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The Secretary
Ontario Securities Commission
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Toronto, ON M5H 3S8
comments@osc.gov.on.ca

Dear Sirs/Mesdames:

Re: Comments from Borden Ladner Gervais LLP on OSC Staff Notice 11-784 – Burden Reduction

We are lawyers in the Securities and Capital Markets practice group of Borden Ladner Gervais LLP and, as such, we are very pleased to provide our views on the ways in which the Ontario Securities Commission can work to reduce the regulatory burdens on industry participants. We very much welcome this initiative and would be very pleased to elaborate further on any of our comments.

We are writing in our capacity as trusted legal advisers to many participants in the financial services industry in Canada, including public companies, entities issuing securities under prospectus exemptions, underwriters of publicly offered securities, managers of mutual funds and other investment funds operating in Canada and elsewhere, distributors of investment funds, service providers to investment funds (auditors, custodians, record keepers etc.), portfolio managers operating discretionary managed account businesses, members of boards and fund independent review committees, as well as others. We consider that we are well placed to identify areas that the Commission can either on its own, or with its CSA colleagues, revise existing regulation and how it is administered, so as to reduce regulatory burdens. The authors of this letter have years of experience in the securities field and we have consulted with our colleagues to ensure that we are giving the Commission as comprehensive a response as possible. However, we note that our comments are our own and should not necessarily be taken to be comments of other lawyers at BLG or our clients.

Please note that the authors of this letter would like to represent Borden Ladner Gervais LLP at the OSC's Roundtable scheduled for March 27.

We have reviewed OSC Staff Notice 11-784 and the seven questions posed in the Notice, as well as your focus on enhancing investor experience and outcomes and developing Ontario-specific improvements. We have organized our response into three categories:

(i) OSC initiatives that would positively impact **all** financial services participants (whether regulated by Corporate Finance, the Investment Funds and Structured Products Branch, Compliance & Registrant Regulation Branch, or any of the other branches).

(ii) OSC initiatives that would positively impact issuers and underwriters of public securities regulated, for the most part, by the Corporate Finance Branch)

(iii) OSC initiatives that would positively impact participants in the asset management industry, whether they be investment funds and service providers regulated by the Investment Funds and Structured Products Branch or registrant firms and representatives regulated by the Compliance & Registration Branch.

In each category we have identified actions that the Commission could quickly take to reduce regulatory burdens, as well as actions that the Commission would need to ensure that their CSA colleagues agreed to, in order to change national instruments and companion policies. We note that we have focused on issues that are easy to fix, as well as on burdensome regulation that is outdated and out of synch with the purported benefits to such regulation.

We wish to emphasize that where there are unnecessary regulatory costs, it is likely that in some way (directly or indirectly) those costs are being passed onwards to investors. Accordingly a project that is characterized as reducing costs for industry participants, is really about reducing costs and improving outcomes for investors. In this way, reducing regulatory burden is a win for all concerned – the industry, investors and the regulators.

As such, we consider that this project is a significant and important step forward by the Commission in improving securities regulation in Canada.

OSC Initiatives – Reducing Regulatory Burden on All Market Participants.

1. ***OSC to Adopt the Passport System*** We understand that the Ontario government continues to work with other applicable federal and provincial governments to develop the Cooperative Capital Markets Regulatory System and the Capital Markets Regulatory Authority. No implementation date has been published beyond the announcement that the Cooperative System would not be ready for launch by the end of 2018. We appreciate that the CCMRS and the CMRA is likely beyond the scope of the OSC's consultation. However, given the continued uncertainty about the CMRA and the transition to the new Cooperative System, we strongly urge the Commission to adopt as a rule and policy Multilateral Instrument 11-102 *Passport System* and hence become a "passport regulator" along with all other members of the Canadian Securities Administrators. This would allow for significant streamlining of the associated National Policies (11-203, 11-204, 11-205, 11-206). Although Ontario not being part of

the passport system does not directly affect Ontario market participants (largely because the rest of the CSA decided to not reciprocate to require "dual" applications and filings of Ontario market participants in their jurisdictions), it directly and negatively impacts industry participants resident in other jurisdictions which wish to do business in Ontario. The result of the OSC not being part of the passport system, increases the regulatory burden, through longer wait times, increases in costs in having to deal with two regulators, as opposed to dealing only with a principal regulator, associated increased legal costs, and the increased bureaucracy with the other CSA members in having to clear a matter with the OSC (even in cases where the subject matter is not novel).

2. ***Publication of Indexed Decisions and Orders*** It is increasingly burdensome to locate the most recent decision granted in respect of any discretionary relief application. The OSC website is our general starting point, however, the search engines on this website are not optimal, the decisions are filed by alphabetical order (not according to type of exemption), such that significant time must be spent in locating relevant decisions (and ensuring that we have the most recent decision) and there are times that we are uncertain if we have the most relevant decision. There are alternatives to locating decisions on the OSC website, but they are costly and one must generally subscribe to these alternative information search services at generally a significant subscription cost. We recommend a work stream be developed to gather industry feedback on the best way to index decisions, including older existing decisions.

