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July 28, 2004

BY ELECTRONIC MAIL

Mr. John Stevenson, Secretary
Ontario Securities Commission
20 Queen Street West
19th Floor, Box 55
Toronto, Ontario
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- and -

Anne-Marie Beaudoin
Directrice du secretariat
Autorité des marchés financiers
800 Victoria Square, Stock Exchange Tower
P.O. Box 246, 22nd Floor
Montreal, Quebec
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Dear Sirs/Mesdames:

Re: ***Proposed National Instrument 81-106 Investment Fund Continuous Disclosure and proposed related amendments to national and local instruments —Comments of Borden Ladner Gervais LLP***

We are pleased to provide our comments to the members of the Canadian securities administrators (CSA) on proposed National Instrument 81-106 *Investment Fund Continuous Disclosure* and its accompanying Form and Companion Policy (collectively, NI 81-106). **We are also commenting on the proposed amendments to existing national instruments published by the CSA at the same time as NI 81-106. These latter comments are noted at the end of this letter and we ask that this letter be considered as a comment letter on each of those proposed amendments.**

Our comments on NI 81-106 and related amending instruments have been compiled with input from many of the lawyers in our Investment Management Practice Group and therefore reflect our collective views. Our comments do not necessarily reflect the opinions of, or feedback from, our investment management clients. We expect that many of our clients will express their views directly to the CSA.

In our view, the CSA will achieve three important objectives by finalizing NI 81-106, all of which we support.

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1. All public investment funds—not just public mutual funds—will be subject to national uniform rules providing for a continuous disclosure regime that has been tailored to investment funds.

2. Existing rules that apply only to mutual funds will be updated to reflect current industry practices and broadened to apply to other investment funds, as appropriate.

3. Investors will have access to information about the ongoing operations of their investment funds that, in addition to being tailored to investment funds, is prepared in a format that invites comparisons and a better understanding of those ongoing operations.

Overall we believe the current draft of NI 81-106 will largely achieve these goals; however, we recommend that NI 81-106 not be adopted, without the CSA making some important changes as we outline in this letter. We have commented primarily on matters that we believe, from a practical or technical perspective, need revision in order to achieve the CSA's overall objectives. Our comments range from "big picture" issues to smaller technical or practical points.

General Comments on NI 81-106

1. ***Anticipated timing for NI 81-106 is unrealistic and unnecessarily ambitious.*** The CSA intends for NI 81-106 to come into force by December 31, 2004 and also that it apply to the annual financial statements prepared by investment funds for financial years ending ***on*** and after December 31, 2004 and to the interim financial statements for financial periods ending after December 31, 2004. Notwithstanding the special transitional timing proposed for the first financial statements filed under NI 81-106, we see significant implementation issues for investment funds if NI 81-106 applies to financial statements for periods ending December 31, 2004 and during the first part of 2005. We expect that the planning horizons of most investment funds with December 31 year-ends are such that significant changes cannot easily be accommodated at this late stage. The CSA's current timing would also mean that fund managers must deal with new disclosure rules in the middle of RSP season, which is traditionally a very busy time of year for the fund industry.

   This version of NI 81-106 contains significant and extensive revisions to the previous draft of the NI 81-106 published for comment in September 2002. We view the shorter 60-day second comment period with a deadline for comments in the middle of the summer, as too limited to allow for meaningful and thoughtful comment from industry participants. The CSA and individual members of the CSA have also asked for comment on other instruments or proposals that may affect investment fund industry participants, all with comment periods ending during this summer period. This may mean that NI 81-106, if it is finalized on the CSA's current schedule, will require amendments once finalized, so that glitches and unintended consequences (which may be significant) can be corrected once industry participants have had a better opportunity to understand the full impact of the rules. This will obviously result in increased costs that must be absorbed by

investment funds and their investors and managers, which we submit is not in the public interest.

We urge the CSA to amend NI 81-106, given the timing of its second publication and the planning horizons of most investment funds, so that it will only take effect for financial years that begin on or after October 1, 2005, at the earliest. All investment funds should be given this minimum window so that they can make the systems and internal procedural changes needed to be able to comply with the new disclosure, reporting and securityholder notification requirements.

We also note that NI 81-106 needs clarification about when certain other requirements take effect. We note where clarifications are needed in our specific comments on NI 81-106 below.

