products to its clients that have embedded in them a leverage component, such as contracts for differences and foreign exchange contracts which quite often contain a leverage component. This is an area of confusion for industry participants.

10. Section 14.5 – Notice to clients by non-resident registrants

We request that the CSA clarify in the Companion Policy what "physical place of business" as used in proposed section 14.5(2) means. We believe that it is appropriate in the context of a Canadian registrant that it include not only "bricks and mortar", but also the presence of an individual representative, in a jurisdiction.

11. Section 14.12 – Content and delivery of trade confirmation

Sub-section 14.12(3): We believe that this section does not accurately reflect the true nature of a mutual fund – mutual funds are rarely technically "affiliates" of dealers even when established as a corporation. And as drafted, sub-section 14.12(3) would clearly not capture a mutual fund that is established as something other than a corporation (e.g. a trust). In order to more accurately reflect the mutual fund – dealer relationship, we recommend that the section be amended as follows:

> (3) Paragraph (1)(h) does not apply if the security is a security of a mutual fund that is established and managed by the registered dealer or by an affiliate of the registered dealer and the names of the dealer and the fund are sufficiently similar to indicate that they are affiliated or otherwise related.

Sub-section 14.12(5): Many registered portfolio managers do not send trade confirmations to their managed account clients that invest in their pooled funds on the basis that

(i) they are not required to do that under their portfolio manager registration, and
(ii) as a practical matter clients get a monthly statement from the custodian of their holdings of units in the registrant's pooled funds, and that statement includes a list of transactions during the month.

Even if such registrants are also registered as exempt market dealers, they still do not send confirmations because the same transaction could be done in reliance on the exemption from the requirement to be registered as an exempt market dealer (section

8.6 of NI 31-103) which suggests that trade confirmations aren't required for managed account transactions.

Many of these same industry participants will be adding investment fund manager registration as required under NI 31-103 and under the proposed amendments to sub-section 14.12(5) these same registrants would be required to provide trade confirmations since their managed account clients routinely provide instructions requesting redemptions directly.

We suggest that the proposed requirement in sub-section 14.12(5) not extend to an investment fund manager who is also registered as a portfolio manager and who is executing a transaction for one of its managed account clients in a pooled fund since clients are provided with the information about that redemption in their regular account reporting.

12. Subordination Agreement (drafting comment)

We note that in section 1 of the Subordination Agreement "owned" should be changed to "owed".

COMMENTS ON PROPOSED AMENDMENTS TO COMPANION POLICY NI 31-103CP

1. Section 8.5 – Trades through or to a registered dealer

The discussion of the application of this exemption continues to cause confusion in a "business trigger" regime. Examples of who could rely on this exemption and who couldn't would be helpful – i.e. is the implication that, for example, someone sitting in their basement day-trading to make their living is "in the business of trading" and that they can rely on the exemption but a "finder" who does "acts in furtherance of a trade" by directing investors to an issuer is "in the business of trading" but can't rely on the exemption even if execution is done through an appropriately registered dealer? The last sentence of the first paragraph (i.e. *The exemption is not available where a person or company conducts dealing activities for which they are not registered or exempt from registration and then directs the execution of those trades by a registered dealer.*) is a good start, but leaves the reader somewhat confused about the application of the exemption particularly given the use of the term "dealing activities" – should that be "trading activities"?

The inclusion of the discussion concerning plan administrators only adds to the confusion as plan administrators are not in the business of trading in securities – they are in the business of administering plans - e.g. employee share purchase plans, the terms of which have been established by an employer and are carried out by the plan administrator for the benefit of the employer and the employees.

2. Section 8.26 – International Adviser

Incidental advice on Canadian securities: We agree with the general concept in the proposed discussion on "incidental advice" but recommend that the CSA confirm that

an international adviser that has a "global mandate" from a client and as part of that "global mandate" advises the client on Canadian securities meets the condition of the exemption – i.e. advising on a "global mandate" for a fund equates to "primarily advising on foreign securities". Many of our clients have asked us this question and we recommend that this be clarified by the CSA.

3. Section 13.15 – Handling complaints

We believe the discussion about complaint handling extends beyond the "guidance intent" of a companion policy and sets out a quasi-prescriptive regime for handling complaints which is more appropriate for a rule given its level of detail.

The CSA states in the Notice and Request for Comments concerning the Proposals that they are preparing a proposal for reporting complaints to the regulator which will be published at a later time. We encourage the CSA to ensure that, in light of the existing compliant reporting regime in Québec, their proposal results in a common reporting regime across all of the CSA jurisdictions in order to reduce the burden on registrants of complying with multiple regimes.

COMMENTS ON PROPOSED AMENDMENTS TO NI 33-109

1. Form 33-109F6

Specified affiliates: We urge the CSA to amend the definition of "specified affiliates" for purposes of Form 33-109F6. The definitions of "specified affiliate", "parent", "significant control", and "specified subsidiary" when read together could be interpreted to require a registrant in, for example, Part 7 of Form 33-109F6 (the "Form"), to disclose ongoing investigations of subsidiaries of a company that holds indirectly, through various holding companies, 21 per cent of the outstanding voting rights attached to all the outstanding voting securities of the registered firm completing the Form. For a registrant that is part of a large international corporate family the disclosure that this definition would require could easily extend to dozens of companies world-wide, most of which the registrant has no first-hand knowledge about. In our view, the amount of effort required to obtain the required disclosure information about these world-wide affiliates is disproportionate to the benefit obtained from having information about a registrant's distantly related affiliates. We recommend that "specified affiliates" be limited to those affiliates that can reasonably be expected to directly affect the registrant (e.g. a direct parent) or over which the registrant has direct control (e.g. direct subsidiary).

Section 6.2 – Conflicts of interest: We request the CSA to provide guidance on the meaning of "significant conflicts of interest". It is unclear what is intended to be disclosed. For example is a portfolio manager who manages funds expected to provide the same level of conflicts disclosure that would be found in the funds offering memorandum or prospectus?

REPORTING ON EACH SECURITY POSITION IN THE ACCOUNT

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Should registered firms be required to include client name securities on account statements?

We commend the CSA for seeking input from industry on this issue to assist it in the formulation of its proposals. We believe that there are circumstances in which a requirement to include client name securities on account statements would be problematic for registrants and confusing for clients. Exempt market dealers for example, do not typically hold client securities, often deal in illiquid securities, and may only deal with a client on a one-off or occasional basis. For these exempt market dealers, information on client held securities may not be available to them in any kind of efficient way (i.e. issuers may not be willing to provide them with the information), valuation of illiquid securities would be challenging (i.e. different dealers may value the same illiquid security differently) and clients who only deal with the exempt market dealer occasionally could be confused by a dealer statement that shows securities the client is holding (or perhaps has transferred without the dealer knowing) that were obtained in a one time transaction.

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We thank you for allowing us the opportunity to comment on the Proposals. Please contact the following lawyers in our Toronto, Vancouver and Montreal offices if the CSA members 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.

- Prema K.R. Thiele (Toronto office) at 416-367-6082 and pthiele@blgcanada.com
- Marsha P. Gerhart (Toronto office) at 416-367-6042 and mgerhart@blgcanada.com
- Rebecca A. Cowdery (Toronto office) at 416-367-6340 and rcowdery@blgcanada.com

We commend the CSA on the work done to date and urge the CSA to continue to strive for complete national uniformity of applicable rules that recognize the national scope of most Canadian capital markets industry participants.

Yours truly,

"SECURITIES AND CAPITAL MARKETS PRACTICE GROUP"

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