3. ***Discourage the use of "sunset clauses" and separate "filings" with Staff as Conditions for Granting Discretionary Relief Exemptions.***

    a. We have seen the increased use of sunset clauses over the past 10 years as a way for staff to grant relief, without necessarily coming to a final decision on a matter. The sunset clause is seen as a way to allow staff and the Commission to reconsider a specific matter, through a new exemptive relief process 2 - 5 years into the future. This increases costs to market participants (duplicate applications, wait times, additional filing fees, additional legal costs, additional firm resources), but more importantly introduces a significant element of uncertainty into the process and the business. Will staff processing the second application have the same views 2, 3 or 5 years into the future and, importantly, will the Commission have second thoughts on granting the relief? Often this puts an untenable burden on market participants which thrive on certainty in regulatory outcomes and ways of operating. Often staff explain that they are not likely to rethink the application, but they simply want to see how the exemption is operating in practice, as a justification for a sunset clause. We strongly consider that this is an inappropriate method of deciding whether or not to grant a decision. There are other options for staff to determine how the exemption is working and is being operationalized as opposed to reconsidering the entire application again. In addition, the Commission has the ability to revoke decisions in appropriate circumstances.

b. Similarly we have seen increased use of conditions requiring periodic factual submissions/certificates to staff (generally annually, but sometimes more frequently). These conditions are often very specific to the decision and continue indefinitely and there is generally little to no explanation as to what staff is going to do with these filings and where these filings should be made. In our experience there is never any feedback on these filings or any form of review. The risk of inadvertently missing a filing is significant (because it could vitiate the decision), the burdens of making the filings (including compiling the information) and keeping track of the timing of the filings adds costs. Many times, we feel that staff make these requests simply as a way to "keep tabs" on an applicant and a specific exemption, without any real understanding as to what staff will do with these filings, including their review and what they will do with the information. Again, we consider that the Commission has alternatives to requiring that these filings be made, including compliance reviews on compliance with conditions to exemptions.

4. ***Establish definitive service standards which differ according to the nature of the matter and adhere to them*** We are aware that the Commission has established service standards to which staff are asked to adhere. Our experience however is that the vast majority of filings in recent years (particularly applications for discretionary exemptions) take far longer to process than in the past years. This is due, in part to the increase in complexities in the industry and its regulation, but we also have experienced very junior staff being assigned to applications for relief where they have little to no experience or knowledge of the matter or its regulation. This includes more routine applications which should be dealt with on an expedited basis, but which are not, largely due to staff inexperience. The increase in regulatory burden due to this process cannot be underestimated. We have experienced recently that a non-complex application can take anywhere up to a year or more to be processed due to staff delays, staff indecision, continued written questions and comments, which require written answers on behalf of the applicant, and the need for staff to consult internally and with CSA colleagues.

   On prospectus filings, we continue to experience inconsistencies in staff requests on additional disclosure (beyond what is required by the forms), which may be required one year, but not the next year and not by another reviewer. In some cases, on renewals of investment fund prospectuses for instance, disclosure requested by one reviewer during one renewal cycle, may be asked to be removed by another reviewer in later renewal cycles. Obviously this lack of clarity and consistency increases uncertainty and costs to industry participants (and investors).

   We recognize that staff work to ensure that comments on prospectus filings are only the most material comments, without commenting on minor details. However, we also experience "basic reviews" of prospectuses where the most minor details are commented upon, and there is very little ability to push back on the comments (short of escalating the matter to managers) which requires unnecessary time and effort (and refilings) to be made, where the matter is very unimportant in the context of the filing. We urge staff to understand that is acceptable – and often necessary for form requirements (and mandated or suggested wording) to be tweaked in order to fit with a specific circumstance.

Increasingly we have experienced multiple comment letters on prospectus filings for instance (but this has also occurred with exemption applications), where the reviewer sends out a basic comment letter (presumably so as to meet service standards), but then sends out additional comment letters with the more substantive comments at a later date. Particularly on prospectus filings where there are deadlines and drop-dead dates, receiving "last minute" additional comments that require disclosure changes to be rushed into documents is very problematic. We have also received additional comments on documents after a prospectus filings has been cleared for final filings, which again is not optimal. We consider that better internal coordination between the staff and Branch management could address this concern.

5. ***Publish OSC phone lists and org charts*** We know that individual branches publish lists of staff (including managers and names and contact details of Deputy Directors and Directors), but we consider it would be most useful if the OSC were to publish a comprehensive list of staff and their contact details, including names of more senior individuals we can contact if we have a problem. This is an example of a small initiative which would be very easy to implement and would have a very positive impact.

