Borden Ladner Gervais LLP
Scotia Plaza, 40 King Street W
Toronto, ON, Canada M5H 3Y4
T 416.367.6000
F 416.367.6749
blg.com

Borden Ladner Gervais

February 15, 2013

DELIVERED VIA E-MAIL

British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
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

Delivered to:

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

Anne-Marie Beaudoin
Directrice du secrétariat
Autorité des marchés financiers
Tour de la Bourse, 800, square Victoria
C.P. 246, 22e étage
Montréal, Québec H4Z 1G3
consultation-en-cours@lautorite.qc.ca

Dear Sirs/Mesdames:

Re: CSA Notice and Request for Comments (the Notice) on proposed amendments to National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (NI 31-103) and Companion Policy 31-103CP *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (Companion

Policy) concerning the requirement on registered firms to provide an independent dispute resolution service - published for comment on November 15, 2012

We are pleased to provide the members of the Canadian Securities Administrators (CSA) with comments on the above-noted proposed amendments to NI 31-103 and the Companion Policy.

Our comments are those of individual lawyers in Borden Ladner Gervais LLP's Investment Management practice group and do not necessarily represent the views of BLG, other BLG lawyers or our clients.

General Comments

We completely support the *policy objectives* of the requirement for an independent dispute resolution service or mediation service (referred to in this letter as IDRS) as currently set out in section 13.16 [*dispute resolution service*] of NI 31-103; that is, to ensure that clients of dealers and advisers have access to an independent process to address complaints they may have with a registered firm. However, we have the following comments/concerns about mandating that all registrants must use one specific unregulated entity.

1. *Lack of regulatory oversight of OBSI*

We have concerns with a regulatory requirement imposed on registered firms that requires use of an unregulated entity. We acknowledge that the Ombudsman for Banking Services and Investments (OBSI) has voluntarily agreed to adhere to standards established by the Joint Forum of Financial Market Regulators, and has engaged in discussions with the CSA on how the services will be provided however, that is not the same as being subject to regulatory oversight.

Under the proposed amendments

> "a registered firm must ensure that the dispute resolution services of the Ombudsman for Banking Services and Investments are made available to the client if the Ombudsman for Banking Services and Investments <u>is willing and able to consider the complaint</u>".

This wording begs the question "under what circumstances <u>will OBSI be willing and able</u> to consider the complaint?" or "under what circumstances <u>won't OBSI be willing and able</u> to consider the complaint? How is a registered firm to know whether a client's complaint will be dealt with by OBSI, or whether the firm will be required to provide another service?

There is always the risk that the regulator's objectives of a requirement are not met or result in unintended consequences, resulting in some regulatory intervention being required. This is made much more difficult when the requirement refers to an unregulated entity. Credit rating agencies are an example of this. The CSA acknowledged that because credit ratings could have a significant impact on the industry, and ratings continued to be referred to in regulations, it was appropriate to develop a regulatory regime for them.

In the Notice, the CSA make the comment that they are considering the role they should play in overseeing OBSI with respect to its terms of reference. If the CSA proceeds with mandating one specific IDRS, then we believe that should only be done in conjunction with regulatory oversight of that service provider, and only after that regulatory oversight has been implemented in accordance with the normal rule-making process.

2. *Purpose of proposed amendments*

The CSA sets out the following as the purpose for the proposed amendments:

(i) belief that the proposed amendments are in the best interests of investors and registrants

(ii) to ensure independence and consistency in expectations and outcomes

(iii) to ensure complaints are handled to a uniform standard

(iv) to reduce investor confusion as to who to contact when complaints are not resolved by the registrant.

We do not believe that the proposed amendments are necessary to achieve these objectives given the current registration regime as contemplated by NI 31-103 (we note the results of research conducted by the CSA on this issue were not specifically identified in the Notice). Currently, section 13.16 of NI 31-103 contains the elements of independence, and a disclosure obligation to clients to reduce any confusion, but it also reduces regulatory burden by allowing dealers and advisers to offer an IDRS that they believe is appropriate for their business structure and their clients.

3. *Complaint Limit*

We note that under the proposed amendments a "complaint" that triggers the IDRS requirement has a limit of $350,000 (i.e. the monetary limit on OBSI's capacity to make a recommendation). We understand that institutional clients would most likely have various avenues of recourse readily available to them (e.g. litigation) if they have a complaint with a registered firm that exceeds $350,000 but what about a retail client who has a complaint that exceeds $350,000 (which is not unreasonable to expect from time to time)? In such a case under the proposed amendments, the retail client would be put into the same situation as most institutional clients in terms of pursuing his or her own, and likely expensive, avenues of recourse. Query whether retail clients will agree that their claim does not exceed $350,000 simply in order to come within the IDRS requirement.

4. *Proposed amendments could be expected to result in additional cost and regulatory burden*

Compliance with the proposed amendments could be expected to result in some additional costs for registrants in light of the limitations in OBSI's service – i.e OBSI has to be willing and able to consider the complaint, and will not consider claims greater than $350,000 – but without a demonstrable benefit to investors. These limitations may result

in registrants having to make available another IDRS in case OBSI is unable or unwilling to consider the complaint.

We find it very troublesome that the CSA's proposed amendments do not acknowledge the effort that many dealers and advisers have already made to put in place IDRSs. Rather than singling out one unregulated entity, we consider it would be more appropriate for the CSA to allow a dealer or adviser to provide the IDRS that is most appropriate for its business structure and its clients.

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We thank you for allowing us the opportunity to comment on the proposed amendments. Please contact any of us at the contact details provided below if the CSA members would like further elaboration of our comments. We, together with other BLG lawyers who have considered the proposed amendments, would be pleased to meet with you at your convenience.

Yours truly,

"*Prema K.R. Thiele"*	*"Rebecca Cowdery"*	*"Marsha Gerhart"*
Prema K.R. Thiele 416-367-6082	Rebecca A. Cowdery 416-367-6340	Marsha P. Gerhart 416-367-6042

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