

February 7, 2025

SUBMITTED VIA EMAIL to comments@osc.gov.on.ca

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

Dear Sirs / Mesdames:

Re: Ontario Securities Commission Consultation Paper 81-737: Opportunity to Improve Retail Investor Access to Long-Term Assets through Investment Fund Product Structures

OVERVIEW

We are pleased to provide the Ontario Securities Commission (**OSC**) with comments on the above-noted consultation paper related to the opportunity to improve investor access to Long-Term Assets through investment fund product structures (the **Proposal**). All capitalized terms used but not defined herein shall have the meaning given to such terms in the Proposal.

The following viewpoints are those of the individual lawyers of Borden Ladner Gervais LLP (**BLG**) listed below. Our comments cannot be taken as the views of other lawyers at BLG or our clients.

We thank the OSC for putting forward the Proposal. We strongly support the OSC's pursuit of enhancing the experience of retail investors and fostering conditions for capital formation and innovation across public and private markets in Ontario. We also support the objective of broadening access to Long-Term Asset investment opportunities for retail investors, as these assets are currently predominantly accessed by institutional and other sophisticated investors that are able to invest in exempt market securities.

Subject to the specific comments below set out under Key Recommendations and in response to the individual Consultation questions, BLG is supportive of the Proposal.

KEY RECOMMENDATIONS

We offer the following Key Recommendations in connection with the Proposal. We believe these to be central to the viability of the Proposal and to achieving the Proposal's intended policy objectives:

- 1. Deference to PMs and IFMs.** The Proposal contemplates that OLTFs must be managed by a registered IFM and advised by a registered PM. The CSA mandates extensive proficiency and conduct obligations for such registrants and we believe that deference to the expertise of the PM and IFM will be instrumental in ensuring the success of the Proposal. Specifically, we believe that the proposed concepts of the Cornerstone Investor and CIV are both too restrictive and unnecessary in all cases, as evidenced by the fact that other jurisdictions, such as the UK, do not have these requirements in their long-term asset fund structures. In place of these requirements, the Proposal should instead defer to the IFM and PM, and require a strong governance framework, which includes independence. The IFM and PM of the OLTF should be required to demonstrate to the regulator, through the prospectus review and receipt process, the viability of the OLTF – having regard to its specific underlying Long-Term Assets - on an initial and an ongoing basis, including from a diversification and liquidity perspective. Moving away from prescription towards the requirement for a sound governance framework will strengthen the viability of the Proposal.
- 2. Additional flexibility required to ensure appropriate outcomes.** An extension of key recommendation 1 above, we view flexibility in the OLTF structure as paramount to its uptake in the industry and, ultimately, for delivering expanded access to Long-Term Assets to retail investors. We have specified below several instances where we believe the proposed OLTF structure requires more flexibility in response to the specific Consultation questions.
- 3. Ability to purchase underlying Long-Term Asset investment vehicles:** We urge the regulator to clearly allow OLTFs to be able to purchase underlying real asset investment vehicles, including those that are not located in or formed under the laws of Canada. We view this as essential to OLTFs being able to achieve the necessary scale and diversification for retail investment.
- 4. Interoperability between OLTF structure and tax law.** The interaction between securities legislation and tax law will be critical to the viability of the Proposal. To the extent that the OSC has not yet engaged in discussions about the Proposal with the Federal Department of Finance, we suggest such coordination prior to the publication for comment of proposed rule amendments.
- 5. National adoption to achieve policy goals.** A harmonized approach across Canada will be instrumental to the viability of the Proposal. Without national adoption by each member of the Canadian Securities Administrators (CSA), we are concerned that the Proposal will not garner the support, and therefore scale, required to realize its policy objectives.
- 6. Proposal alternatives.** We urge the OSC to also consider alternatives to the Proposal, including an amendment to the version of the offering memorandum prospectus exemption (the **OM exemption**) available in British Columbia and Newfoundland and Labrador in subsection 2.9(2.1) of National Instrument 45-106 – *Prospectus Exemptions (NI 45-106)*. We believe it is possible that the objectives of the Proposal could be substantively met if the OSC were to expand the availability of the OM exemption to investment fund issuers

(the **OM amendment**). This alternative also supports a harmonized approach to securities laws across Canada with the benefit of leveraging an existing regulatory framework.