6. ***Enhance Compliance with Rule-Making Procedures*** In recent years, many significant proposals, with far-reaching consequences, have been issued to several national instruments, including NI 81-102, NI 81-105 and NI 31-103. Often we find the cost-benefit analysis accompanying such proposals to be general and high level, with no specific costs or benefits discussed or analyzed. Section 143.2(1)7 of the *Securities Act* (Ontario) requires the Commission to publish "a description of the anticipated costs and benefits of the proposed rule" as part of the rule notice. A robust and meaningful cost-benefit analysis is critical to the process of creating rules that are proportional to the matters they are addressing, without imposing undue cost and burden on industry. In our experience, this requirement has largely been not adhered to by the Commission, other than in a very high-level fashion.

7. ***Reconsider the Ability for the OSC to grant a Blanket Order*** We know the history behind, and reasons for, section 143.12 of the *Securities Act* (Ontario), but the lack of an ability for the Commission to make an order that covers more than one or several named applicants is very burdensome, particularly when quick fixes are necessary to adjust new regulation that results in unintended consequences or to provide for global exemptions for segments of the industry which are similarly affected. Over the past several years, it has been increasingly difficult for us to obtain more "blanket" exemptions that cover a segment of the industry, with the various staff of the OSC taking increasingly stringent views on how to interpret section 143.12. We have landed on a methodology of filing "group" applications that cover more than one applicant, in order to deal with the OSC's inability to grant blanket orders. Particularly bothersome is the insistence of staff that each applicant be "named" in group applications (as

opposed to having one representative applicant and a tight definition of who the exemption is granted to) and pay separate application filing fees. This has given rise to some industry participants being left out of a group application, which then must make a separate application. This obviously gives rise to additional resources – both industry and regulatory. In our view, only one filing fee should be paid, particularly when each applicant has the same facts and circumstances and staff is not considering each applicant's facts on its own. There is in essence one application that is being processed together and one set of filing fees should govern.

8. ***Reduce Regulation by Audit (or Compliance Review) and Reduce Regulation through Staff "Guidance" or "Notice"*** We recognize the need for staff to supplement rules and companion policies by interpretative guidance and indeed, we also recognize that many of our clients appreciate the additional guidance that is given in various staff notices, including annual reports of compliance with various instruments. We also understand and completely respect that staff must be free to make their views known about industry participant's compliance with rules and regulations during compliance reviews and come to a determination on compliance deficiencies. However, increasingly in recent years, staff are "regulating by audit" through significantly supplementing rules and Commission policy with their own views on a case by case basis in ways that significantly increase regulatory costs. It is often virtually impossible to push back in any meaningful way on staff's findings (we provide more commentary on this issue later in our comments).

   The rule and policy making mechanics established in the OSA are being eroded, in our view, by ***voluminous*** staff "industry guidance" provided over the years, which often times is hard to locate and more troublesome, unknown (by our clients) to exist. Often supplemental "guidance" is written in ways that could be viewed by staff as "the law", but that guidance has never been the subject of industry comment and focus or, importantly, Commission review and consideration. Industry participants find themselves in the very awkward position of simply not being aware of staff's views, despite their best efforts in keeping up with changes in the law and policy on a regular basis. It is increasingly impossible to keep track of staff "guidance" provided in reports that are years old – even with the efforts the staff have taken to provide indices to staff guidance.

   One of the benefits of staff guidance, is that it is not law and is not Commission policy, however, in our experience, if staff wish to "enforce" their views, they will point to staff guidance as being indicative of their position and hence an industry participant will be held to be in breach of a law or regulation, simply because of a staff view point with which they (and others) do not agree. Where we disagree with a staff position set out in guidance, it is often very difficult to make our views known and even if we are successful, it is very rare that staff publish a retraction. We consider this issue to be a significant issue and one deserving of a separate work-stream to review and consolidate existing staff guidance and determine which should be policy (and hence published for comment) and which should be simply dropped. This is a very large aspect of the current regulatory burden and should not be underestimated.

9. ***Improving the electronic filing systems used by the OSC and the CSA*** All of SEDI, SEDAR and NRD are very outmoded systems requiring increasingly burdensome workarounds and updates on these systems should be considered on an absolutely priority basis. In particular, our firm is moving to a new state of the art document management system later this year, but we find we are having to develop a work-around so that we can continue to file documents received from our clients on SEDAR. We are concerned about our continued ability – and that of our clients to continue to use SEDAR without concern for overloaded systems and systems failures. It goes without saying that SEDAR has outlived any purpose it might have had as a repository for the investing public to find information about a specific issuer and it is now simply an electronic database and filing system.

10. ***Inability to modify conditions to an existing Exemption Decision*** We urge the task force to consider alternatives to industry participants having to make applications to vary existing exemptions that continue to be necessary for specific purposes. Often times we find specific conditions to older exemptions to be burdensome and outdated, but we have no other option to advise our clients to file a variation application, with attendant regulatory filing fees and the risk that the entire exemption will be reconsidered. We would very much appreciate being able to have staff confirm that an outdated condition need not be adhered to, rather than seeking to obtain a completely restated exemption decision.