We know that many of our clients are concerned about the shortened deadlines for filing annual and semi-annual financial statements and also the new disclosure documents. We are not clear why the CSA are proposing shorter time frames, other than to conform to changes made to the continuous disclosure regime for other reporting issuers. We submit that, in this instance, given the sheer number of funds and attendant continuous disclosure documents to be completed by fund managers, it would be appropriate for the investment funds regime to be different from that for other reporting issuers. We see no clear policy rationale for the shorter time frames for investment funds' continuous disclosure documents.

2. ***CSA should take the opportunity to revoke or rescind outdated regulation of investment funds.*** Given NI 81-106 and its inclusive application to all investment funds, we recommend that the CSA take this opportunity to revoke or rescind remaining outdated regulation of investment funds, at the very least to the extent that this outdated regulation concerns continuous disclosure matters. We recommend that the following policies of the CSA or the OSC be revoked and rescinded when NI 81-106 comes into force:

- National Policy Statement No. 29 [Mortgage Mutual Funds]
- National Policy Statement No. 15 [Scholarship Plans]
- OSC Policy Statements No. 5.3 [Real Estate Funds] and 5.4 [Closed-end Funds].

These policy statements have been on the "books" for years, without amendment, and without any real application by the CSA, given their outdated nature. Since NI 81-106 deals with the continuous disclosure regime for all of the above-noted categories of investment fund, we submit that the CSA could clean up the outdated regulation by revoking it all, without reducing protection for investors in these funds.

3. Question the utility of the Final Report of COMPAS Inc. published with NI 81-106. We question the usefulness of the Final Report of COMPAS Inc. published with NI 81-106 in late May. Although we believe that the CSA's actions in

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commissioning this report are commendable, we wonder whether the survey participants understood what the interviewers considered to fall within the category of "mutual fund reports". The Final Report does not discuss the meaning of this phrase, other than to note that survey participants were told not to consider "their personal statement of account" that they received. Does COMPAS Inc. consider that survey participants understood that the phrase "mutual fund reports" meant *only* the annual and semi annual *financial statements* of the mutual funds they own? As you know, mutual fund investors receive other informative documents or "reports" throughout the year. Many fund managers send investors fund updates, prospectuses, information sheets about investing and about their mutual funds, among other reports. Would survey participants hearing the phrase "mutual fund reports" be thinking ONLY of financial statements? Or would they be thinking generally about all of the information that they receive from fund managers? Unless the interviewer clarified all questions with this explanation, we consider it highly possible that the latter would be the case. As such, we question whether it is appropriate for the CSA to rely heavily on the conclusions in the Final Report.

Specific Comments on NI 81-106

Part 1 Definitions and Application

1.1 Definitions

Although we comment on other individual definitions in the sections where they are primarily used, we have the following comments on definitions.

- Why does NI 81-106 define "manager", given section 1.3(2) and the definition of "manager" contained in NI 81-102? Why are the definitions different? We recommend the definition in NI 81-106 be deleted.

- NI 81-106 contains ambiguous definitions that may or may not (depending on the CSA's intentions) change industry practice. For example, why does NI 81-106 define "management fees", when this is a commonly used and easily understood term? The terms "management fees" or "management fee" are used elsewhere in securities regulation [NI 81-101 and NI 81-102], without definition. Does the CSA intend for the term defined in NI 81-106 to mean something else, other than the percentage fee charged by a fund manager to a mutual fund, which is generally a specified percentage of the assets of the fund? The additional phrase after the comma "but excluding audit fees, directors fees, custodial fees and legal fees" adds significant confusion and ambiguity, since one would not normally consider these fund expenses to be "management fees". We recommend this definition be deleted.

- Notwithstanding the explanation contained in section 1.3 of the Companion Policy to NI 81-106, we do not understand why the CSA has defined "material change" and also defined this term in NI 81-102 (which refers back to NI 81-106). In Ontario, this term is defined in the Securities Act and we submit that, in Ontario, the definition contained in the Securities Act will govern. We

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recommend a more complete explanation for this definition be provided in the Companion Policy and also in NI 81-102.

- NI 81-106 contains complex definitions of commonly understood terms. For example, why does NI 81-106 provide definitions of "education savings plan", "group scholarship plan" and "scholarship award"? The definitions themselves are not clear, for example what is the difference between "educational assistance payments" (not defined) and a "scholarship award"? In addition, the definitions are not used consistently throughout NI 81-106 (for example, see our comments on section 3.12). We recommend deleting the definitions.

