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The Manitoba Securities Commission
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Registrar of Securities, Prince Edward Island
Nova Scotia Securities Commission
Securities Commission of Newfoundland
Securities Registrar, Government of the Northwest Territories
Registrar of Securities, Government of the Yukon Territory
Registrar of Securities, Government of Nunavut

Claude St. Pierre, Secretary
Commission des valeurs mobilières du Québec
Québec, Ontario
800 Victoria Square
Stock Exchange Tower
P.O. Box 246
22nd Floor
Montréal, Québec
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c/o John Stevenson, Secretary

Ontario Securities Commission
20 Queen Street West
Suite 800, Box 55
Toronto, Ontario
M5H 3S8

Dear Sirs/Mesdames

Re: Proposed National Instrument 81-104- Commodity Pools

In response to the request for comments set out as item 6.1 of (2000) 23 OSCB, we are submitting the following comments in respect of the draft form of National Instrument 81-104 (Commodity Pools) set forth at pages 3867 through 3874 of (2000) 23 OSCB (the "**Proposed National Instrument**") in our capacity as counsel to Friedberg Mercantile Group ("**FMG**").

Our comments (on behalf of FMG) are set out below. For convenience of reference, we have ordered our comments to correspond with the order of appearance of the applicable provisions in the Proposed National Instrument.

1. **Investment Restrictions and Practices**

- 1.1 Section 2.1 ("Concentration Restriction") of National Instrument 81-102 continues to apply to commodity pools. It is suggested that the concept of "Issuer" for the purposes of the Proposed National Instrument does not appear to work for the purposes of a commodity pool.
- 1.2 FMG believes that there should be no concentration restrictions with respect to exchange traded commodity derivatives and that there should be no concentration restrictions with respect to over-the-counter traded commodity derivatives where the issuer of the instrument has equity of \$50 million or more. The nature of commodity pools is such that investors, with the benefit of full disclosure, are aware of and expect the trading manager to make extensive use of leverage and to take significant positions in those underlying interests which the trading manager believes constitute the most advantageous investments at a particular time. Accordingly, other than restrictions in respect of taking positions with counter-parties who do not meet the capitalization threshold described above, imposing concentration restrictions would defeat the purpose of commodity pools and, in effect, undo the recognition of the reasonable expectations of investors in commodity pools which is otherwise implicit in the Proposed National Instrument.

In support of the submissions set out above in this item, enclosed is a letter from Dorsey & Whitney LLP (U.S. counsel to FMG) to the effect that no such restrictions exist under United States federal securities or commodities legislation relating to commodity pools.

- 1.3 Section 2.6 ("Investment Practices") of National Instrument 81-102 continues to apply to commodity pools, although paragraphs (a), (b), (c) and (d) are clearly inconsistent with the nature of commodity pools. Accordingly, it is suggested that Section 2.1 of the Proposed National Instrument should include paragraphs (a), (b), (c) and (d) of National Instrument 81-102 among those which do not apply to commodity pools.

2. **New Commodity Pools**

- 2.1 It is suggested that Section 3.2 (1)(b) of the Proposed National Instrument should be revised such that the \$500,000 threshold should be made inclusive of the \$50,000 investment made in accordance with Section 3.2 (1)(a).
- 2.2 It is suggested that there is no compelling reason for the requirements set forth in Section 3.2 (2) of the Proposed National Instrument and that, rather, an approach analogous to that set forth in Section 3.1 (b) of National Instrument 81-102 would be more appropriate. In

particular, there does not appear to be any basis for the proposition that promoters, sponsors or persons related to them need a different incentive to properly perform their services on a continuing basis for a commodity pool established by them than that which would apply for sponsors, promoters, or persons related to them in connection with any other mutual fund governed by National Instrument 81-102.

3. Proficiency and Supervisory Requirements

- 3.1 The phrase "located in the local jurisdiction" in Section 4.1 (2)(a) should be deleted. The phrase is not consistent with the terms of registration which apply to FMG and, we would suspect, others who (with express approval of the Canadian Securities Administrators) are registered in multiple jurisdictions, but operate solely from one location.
- 3.2 At the request of a member of OSC staff, we have asked FMG to consider whether the proficiency requirements of the Proposed National Instrument are unduly restrictive. We have been advised that management of FMG are still considering this issue and anticipate providing us with feedback in the near future. We will provide you with a follow-up letter in the event that FMG concludes that changes to the Proposed National Instrument on this issue would be desirable.

4. Termination of Agreements

- 4.1 It is suggested that Section 5.1 of the Proposed National Instrument should be deleted. In FMG's view, there is no reason to differentiate the provisions which would be appropriate for commodity pools from those which have been determined to be appropriate for other mutual funds governed by National Instrument 81-102.

5. Incentive Fees

- 5.1 FMG remains of the view that the "net new profits" incentive fee model (under which incentive fees are only paid where performance exceeds the previous performance high water mark) is the most appropriate model (both from the perspective of investors and management) and represents the industry standard in the United States. FMG is of the further view that a benchmark of 90 day Government of Canada treasury bills or U.S. Government treasury bills, while not as appropriate as a "net new profits" model, represents a satisfactory benchmark for the purposes of incentive fee compensation.

6. Prospectus Disclosure

- 6.1 It is suggested that Section 10.2 (j) is so broad as to not provide meaningful guidance to those preparing prospectuses for commodity pools. It is further suggested that standard language should be mandated given that it will apply equally to all commodity pools. We

would, of course, be pleased to work with staff in formulating this language if you feel that we could be of assistance in this regard.

7. Risk Measures and Risk of Loss of Limited Liability

7.1 In response to the additional questions for which you requested comments at (2000) 23 OSCB 3859, we (on behalf of FMG) would comment as follows:

- (a) With respect to risk measures, it is suggested that an appropriate risk measure would be a "peak-to-valley" assessment, being a measure of the sharpest negative trend in a fund's history. It is further suggested that such assessment be limited to the two years preceding the date of a prospectus, subject to a further requirement that a cautionary statement be included if there has been a sharper negative trend at any time preceding such two year period.
- (b) With respect to disclosure of the potential loss of limited liability, it is suggested that it would be sufficient to state that there are risks relating to investing in a limited partnership or trust and by further providing a cross reference to detailed disclosure in the "risk factors" section of the prospectus.

Given the "typical" risk disclosure in this regard, the requirement for its full inclusion on the cover page would risk not only over emphasizing this risk but also potentially have the practical effect of de-emphasizing other significant risks which only require short cross-reference type disclosure on the cover page.

Both we and FMG hope that the foregoing comments will be of assistance to the Canadian Securities Administrators and would be pleased to respond to any questions which you may have, whether arising as a result of the comments above or otherwise.

Yours truly

FOGLER, RUBINOFF LLP

Gary M. Litwack

GML/nrb

encl.

cc. Enrique Z. Fenig
Friedberg Mercantile Group
J.P. Bruynes

Dorsey & Whitney LLP

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