11. ***Prospectus Exemptions*** The scope and availability of certain prospectus exemptions should be expanded. For example, the $150,000 minimum amount exemption should not be disallowed for a purchaser that is an individual. Currently, the $150,000 minimum amount exemption is available for purchasers that are corporations or other institutional investors. There does not appear to be a justifiable reason to distinguish between a purchaser that is an individual and a purchaser that is a corporation for the availability of the exemption (although we know this was a subject of much discussion over the years). In addition the "risk disclosure" form that has to be given to certain individual accredited investors is far too inflexible – and issuers should be able to modify the form to fit with a specific offering and issuer (it particularly does not work well for investment fund offerings).

OSC Initiatives – Corporate Finance Issuers

12. ***At-the-market offerings (ATMs)*** Currently, issuers are permitted to undertake ATMs pursuant to base shelf prospectuses but they are required to seek discretionary relief from the regulators with regard to certain matters related to such offerings. The discretionary order typically granted in connection with an ATM, among other things, exempts: (i) the issuer from the requirement to physically deliver the prospectus to the purchaser, (ii) the issuer from the requirement to grant the purchaser the right to withdraw from its purchase within two business days of the receipt of the prospectus, and (iii) the offering from the right of action against the agent for non-delivery of the prospectus. These discretionary orders are routinely given and there is little or no

variation amongst the orders granted. We would therefore submit that the CSA implement an instrument to enshrine the terms and conditions of the typical discretionary order that is granted. This would remove a time consuming and costly process of having to apply for discretionary relief to enable the issuer to proceed with an ATM. Additionally, we would submit that the terms of permitted ATMs be expanded to increase the maximum value of securities sold under a single ATM offering prospectus from 10% to 20% of the issuer's market cap. We believe that the increase in the maximum value from to 20% is justifiable in view of the requirements for the filing of a prospectus supplement and other reporting and public disclosure required in conjunction with an ATM. The need to obtain such discretionary relief, together with other limitations including the 10% limit, has led to many Canadian issuers that are cross-listed to conduct ATMs in the US only.

13. ***Small Cap issuer reporting*** We would submit that three- and nine- month interim period reporting be made optional for small cap issuers. Small cap issuers should be defined as any "venture issuer" (as defined in National Instrument 51-102 *Continuous Disclosure Obligations*) and any issuer (other than a venture issuer) whose market cap is less than a stipulated amount which we would submit should be $50 million. It is submitted that investors who purchase securities of issuers that fall within this definition of "Small Cap Issuer", whether in the primary or secondary markets, make their investment decisions principally based on factors other than quarterly financial results. Additionally, many of these issuers are development stage companies in the natural resource, tech and life sciences sectors and have little to no revenue or earnings to report. These issuers typically have only very modest financial accounting and reporting staff and quarterly reporting imposes a significant burden on such issuers without any meaningful benefit to investors. The requirement for 6-month interim and annual reporting would remain and would be consistent with other jurisdictions such as the UK.

14. ***Confidential filing of prospectuses*** Both issuers undertaking initial public offerings and reporting issuers undertaking subsequent public offerings should be permitted to confidentially file preliminary prospectuses and to respond to and to learn of potential issues raised by the regulator prior to filing an amended and restated preliminary prospectus which would become public upon filing. This would be of significant benefit to a range of issuers as it would shorten the period of time between the public filing of the amended and restated preliminary prospectus and the filing of the final prospectus. It would also give issuers and underwriters the opportunity to file a preliminary prospectus and receive comments before determining whether or not to proceed with a public filing, clearing the prospectus and completing the offering. In short, it would give the issuer the option to withdraw the confidentially filed preliminary prospectus before it becomes public, having regard to market conditions as well as the regulator's comments. This measure would mirror the SEC's practice of allowing issuers, in certain circumstances, to file registration statements on a confidential basis and would allow for more seamless cross-border offerings in Canada and the United States.

15. ***Extension of Testing the Waters Exemption to follow-on offerings*** Currently, National Instrument 41-101 exempts from the prospectus requirement the solicitation of expressions of interest from accredited investors by an issuer that is not a public issuer in accordance with Section 13.4 of the instrument. We would submit that a similar exemption ought to be implemented to permit public issuers to solicit expressions of interest from accredited investors in order to ascertain whether there would be sufficient interest in connection with an upcoming prospectus qualified offering. This would allow issuers to assess market receptiveness before engaging in the expensive and time consuming process of the preparation and filing of a prospectus and the regulatory review process. Appropriate conditions would be incorporated including those applied to IPO issuers (except that the issuer need not be a public issuer). This approach would be consistent with the very recent announcement by the SEC to implement Rule 163B that would expand the "test the waters" provision of the JOBS Act to apply to all issuers, and not only to Emerging Growth Companies.