- The definition "mutual fund in the jurisdiction" does not appear to be used other than in subsection 1.2(1)(b). NI 81-106 generally uses the term "mutual fund that is not a reporting issuer". If the applicable CSA members do not take our comments below concerning the application of NI 81-106 to pooled funds, we recommend that this definition be deleted and subsection 1.2(1)(b) refer to a mutual fund that is not a reporting issuer, if it has been organized under the laws of the local jurisdiction. Please see our comments below on subsection 1.2(1)(b).

- NI 81-106 provides two definitions of an identical term "non-redeemable investment fund"; one to be used in all provinces and territories, other than Ontario and one to be used in Ontario. We believe that having two definitions of an identical term is practically unworkable. We strongly encourage the CSA to agree on one definition and to clearly define the scope of that definition. **Please note that this comment also extends to the proposed amendment to National Instrument 51-102 published for comment on May 28, 2004 and we ask that this letter be considered a comment on that proposed amendment.** We note that the definition presently contained in NI 51-102 has a broad scope, which gives rise to the need for the CSA to clarify the scope of the definition in the Companion Policy of NI 51-102. A narrower definition would not sweep in reporting issuers that should report on their ongoing operations according to rules for "corporate finance" operating companies.

1.2 Application

Application of NI 81-106 to non-redeemable investment funds. As drafted, NI 81-106 would apply to publicly offered investment funds (other than the provincial labour sponsored funds identified in this section). We support this approach, provided that one definition of non-redeemable investment fund is used and further clarity on the extent of this definition is given. In this regard, we believe that the CSA should explicitly include limited partnerships established to provide the financing for deferred sales of mutual funds within the continuous disclosure regime for investment funds established by NI 81-106. We believe that these vehicles fall within both definitions of non-redeemable investment funds and therefore within the ambit of NI 81-106. However, given the discussion in NI 51-102CP, we recommend that the Companion Policy to NI 81-106 explicitly recognize this to provide further clarity to these reporting issuers.

We note that in this publication, the CSA does not address its earlier recommendations as part of the Joint Forum of Financial Market Regulators that the regulation of segregated

funds be harmonized with that of mutual funds. With the adoption of NI 81-106, the regulation of segregated funds will be further out of step with the regulation of mutual funds. We urge the CSA to continue its harmonization efforts in this area so as to ensure that one investment product (mutual funds) is not subject to a greater regulatory burden than a similar investment product (segregated funds).

Application of NI 81-106 to pooled funds. We recognize that the rules that will apply to pooled funds are largely similar to the current requirements in Ontario and other jurisdictions. However, we believe that having different regimes across Canada, both for continuous disclosure and distribution exemptions, is in fact a step backwards from the stated harmonization goal of the CSA. As we point out in our comments on Part 15, NI 81-106 introduces a significant new burden for pooled funds (at least in provinces other than BC, Alberta, Manitoba and Newfoundland and Labrador) in that pooled funds will now have to calculate MERs in ways that may be different from current practice.

We recommend that the CSA reconsider the application of NI 81-106 to pooled funds or "mutual funds that are not reporting issuers, but have been organized in the local jurisdiction". Given the complete exemption granted to pooled funds in British Columbia, Alberta, Manitoba and Newfoundland and Labrador, we believe NI 81-106 would allow a pooled fund to be organized under the laws of Alberta (or one of the other 3 provinces), but distributed in Ontario (or one of the other 7 provinces or 3 territories) under applicable exemptions. In this way, the pooled fund would completely avoid the application of NI 81-106. Since NI 81-106 could be so easily avoided and also given that portfolio managers generally do prepare and send the financial statements NI 81-106 would mandate, we recommend that the members of the CSA reconsider whether pooled funds should be included in NI 81-106.

In our view, NI 81-106 is an appropriate rule (subject to our comments) for reporting issuers. The current draft of NI 81-106 attempts to apply the regime to pooled funds, but then exempts them from nearly every section, on a section-by-section basis. We believe a better approach would be to continue to consider how the CSA wishes to regulate pooled funds, if at all, in a manner similar to that suggested by the OSC in November 2001 when it made OSC Rule 45-501. In this way, the regulatory scheme for pooled funds can be reviewed in a complete and holistic manner in the proper investment management context.