We have provided our responses to certain of the Consultation questions in the Proposal below.

OBJECTIVES

- 1. Do you agree that retail investors could benefit from increased access to Long-Term Assets? Please explain.**

In our view, retail investors would benefit from increased access to Long-Term Assets. The opportunity for retail investors to gain greater access through indirect exposure to Long-Term Assets managed by an IFM and PM would create new avenues for diversification and the potential for higher returns that have lower levels of correlation to public market investments.

- 2. Could investment fund product structures facilitate increased retail investor allocation to Long-Term Assets, while mitigating some of the risks of holding these illiquid assets? Please explain.**

The current regulatory framework for investment funds contains very limited access to illiquid assets. Public investment fund portfolios must limit their exposure to Long-Term Assets due to the investment restrictions in section 2.4 of NI 81-102 and the disclosure, valuation and liquidity risks applicable to those public funds. We agree that an investment fund product structure designed for investing in and holding Long-Term Assets (with modifications to the existing investment fund regime on the threshold issues outlined in the Proposal) could facilitate access to Long-Term Assets for retail investors. We further believe it could do so while mitigating risk by ensuring that only appropriately registered and regulated market participants may offer these products to the retail segment of the market and by providing access to the Long-Term Asset class through a structure designed for retail investors which offers diversification and is subject to a rigorous regulatory framework.

- 3. [Intentionally blank]**
- 4. Would the investment fund structure be less attractive or not viable if the Proposal were to place some restrictions on minimum investments in the Long-Term Assets located in Ontario? Please explain.**

We are not supportive of placing restrictions on the amount of the investment to be located in Ontario, as we believe such a requirement would make the Proposal less viable.

- 5. Should the Proposal exclude certain types of Long-Term Assets (e.g., sensitive infrastructure projects in specific countries or Long-Term Assets that non-investment fund issuers would be prohibited from owning)? Please explain.**

The PM should be permitted to determine where and what assets to invest in. These decisions will be informed by their duty of care, applicable laws, and expertise. We urge the OSC to not disallow certain types of assets, such as real estate. By including all Long-Term Asset types in the potential

list of investments for OLTFS, the regulators can facilitate important diversification for retail investors.

OVERVIEW

6. Please explain your views on each of the following overview elements:

(i) OLTFS having the same restrictions on control that apply to investment funds under section 2.2 of NI 81-102

The control restrictions contain a prohibition against exercising control over management of an issuer, however, it is common in the private investment space for significant investors to take a seat on the issuer's board. It will be important to allow representatives of the PM and IFM to sit on boards or governing bodies related to the underlying Long-Term Asset in order for them to be able to monitor their investments.

(ii) OLTFS being subject to their own unique regulatory requirements

Subject to our comments pertaining to certain details of the Proposal, we recommend that NI 81-102 be revised to accommodate the OLTFS structure – similar to how the instrument was modified to accommodate liquid alternative funds. Integrating these proposed requirements into an existing framework will create more clarity and understanding of the requirements and regulatory expectations. It will also minimize regulatory burden.

(iii) OLTFS distributing units through a prospectus-qualified offering

We support the consultative process to explore the possibilities of OLTFS being distributed through prospectus-qualified offerings to retail investors.

However, as noted in our key recommendations, we believe that the OM amendment could also be effectively used for this asset class.

(iv) The impact of OLTFS being only distributed to Ontario investors

We strongly urge expanding the distribution of OLTFS beyond only Ontario investors. The limited nature of the Canadian market makes broader access central to the practical viability of the Proposal, as well as to the broader objective of creating additional capital for Long-Term Assets. These types of funds will require scale to be viable.