16. ***Issuer Liquidity and Base Shelf Prospectuses*** We submit that the CSA should revise or change the manner of interpreting CSA Staff Notice 41-307, which relates to concerns regarding an issuer's financial condition and the sufficiency of proceeds from a prospectus offering, to the extent that it is being applied to deny any reporting issuer the ability to file a base shelf prospectus where the issuer does not have sufficient working capital to carry its operations for at least 12 months. The current practice by staff of the OSC and other CSA members effectively precludes early/development stage issuers from using the base shelf prospectus system (and benefitting from the cost and time efficiencies associated with that system). We acknowledge the validity of staff's concern of allowing issuers to be permitted to clear base shelf prospectuses without any rules as to the manner in which the shelf system may be used to complete discrete offerings. Ontario capital markets comprise issuers that range vastly in size and sector. The Toronto Stock Exchange, TSX Venture Exchange and Canadian Stock Exchange, each have listed issuers that are engaged, for example, in the development of a technology, biotech/pharma or software and these sorts of issuers often go public prior to becoming cash flow positive because of the investor demand for their securities. We understand staff's concern that permitting issuers with short term liquidity concerns the ability to clear base shelf prospectuses may lead to greater risk for investors arising from the lack of regulatory review of the prospectus supplement. This may be addressed in a number of ways. For example, the OSC has, in the past, permitted an issuer without 12-months of working capital to clear a base shelf prospectus provided that the issuer delivers an undertaking to the OSC (and filed on SEDAR) to refrain from undertaking an offering under a prospectus supplement in conjunction with the base shelf prospectus unless the minimum net proceeds from the offering, when combined with the current working capital, is sufficient to fund the operations of the issuer for a period of time, or in the case of a development stage issuer, to fund the achieve the next material development milestone. We understand that the British Columbia Securities Commission may clear a base shelf prospectus where the issuer has given an undertaking to permit the BCSC to review the prospectus supplement to be filed by the issuer. Additionally, if the OSC were to implement such a measure of requiring such undertakings, certain additional disclosure requirements might also be introduced to provide for appropriate disclosure of data in

the prospectus supplement, such as: (i) working capital as of the most recent month-end, (ii) the amount of time that the issuer may operate at its current pace if the minimum amount of the offering is raised, and (iii) statement that the minimum amount raised will provide the issuer, combined with its existing working capital, sufficient funds to complete the next material milestone (for a development stage issuer). Moreover, the current practice by OSC staff results in an uneven playing field that works against Ontario issuers - currently, reporting issuers for which Ontario is not the principal regulator may be able to file and clear base shelf prospectuses in their principal jurisdictions as well as in Ontario without being subjected to the 12-month working capital requirement. In any event, it is submitted that investors should be permitted to assess the risk of investing in an early stage issuer provided the prospectus contains full, true and plain disclosure and otherwise complies with applicable prospectus rules and instruments. We would observe that the SEC does not have any rule or practice, in our experience, which requires an issuer filing a shelf registration statement to have any minimum amount of working capital, provided that adequate disclosure is set forth in the prospectus as to the issuer's financial condition and as to the sufficiency of proceeds. Additionally, we note that the SEC has no rule, practice or policy of which we are aware which would preclude any issuer to clear a shelf registration statement with the SEC due to the issuer having insufficient working capital at the time of the registration statement becoming effective. The practice of denying issuers from clearing base shelf prospectuses in Ontario and in other Canadian jurisdictions impedes seamless cross border offerings using the shelf system.

OSC Initiatives – Investment Funds and Registrant Regulation

17. ***Eliminate "one-off" filings required by Rule -*** Eliminate unnecessary documents required by various rules to be prepared and filed with the Commission that may have been considered important when the rules were newly instituted, but serve no real purpose today. We identify some below, but urge staff to identify all such "random" filing requirements and consider if they are still necessary.

    a. SEDAR Forms 6 (if not eliminated altogether – allow scanned or conformed signatures)

    b. Rationalize PIFs and NI 33-109F4 filings for the same people, as well as conducting police checks on individuals named in a prospectus, where those individuals are registrants or permitted individuals. Requiring regular filings of PIFs for these individuals who already are required to keep a NI 33-109F4 up to date is a perfect example of additional regulatory burden and the lack of coordinated filings between branches

    c. Unify the forms of PIF (if retained) of the OSC, with the TSX PIF and the NEO Exchange PIF so that there are not differing documents to be used for the same individuals depending on where documents are filed and securities listed.

    d. Drop Part 12 NI 81-102 Compliance Reports. These reports were first required when Parts 9, 10 and 11 came into force in the late 1980s and early 1990s as a way for Commission staff to monitor and ensure compliance with those provisions.

