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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

Denise Brosseau, Secretary
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Commission des valeurs mobilières du Québec
Québec, Ontario
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c/o John Stevenson, Secretary
(email to: jstevenson@osc.gov.on.ca)
Ontario Securities Commission
20 Queen Street West
Suite 800, Box 55
Toronto, Ontario
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Dear Sirs/Mesdames

Re: Proposed National Instrument 81-104- Commodity Pools

In response to the request for comments set out as item 6.1.1 of (2001) 24 OSCB at 7419, we are submitting the following comments in respect of the draft form of National Instrument 81-104 (Commodity Pools) set forth at pages 7427 through 7437 of (2001) 24 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** (Part 2 of the Proposed National Instrument)

- 1.1 It is somewhat unclear to FMG as to whether the effect of subsection 2.1(1) of National Instrument 81-102 would be applied so as to restrict the underlying exposure of a commodity pool to a certain type of instrument to 10% of the aggregate positions of the pool. For example, would a commodity pool be permitted to invest solely in futures contracts for one commodity?

If the intention is that the concentration restrictions would apply to securities but not to commodities, it would, we would suggest, be helpful to so state (even if in the companion policy). If such is not the intention, then we would suggest that the Proposed National Instrument is not consistent with the intention for commodity pools.

2. **New Commodity Pools** (Part 3 of the Proposed National Instrument)

- 2.1 It is suggested that subsection 3.2(1) should be expanded slightly so as to include affiliates and associates of the persons and companies referred to in subparagraphs (i) and (ii) of such subsection. From a policy perspective, the appropriate types of persons/companies would be subject to the economic exposure and restrictions which would appear to underpin the reasons for section 3.2.

- 2.2 As a small point, the reference in section 3.3 shall be to paragraph 3.2(1)(b).

3. **Proficiency and Supervisory Requirements** (Part 4 of the Proposed National Instrument)

- 3.1 As a small point, the reference to "the local jurisdiction" in the third line of subsection 4.1(2) should be a reference to "a local jurisdiction".

4. **Calculation of Net Asset Value** (Part 7 of the Proposed National Instrument)

- 4.1 It is suggested that the words "or make available" be inserted after the word "provide" in subsection 7.3(b).

5. **Continuous Disclosure - Financial Statements** (Part 8 of the Proposed National Instrument)

- 5.1 It is not clear what is meant by the references to "total volume" in section 8.4. FMG assumes that it is the measure of the physical commodity underlying a series of

contracts, such as the total ounces of gold underlying various contracts entered into by the subject commodity pool.

- 5.2 The phrase "the significance of the maximum and minimum levels of leverage to the commodity pool" remains unclear. Is the intended requirement simply that there should be appropriate risk disclosure as the effects of leverage (i.e. the "multiplier" effect)?

6. **Prospectus Disclosure** (Part 9 of the Proposed National Instrument)

- 6.1 With respect to subsection 9.1(d) of the Proposed National Instrument:

- (a) as a narrow point, given that significant trading would always be carried out through U.S. exchanges, and given further the degree of regulation over U.S. exchanges, we would suggest that the disclosure should relate only to markets outside Canada and the U.S.
- (b) As a broader point, it is unclear why this risk factor is mandated for commodity pools but not for foreign equity funds and other conventional mutual funds which invest through foreign exchanges.

- 6.2 The language (and requirement) in subsection 9.2(o) seems unduly complicated. Would it not be simpler to simply require disclosure as to the number of units/shares of the commodity pool held by the subject persons/companies?

7. **Exemption** (Part 10 of the Proposed National Instrument)

- 7.1 We have recently encountered technical difficulties (unrelated to FMG) with respect to the ability to obtain blanket relief on behalf of service providers to mutual funds governed by National Instrument 81-102, because in certain respects such Instrument only imposes restrictions and requirements on the mutual funds themselves rather than service providers. Accordingly, staff of certain CSA participants have had to go to significant lengths to obtain results akin to blanket relief in deserving circumstances.

Accordingly, we would suggest that the Proposed National Instrument should expressly permit the granting of exemptions (including on a "blanket" basis) to persons or companies which may be, in effect, subject to the requirements of the Proposed National Instrument as a result of providing, or seeking to provide, services to a commodity pool which is subject to the Proposed National Instrument.

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/hp

encl.

cc. Enrique Z. Fenig
Friedberg Mercantile Group