As the Proposal is not limited to assets located in Ontario, facilitating the distribution of OLTFS to retail investors in other Canadian jurisdictions could promote the generation of greater capital in Long-Term Assets (i.e., infrastructure). On this point, we urge all members of the CSA to work collaboratively to simultaneously adopt the final Proposals for the benefit of all stakeholders.

(v) OLTFs being either fixed-term or evergreen investment funds

We support the flexibility of the Proposal to permit both fixed-term and evergreen investment funds.

(vi) The proposed CIV requirement

We support the concept of a CIV as a permitted underlying holding of an OLTF. However, in our view, this should not be a mandatory requirement. For example, it may add extra burden and expense for retail investors if access to the underlying investment through a CIV is not necessary, and therefore not in the best interest of the OLTF. This might arise in the context of a fund of fund investment. There may, however, be circumstances where a CIV will be in the best interests of an OLTF. For example, for tax reasons (such as blockers) or to facilitate a co-investment by an institutional investor. We believe that a CIV should be permissible though its use should be left to the discretion of the PM and IFM as part of their expertise in assessing the most appropriate structure. Additionally, we believe that the concept of the CIV in the Proposal should be clarified to make it clear that it is intended to capture underlying fund investments, and other underlying investments, as well as bespoke purpose-built investment entities related to a specific Long-Term Asset.

(vii) OLTFs within a fund-on-fund structure under an investment fund subject to the requirements of NI 81-102.

We believe that NI 81-102 funds should be permitted to invest in OLTFs up to certain limits. We also view it as essential that OLTFs be permitted to invest in underlying funds (as this is in the expertise of a PM to assess) to help OLTFs achieve the scale and diversification required to be suitable for the retail market. As part of this Proposal, in order to accommodate this structure, an exception to the three-tiered fund of fund structure must be provided.

7. [Intentionally blank]

THRESHOLD ISSUES

8. [Intentionally blank]

9. Please explain your views on each of the following redemption features:

- i) Frequency.**
- ii) Discounts.**
- iii) Caps.**
- iv) Notice.**
- v) Payment.**

vi) Suspensions.

Given the nature of OLTFS, there will not be a one-size-fits all approach. Flexibility is required in order to properly design and manage an OLTFS, as the IFM and PM must assess the liquidity of the underlying Long-Term Asset which will vary. In order to satisfy various investor needs, managers will need OLTFS to be able to fit within certain tax concepts. For example, some OLTFS will need to qualify as mutual fund trusts for Income Tax Act purposes, and this would necessitate a certain redemption frequency. However, depending on the investor base for a particular fund, in other cases, this would not be required. Consequently, we strongly urge flexibility on these points. Particularly, we find the notice periods and suspension periods to be very short for this asset class, such that they may cause access to certain Long-Term Assets to not be viable and have the impact of excluding such assets.

Given the nature of the underlying Long-Term Assets, a more flexible approach is required regarding winding up an OLTFS in the case of continued redemptions.

For example, we are concerned that requiring a wind-up to occur in response to reaching the redemption request threshold within a predetermined timeframe could trigger a “fire sale” of the assets to the detriment of investors and that it may not be in the best interests of the OLTFS. Additionally, the nature of the underlying assets could mean that an option other than wind-up would be more beneficial for the investors of the fund. As an alternative, in a period of sustained redemptions, the governance body of the IFM (which should include independence), should assess continued viability of the fund and, if it is not viable, present investors and/or the regulators with a recommendation as to how to proceed in the best interest of the fund. Options may vary and include wind-up, a merger, continuation fund option, or a liquidation plan over a defined period.

10. What are the minimum redemption restrictions OLTFS would need to effectively manage their liquidity?

Please see our response to Question 9 above.

11. Could there be investor demand for fixed-term OLTFS that do not offer any or very restrictive redemption rights to their securityholders? Please explain.

We believe there is investor demand for such fixed-term OLTFS, as other limited redemption products currently exist in the market. Because of the cost associated with liquidity, limited liquidity may be both suitable and desirable for certain investors.