With today's increasing electronic world, those reports are largely meaningless, but have a cost and contribute to regulatory burdens.

e. Drop the requirements to file Section 6.7 (NI 81-102) custodian reports. Again, these reports may have been necessary or useful when the custody provisions were first put in place (again in the late 1980s and early 1990s), but are not necessary now. There are other ways for staff to ensure compliance with the requirements.

f. Drop the requirements to file NI 24-101 quarterly filings. These are poorly understood filings and in our discussions with certain of our clients completely overlooked. If these filings are important, then we urge staff to plainly and clearly explain what is intended with these filings and what industry participants need to do to make these filings.

g. Work with FINTRAC to drop the requirement to make monthly AML filings with the securities regulators – particularly for NIL reports. In our view, this should not be within the purview of the securities regulators.

h. Drop the requirement to annually "disclose how to redeem securities" from NI 81-102 (section 10.1(3)). Surely this kind of disclosure is completely irrelevant and unnecessary today.

18. ***Rethink NI 33-109 Filings*** While we understand the need for registrants to keep information up to date in their registration filings – including the purpose that late filing fees serve to make sure registrants are incented to make these filings on a timely basis, we urge the Commission to review the NI 33-109 filings to determine whether the strict requirements really serve a regulatory purpose. We point out two significant issues that, if nothing else, we recommend the Commission work to alleviate:

    a. Disclosure of "outside business activities" has, in our view, become increasingly rigid and problematic. We understand the importance of disclosing paid board positions and "positions of influence", as well as of other gainful occupations, but the requirements to disclose matters such as coaching children's sports teams (even competitive sports teams), acting as volunteers around children's activities, such as Brownies and Cubs, volunteering on boards or volunteering in specific capacities with volunteer organizations, is pushing the principles behind such disclosure to the absolute limit. The rigidity of OSC staff in enforcing time deadlines for making these filings and imposing late filing fees serves to dissuade people from fixing "goofs", including pure human errors arising out of forgetfulness or lack of recognition that an activity should be disclosed. Many of our clients have put in place period reviews (monthly, quarterly or annual) of individuals' OBAs and ask these individuals to consider and report any changes. This is a positive development, but individuals may be reluctant to report if there will be late filing fees levied. Either late filing fees should be waived, or some form of annual amnesty should be permitted to allow people who make human errors to catch up with filings. In this way, firms and individuals will not be penalized for simple human errors in failing to make these disclosures. In our experience, very few OBAs are true “issues” where conflicts of interest arise – they are often times personal holding companies or volunteer positions, which are completely separate businesses from what the firm carries on. Again, in our experience, it is very rare that any conflicts of interest arise out of these activities. In our view, only OBAs that raise conflicts of interest should be filed as part of the individual’s registration.

b. The need for <u>immediate</u> filings of changes to matters such as changes of or to shareholders or affiliates, in the Form 33-109F6. We recommend consideration of an annual filing of the Form 33-109F6 where updates are necessary, except for certain matters, such as name of registrant, change of control of registrant, change of address of registrant, where a more immediate notice is warranted. This will allow registrants to keep the Form 33-106F6 up to date, and also allow them to focus on each of the provisions at one time (annually), rather than on a continuous basis. Particularly for large global firms with many affiliates, the burdens associated with keeping Form 33-109F6 up to date are extreme.

c. The Form 33-109F6 information filed by a firm and any updates made should be maintained by the Commission in an electronic format, similar to NRD, which is then accessible to the Firm. This will increase the quality of information provided by the firm, and will greatly facilitate updates being made to the F6. Particularly given the switchover of registrants that occurred in 2009 (with the coming into force of NI 31-103) has left some firms with incomplete records of their F6.

19. ***Rationalize Notice Filings required in respect of Transactions involving Registrants (NI 31-103 and NI 81-102)***

a. We strongly urge changes to NI 81-102 and to NI 31-103 to require a single point of contact in respect of merger and acquisition transactions involving fund managers and investment funds (changes of manager and/or changes of control of manager). Single applications that cover both regulatory requirements should be filed and considered by a single staff unit (rather than 2, with different timings and the current apparent lack of coordination).

b. Commercially reasonable deadlines should be considered (closing dates) and staff should endeavour to finalize their reviews in order to meet them.

c. The most recent changes to NI 31-103 necessitate notice filings (section 11.9 and 11.10) in circumstances where only very minor changes in share structure are being proposed. We commented on these changes explaining the negative impacts, but our comments were not taken. We urge OSC staff to reconsider the practical impacts on having to make section 11.9/11.10 notice filings in advance of internal restructurings where no new entity is becoming a shareholder of the entity.

20. ***Questionnaires and Compliance Surveys*** Staff has increasingly relied on voluntary answers to RAQ questionnaires, as well as discrete compliance surveys that do not appear to be coordinated or well communicated out to the registrant community. The RAQ questionnaires should be maintained in a consistent format to reduce the regulatory burden (without too many "new" questions or approaches being introduced), time should be given to the registrant community to answer them adequately and the current 2 year cycle could usefully be increased to a 3 year cycle. We recommend that staff do not target more than one additional compliance survey per year per type of registrant community – and that those questionnaires and surveys be published and their purpose explained. Aggregate and anonymized results should be published wherever possible and feasible.

