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VIA EMAIL

November 21, 2012

The Secretary
Ontario Securities Commission
20 Queen Street West
19th Floor, Box 55
Toronto, ON M5H 3S8
comments@osc.gov.on.ca

Dear Sirs/Mesdames:

RE: OSC Request for Comments – Proposed Amendments to OSC Rule 13-502 *Fees* and Companion Policy 13-502CP *Fees* – Published for Comment on August 23, 2012

We are lawyers in the Investment Management practice group of Borden Ladner Gervais LLP. As such we work with many registrants and investment fund issuers that are registered or exempt from registration and/or issue securities in Ontario and have followed the various changes to the regulatory fees payable by those entities to the Ontario Securities Commission (OSC) made over the years. Our comments focus on the "participation fees" and "activity fees" payable by registrants, including "unregistered investment fund managers" and exempt international firms, to the OSC. Our comments should not be taken as the views of BLG, other lawyers at BLG or our clients.

We have the following comments on the proposed amendments to OSC Rule 13-502 (the Fee Rule) and the Companion Policy.

1. More explanation about the allocation between "corporate finance" and "capital markets" industry participants would be appreciated

The OSC explains in the Notice accompanying the proposed rule amendments, that the proposals, including the applicable fee increases, are designed to ensure that the overall costs of the OSC are borne 50/50 by "corporate finance" and "capital markets" industry participants. There is no real discussion on this point, other than to note the ongoing difficulties in so allocating the costs, as well as annual deviations in such costs, therefore we are unable to determine whether this is a fair allocation or not. We urge the OSC to provide more information about its costs and the origins of those costs so that the various industry participants can better understand the OSC's position on fee allocation. The OSC participation fees were originally intended to reflect the real cost of the

OSC in regulating all sectors of the industry, and were designed to deal with the widely understood fact that the mutual fund industry paid a disproportionate share of the fees collected by the OSC (under the original fee schedule). We feel that this shift to a 50/50 split will be working towards a less equitable sharing of the costs of the OSC – and certainly will lead to comments again that the mutual fund industry in Canada is paying more than its fair share of the fees to the OSC.

2. More explanation about the OSC's decision-making about fees

Related to our comment above, we recommend that the OSC publish its rationale for levying fees in the way it proposes to with the amendments to the Fee Rule, with answers to the following concerns that have been raised with us:

- The OSC has been steadily increasing fees over the past few years. Is the current fee increase a one-time adjustment or can it be seen as a continuation of a pattern of increases? What are the controls over continued fee increases?

- Has the OSC considered levying charges against industry participants who give rise to more costs to the OSC? Some industry participants would be in favour of a smaller "participation fee", but with higher activity fees, which would reflect the real costs incurred by the OSC in dealing with various industry participants on various matters, particularly unusual matters, such as enforcement or significant compliance proceedings. It goes without saying that those registrants or issuers who have little interaction with the OSC would pay less fees. Fees would not be higher simply because a registrant happens to earn more revenue from their successful business. The way the current Fee Rule is structured, a larger registrant pays more fees, while not "costing" the OSC as much as a much smaller registrant who happens to get into "trouble" with the OSC and accordingly using a disproportionate amount of the OSC's resources.

- With the current model, there is little transparency in how the OSC spends its fees, including how it deals with "unspent" amounts or overages. Ideally overages would be returned to industry participants, rather than being deposited into a reserve fund.

- Some of our clients have questioned the need for the OSC to raise fees at this time. Some of the more general justifications provided by the OSC – for example, the need to keep up with international developments and to deal with more complex products – do not appear to justify increased fees for industry participants on such a dramatic and blanket basis as are proposed.

3. Fee Payment Timing for "Unregistered investment fund managers" (IFMs)

We have provided comments to the OSC on more than one occasion about our disagreement with the position that international "unregistered IFMs" must pay participation fees to the OSC. Our comments have not been adopted, and with the coming into force of MI 32-102, the position of the OSC has solidified and works against our earlier comments.

However, we were pleased to see that the OSC has clarified that unregistered IFMs who have no investors in their funds in Ontario or who are relying on the "no active solicitation" exemption

provided for in MI 32-102, do not pay fees under the Fee Rule. We completely support this position.

For those international unregistered IFMs who are relying on the "permitted client" exemption provided for in MI 32-102, we note that the OSC has confirmed these entities must pay participation fees to the OSC (although we continue to stand by our earlier comments). However, we urge the OSC to change the payment timing to be consistent with that of other exempt international firms (international advisers and international dealers). Given that many international IFMs are also international advisers (and dealers to a lesser extent), the filings and fee payments should be made on the same December 1/December 31 timing to ensure ease of compliance, particularly given the timing for annual AUM filings required by MI 32-102.

4. "Passing on" of Participation Fees – section 4.1 of the Companion Policy

We assume that section 4.1 of the Companion Policy is intended by the OSC to put IFMs (in particular) on notice that the participation and activity fees payable to the OSC should not be passed onwards as "operating fees" to the funds they manage. We consider this "policy" to be inappropriate from a legal perspective, and at odds with the OSC's position pre-2003 when the Fee Rule was first proposed to the industry. Prior to the Fee Rule, the OSC levied fees relating to mutual funds as part of the prospectus renewal process. At that time, there was no question, legally, that these fees were very obviously expenses of the mutual funds, unless the manager had agreed to pay these fees. With the introduction of the Fee Rule, the OSC did not say one way or the other whether this practice could continue; but informally gave the industry comfort that they could continue to charge expenses to the funds where the funds' constating documents and other contractual agreements permitted this. In our view, this is the only appropriate position for the OSC to take. Fund managers are bound to abide by the contractual provisions relating to the funds – and expenses are disclosed to investors in ways mandated by the CSA. The fund manager pays the participation fees, but can appropriately take the position that those fees are their costs of operating the funds – and hence can be passed onwards to the funds.

We note also that many IFMs consider charging expenses to, and allocation of expenses amongst, funds to be a "conflict of interest matter" (as defined in NI 81-107), which means that fund expenses are the subject of scrutiny by independent review committees of the various funds. There is no need for the OSC to be involved in a discussion as to which expenses are and are not suitable for charging as operating expenses to the funds.

If the OSC wished to make its position on "passing on" fees to "others" mandatory, then the Fee Rule should be amended to make the position a rule, and subject to the rule-making procedures, including an explanation as to why this "rule" is appropriate having regard to the discussion above. The statement in section 4.1 of the proposed Companion Policy is a statement of "policy" and as such it cannot be enforced by the OSC. This only serves to enhance the uncertainty of this OSC position. We strongly recommend that section 4.1 be deleted from the Companion Policy.

Thank you for considering our comments. Please contact any of us if you would like additional information or wish us to elaborate on our comments.

Yours very truly,

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