12. Are there other redemption issues the Proposal should consider? Please explain.

Further to our introductory comments about the importance of the OLTFS framework being conceived in tandem with corresponding tax considerations, redemption issues will necessarily be a central focus of the proposed OLTFS framework. We encourage collaboration between the OSC and the Department of Finance to ensure a coordinated approach. In particular, given the long-term investment horizons of many individual and group RRSPs of Canadian retail investors, we view the OLTFS as being particularly suitable as a portion of a portfolio of these plans.

We would like to stress that OLTFS will be sold to investors for whom they are appropriate, however, there will always be cases where investor circumstances change, resulting in investors wanting to exit the investment and expecting liquidity. We believe this risk can be managed through clear disclosure about the particular risks of investing in OLTFS at the outset, therefore we support the disclosure aspects of the Proposal.

13. Should OLTFS only be required to calculate NAV as often as the frequency of distributions and redemptions in addition to financial reporting periods? Please explain.

We agree that OLTFS should be required to calculate NAV for financial reporting periods as well as every time there is a redemption or a distribution with a reinvestment right.

There may be instances where valuation reporting is required for investors that does not necessitate a formal NAV strike. In these cases, OLTFS should not be precluded from providing more frequent valuations (more akin to a record-keeping NAV).

14. Please explain if any of the following might mitigate the difficulties of calculating fair and reasonable NAVs for Long-Term Assets:

- i) Experienced IFMs**
- ii) Independent boards of directors (or an independent review committee with enhanced supervisory powers additional to reviewing conflict of interests)**
- iii) Cornerstone Investors**
- iv) Independent valuers**

While each of these entities may be appropriate for calculating NAV in certain circumstances, we do not believe any one of these should be prescribed. The valuation procedures of a fund should be left to the expertise of the PM and IFM. Based on this, the valuation procedure should be a critical feature of the viability of the fund and the suitability of the fund for retail investors that must be demonstrated by the IFM as part of the prospectus qualification process. The above list should be included in the Proposal as options for an IFM to consider to be able demonstrate an appropriate valuation procedure, however, the procedure should not be mandated.

15. Are there other valuation issues the Proposal should consider? Please explain.

There are costs associated with many of these valuation processes, including and especially when using independent valuers which should be weighed against the benefits to investors.

Additionally, certain Long-Term Assets, such as real estate assets, may necessitate differing valuation timelines, and this asset-specific flexibility should be permitted in the OLTFS framework with deference given to the IFM as to the appropriate valuation frequency.

16. **Please provide your views on whether, given its unique purpose and structure, an OLTF should only have a majority-independent board of directors and no independent review committee or alternatively, whether it should have an independent review committee with enhanced supervisory powers additional to review conflict of interests. Also, could an OLTF also be organized as another type of entity, such as a trust with a majority-independent board of trustees?**

We believe the proposed requirement for OLTFs to operate exclusively as corporations is overly restrictive and that such a requirement will limit desired flexibility in structuring these funds. As a result, these structuring considerations should be not mandated and should instead be determined by the IFM in their professional judgement.

While a majority-independent board can provide robust governance, it is important to consider that other structures, such as trusts or limited liability partnerships, may be better suited for certain tax, operational, or investor-related considerations. While we support the concept of independence as it assists with the mitigation of risk, allowing OLTFs to adopt a range of organizational structures will enable fund managers to align governance frameworks with the specific needs of the fund and its investors while still meeting regulatory and oversight objectives. Flexibility in the organization of an OLTF will foster innovation and accessibility while maintaining investor protections and alignment with regulatory goals.

Given the involvement of a registered IFM, we believe that the use of IRCs, as they currently exist for conflicts of interest evaluation purposes, is useful and should be extended to OLTFs.

17. **[Intentionally blank]**

18. **Should the Proposal require a new form of Fund Facts for OLTFs? Please explain.**

We agree that the Proposal should require a new form of Fund Facts for OLTFs. There are likely to be concepts and features of the OLTF that are not captured in the current Fund Facts that will necessitate an OLTF-specific form.