21. Compliance Reviews

a. During compliance reviews/audits, staff often-time asks for documents that are available to Commission staff through public filings or filings that are required to be made to the Commission, rather than staff accessing what is available publicly or on file with the Commission. This is a small point, but one which would have an impact in reducing the regulatory burden.

b. A much more significant issue with compliance reviews is the inability of registrants to successfully push back on findings of staff conducting the audit. It used to be the practice of staff to conduct an "exit" interview with the registrant, where the registrant could correct misconceptions and explain matters, such the matter would not give rise to a deficiency. While exit interviews do take place, these are nowadays simply a one-sided discussion by staff often conducted by telephone of the "deficiencies" that will be written out into a written report and provided to the registrant in coming days and weeks (sometimes an official report comes to the firm after relatively significant delays). There is no meaningful way for the registrant to respond during these exit interviews (in fact in many cases, staff asks registrants to not make submissions or give explanations while staff is reading the list of deficiencies). We understand that all compliance deficiency reports are reviewed by a senior staff person, but in our experience, this more senior staff will generally not overrule the staff conducting the compliance review, such that the registrant is left generally without any recourse if they cannot change staff's views on a particular matter. We strongly recommend that the process of carrying out compliance reviews, providing registrants with deficiencies and the resolution of those deficiencies be reconsidered, with industry input. The human and capital costs of responding to compliance audit requests and "fixing" deficiencies can be very significant indeed, particularly where staff has taken a stance on a matter and the registrant disagrees. If any matters are referred to "Team 4" of the Compliance and Registrant Regulation Branch, in our experience, it is <u>extremely</u> difficult for a registrant to successfully extricate themselves from continuing review and scrutiny at costs that can run upwards of many tens of thousands of dollars in consultant and legal costs. We wish to emphasize that we are speaking only of more minor insignificant compliance issues or issues where we or our client consider that staff have overreacted or have misconstrued a particular matter. We completely understand the aim of compliance reviews and the necessity for them. We also know that registrants will have compliance deficiencies and it is in the best interest of the industry to require those registrants to fix those deficiencies. Our comments are primarily directed at a lack of a forum for registrants to escalate matters and be able to successfully push back on a finding if they disagree (without repercussions).

c. We strongly recommend that only a principal regulator should conduct compliance reviews of a registrant and we urge the OSC to come to an understanding with its counterparts on this matter. "Secondary" reviews by non-principal regulators are unnecessary, duplicative and run counter to the passport system, even when those secondary reviews are ostensibly about the activity of the registrant within the non-principal regulator's jurisdiction.

22. ***Rethink Staff Approach to Associate Advising Representatives and Advising Representatives*** We raise the difficulties that registrants experience in obtaining waivers in appropriate circumstances of the educational and experience requirements associated with AARs and ARs. This is a significant issue and we recommend a separate work stream be developed to rethink how these waivers are handled and by whom (what level of OSC staff). We recommend consistency amongst the CSA on this point (of which we feel there are differences in approach and views and levels of knowledge and understanding). We know that the CSA, including the OSC has been aware of these issues for years – and are working on a modification of the experience requirements as they apply to client relationship individuals and we urge the OSC to keep this effort going and escalate it, such that it can be completed.

23. ***Streamline NI 45-106 Exempt Trade Report Filings***

a. The Form has been amended almost continuously (albeit in minor ways), which raises significant issues in compliance from year to year and we recommend a moratorium on changes to this Form, unless it is to remove disclosure requirements.

b. It is completely unacceptable to continue to have three ways of filing these documents (BC portal, OSC portal and SEDAR everywhere else). We note that the OSC portal requires information to be inputted manually per issuer (per fund in our case) – item by item, as opposed to uploading a completed form. This takes time to do, which in compressed filing times increases costs and increases the likelihood of mistakes being made.

c. The annual filing for investment funds is very welcome and useful, but the 30-day window after year end is <u>significantly</u> too tight in our experience, given all the other year-end activities and the holiday period, based on working with our many clients over the past 3 years, and we recommend the deadlines be extended to <u>at least</u> a 45-day window, which will allow for year-end issues to be alleviated.

d. We were also very disappointed to see the publication of CSA Staff Notice 45-325 on February 7, which was one week after the January 30 deadline for the applicable exempt trade report filings for investment funds. Although this Notice reinforced the OSC's position (with which we completely agree), this Notice introduced considerable uncertainty on the approach to be taken in these filings in Manitoba and Quebec in particular. We are taking the position that any different views expressed by Manitoba and Quebec can only apply to 2019 and subsequent filings and not to filings for years prior to the publication of the Notice.