19. **Should the Proposal require a new form of MRFP for OLTFs? Please explain.**

We encourage Staff to consider this issue in connection with the CSA's consultation on the Modernization of the Continuous Disclosure Regime for Investment Funds, in particular, with regard to the new Fund Report format proposed in that consultation. As with the Fund Facts document, it is likely that there will be concepts and features of the OLTF that are not captured in the new Fund Report that will necessitate an OLTF-specific form.

20. **Are there other disclosure requirements the Proposals should consider? Please explain.**

We anticipate that valuation and liquidity risk management issues will be unique attributes of OLTFs that will not be adequately addressed in existing investment fund disclosure requirements and additional disclosure requirements could be considered.

21. Please explain your views on each of the following investment restrictions:

- i) **Minimum level of Long-Term Assets.**
- ii) **Minimum level of liquid assets (maximum level of Long-Term Assets).**

Both the appropriate minimum and maximum levels of Long-Term Assets will be highly dependent on the redemption rights of the particular OLTF. The IFM and PM should be given the flexibility to establish the OLTF's minimum and maximum level of Long-Term Assets appropriately, drawing on their professional expertise.

- iii) **Concentration restrictions for evergreen OLTFS investing in pools of Long-Term Assets.**
- iv) **Concentration restrictions for fixed-term OLTFS investing in infrastructure or other development projects.**
- v) **Concentration restrictions if there is a CIV requirement.**

Concentration restrictions may create challenges for Cornerstone Investors, such as pension plans, which are subject to their own regulatory restrictions, including a 10% diversification cap and 30% control restrictions. Ensuring compliance with both the Proposal and existing regulatory requirements could be difficult, particularly for Cornerstone Investors investing in CIVs that may not neatly align with the prescribed limits as there could be many variables to how an OLTF would be structured.

As stated above, we recommend the OSC reconsider the necessity of the Cornerstone Investor, especially considering that other jurisdictions, such as the UK, do not mandate similar requirements.

- vi) **Limitations on debt, leverage, the use of specified derivatives, securities lending transactions and purchase or repurchase transactions.**

Given their nature, OLTFS will require additional flexibility than what is currently afforded to alternative mutual funds under NI 81-102. OLTF managers will want to use debt and leverage, and this ability should be permitted and part of the OLTF's liquidity risk management tools. This should form part of the overall viability construct of the fund to be reviewed by the regulator.

22. **Are there other investment restrictions the Proposal should consider? Please explain.**

In order to allow access to various asset classes, such as real estate, the various investment restrictions in NI 81-102 will require amendment.

23. Please explain your views on each of the following distribution matters:

- i) Should there be limits on the amount that an investor can invest? If so, what should the limits be?**
- ii) Should a purchaser be required to receive investment advice from an adviser in order to invest in an OLTF? Should OLTF units be available through order-execution-only channels?**

We do not believe there should be limits on the amount investors can invest in an OLTF, provided that the OLTF has been purchased with advice from an investment adviser. In the circumstances where the OLTF is purchased through an OEO channel, we see the benefit of imposing investor limits to which the client can self-certify that they have not exceeded.

24. Are there other distribution matters, specifically other investor protection mechanisms, the Proposal should consider? Please explain.

The due diligence that dealers will have to conduct to ensure their KYP and suitability obligations are met on OLTFs will, in some cases, be much more significant than what is required for NI 81-102 funds and therefore, costly. Dealers should be permitted to receive reasonable compensation from IFMs of OLTFs for this process. This would require an exemption from NI 81-105 on the payment and receipt of monetary benefits between dealers and IFMs. It is very important that this exception be created, otherwise we are concerned about lack of take-up due to financial considerations.

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Thank you for this opportunity to express our comments about the Proposal. We hope our comments will be considered positively by the OSC and the wider CSA and helpful with respect to the development of the Proposal. We reiterate our invitation for the OSC to further explore the possibility of the OM amendment and would be pleased to provide additional comments upon request to any of the undersigned.

If you have any questions or if we can be of any other assistance, please contact any of the lawyers indicated below.

Yours very truly,

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