24. ***Complete Initiative to Rethink Fund Disclosure*** We are in complete support of the Commission's, with the other CSA members, to rethink fund prospectus and continuous disclosure. This is an initiative that we consider must be done periodically to ensure that investors are not paying for disclosure that they do not use or need. Some of the issues we strongly urge the CSA to consider are as follows:

    a. Creating one base document for each applicable fund family (managed by the same IFM) and dropping the SP/AIF concept. We recommend this be achieved as simply as possible – providing basic "evergreen" disclosure about the fund family and the fund manager. As much as possible the information provided in this document should be evergreen and should not provide much, if any, specific disclosure about each investment fund.

    b. Evergreen base documents could be reviewed/renewed every two or three years (rather than every year).

    c. Requiring Fund Facts documents for <u>each FUND</u> (and not per series). We know a lot of work and effort, including investor testing, went into the Fund Facts documents, but we strongly believe it is time for a rethink of the utility of those documents and the information provided in it. Per series Fund Facts are among the highest cost items (with great potential for errors simply due to the volume of documentation) associated with investment fund disclosure. A single Fund Facts per fund also has the added benefit to investors to allow them to see their investment options (otherwise they may have no idea that they can invest in a Series F as opposed to a Series A) and greatly enhances the ability of investors to have their investment "auto-switched" into suitable series if they meet the criteria.

    d. Fund Facts documents must be made more flexible – in that disclosure that is irrelevant to a specific fund should not have to be included simply because the form requires it. We have experienced the uncomfortable situation of advising our clients to include information mandated by the form even when it was inaccurate for the specific fund or series, given staff's rigid insistence that the disclosure be included.

    e. Rethinking the MRFPs. We consider these documents are amongst the single most unread documents available for fund investors. Unread documents by definition are an undue regulatory burden. We understand the concept behind the MRFPs, but we recommend a rethink of these documents to see if "less would be more", particularly given the experience since NI 81-106 was put in place over 15 years ago.

f. Rethinking the delivery requirements associated with Fund Facts and continuous disclosure. We can understand the reluctance of the OSC to reopen the debate about "pre-sale delivery" of Fund Facts, given that the new rules have only been in force for a few years, however we strongly urge the Commission to consider "access equals delivery" for financial statements and MRFPs (which would allow the convoluted requirements around delivery in NI 81-106 to be significantly modified and simplified, if not completely eliminated). This will have the obvious effect of reducing mailing costs – while still ensuring that investors have access to the documents. We also urge the staff to clarify that portfolio managers are NOT required to provide Fund Facts to their clients who are invested (by the PM) in accordance with discretionary managed accounts. We have raised this issue on several occasions with staff to essentially little to no response. There are suggestions in the recent documentation published by the CSA that this is a live issue. We consider this to be a very clear cut situation, but given the uncertainty, we recommend that this be clearly stated by staff and the OSC.

25. ***Rethink Derivatives Rules*** The derivatives and hedging rules as set out in NI 81-102 (and, to some extent, NI 81-106) in some cases do not technically function as expected in practice and should be updated to correct those issues, and in other cases are antiquated in such a way that they could be read to mandate only very manual systems, rather than automated systems that are created to streamline the hedging or derivative investment process in a consistent and impartial manner. Similarly, these rules seem to be written mainly to accommodate equity products, creating an undue regulatory burden for fixed income products. Conforming the NI 81-102 rules, *where appropriate*, with similar international rules would reduce the regulatory burden faced by our clients who operate internationally or who provide services on a cross-border basis. We have provided staff on several occasions with submission on these and other issues and very few of our recommended changes have been made, such that industry participants continue to experience compliance difficulties, as well as comprehension problems in interpreting these rules.

26. ***Derivatives registration and business conduct rules.*** We would also like to take this opportunity to echo the comments made by SIFMA (we participated in the development of these comments) in connection with the proposed derivatives registration and business conduct rules, which letter is available here: http://www.osc.gov.on.ca/documents/en/Securities-Category9-Comments/com_20180917_93-101_93-102_sifma.pdf). The implementation of these rules as currently proposed would significantly increase the regulatory burden for portfolio managers by adding duplicative regulation to entities that are already subject to extensive regulation. We recommend a reconsideration of the necessity of these proposed rules or at the very least a scaling back of these rules.

27. ***Repeal the Commodity Futures Act*** This legislation has long been determined to be outmoded and out of synch with the approach to derivatives being taken by the regulators both within

Canada and internationally, yet, nothing has been done with this legislation. It should be repealed as soon as possible for the many reasons as have been stated publicly over the years.

In conclusion, we wish to emphasize that we completely appreciate the professionalism and dedication of the OSC, its executive and its staff in regulating the securities industry. The comments provided in this letter should be taken in light of our wish to assist the task force in carrying out its mandate and not as any criticisms of staff, the executive or the Commission itself. We thank you for considering our comments and urge you to call us if you wish to discuss any aspect of our comments. We would be pleased to organize meetings with the many BLG lawyers who participated in the development of this letter, if you would like further explanation of our views and comments. We look forward to being able to attend the March 27 Round Table. We have copied our colleagues who provided input.

Yours very truly,

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