As an interim measure, if the applicable members of the CSA continue to believe that NI 81-106 should apply to pooled funds in the applicable jurisdictions, we urge those members to redraft NI 81-106 so that the rules that apply to pooled funds are found in one location of the NI so as to simplify compliance and assist understanding in how NI 81-106 applies to these investment funds.

Part 2 Financial Statements

2.9 Change in Year End

NI 81-106 is intended to be a complete rule-book for all continuous disclosure obligations that apply to investment funds. We note that having to refer back to another instrument [in this section, NI 51-102] detracts significantly from this objective and is

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potentially confusing. We recommend that NI 81-106 restate the rules applicable to investment funds, which would allow the CSA, and the users of the instrument, to consider the full context in which the section and terminology is used. In respect of section 2.9 (changes in year-end), we submit that repeating section 4.8 of NI 51-102 in NI 81-106 would not add any substantive length to NI 81-106 and would clarify the rules that apply to investment funds and make NI 81-106 significantly more user-friendly.

2.10 Change in Legal Structure

This section would appear to supercede or build on subsection 5.8(2) of NI 81-102. We recommend that subsection 5.8(2) of NI 81-102 be deleted to simplify compliance and the scenario of an investment fund termination be added to section 2.10 of NI 81-106. We also recommend that the drafting of this section regarding mergers be conformed with the language used in Part 5 of NI 81-102.

We also believe the deadline for filing the notice anticipated by section 2.10 needs clarification. For example, if an investment fund ceases to be a reporting issuer or terminates, then what filing is required under NI 81-106 "following the transaction"? We recommend that the filing deadline be simplified to merely require this notice filing within 30 days of the transaction (consistent with subsection 5.8(2) of NI 81-102).

We also note that not all of the listed disclosure items (e) to (j) would apply to all the types of transactions contemplated. This should be reflected in the drafting. For example, if an investment fund merged with another fund and terminated, then the first investment fund (the terminating fund) would not have a "first financial year end subsequent to the transaction" as contemplated in (i).

Please clarify whether this notice must be filed on SEDAR.

2.11 Exemption and Requirements for Mutual Funds that are Non-Reporting Issuers

If the applicable CSA members do not take our comments about the application of NI 81-106 to pooled funds (see above comments on section 1.2), we believe section 2.11 needs amendment in two ways.

1. Paragraph (a) speaks of the mutual fund "preparing the applicable financial statements in accordance with this instrument". We believe this section should require these statements to be prepared within the applicable 90 day and 45 day deadlines (since the deadlines are otherwise provided for in section 2.1, from which pooled funds are exempt).

2. Paragraph (c) would require a pooled fund to "advise" the regulator that it is relying on this exemption. This paragraph should be revised to clarify that this advice can be provided in a one-time notice to the regulator given, for example, once NI 81-106 comes into force. Given the reference to "a financial year" and "an interim period", without this clarity, a pooled fund may consider that it must "advise" the regulator annually and semi-annually. This would not be a practical regulation and would significantly increase the regulatory burden on pooled

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funds. Please also clarify whether this notice must be given in writing and filed on SEDAR.

Part 3 Financial Disclosure Requirements

3.1 Statement of Net Assets

The drafting uses the words "securities", "investments", "portfolio assets" in ways that are confusing. A reader needs to understand the context for these words, because they appear to be sometimes used interchangeably and at other times to mean different things. We recommend that the word "portfolio asset" be used when referring to the investments of the fund (that is, use the term defined in NI 81-102) and the word "securities" be used to signify the securities issued by the fund, provided that word is appropriately modified, as is done in NI 81-102. In this way the word "investments" can be dropped. Our comments on section 3.1 also apply to section 3.2 (although the drafting appears to be more precise in section 3.2).

3.2 Statement of Operations

Given the application of NI 81-106 to all investment funds, we wonder why subsection 3.2(2) singles out commodity pools (being a specialized mutual fund regulated under MI 81-104). It would appear that other investment funds may have similar strategies to commodity pools and therefore investors would benefit from receiving this additional disclosure.

3.5 Statement of Investment Portfolio

This section uses the words "derivatives" and "specified derivatives" seemingly interchangeably. As you know, "specified derivative" is a defined term in NI 81-102, while "derivative" is defined in securities regulation in some provinces. We recommend the term defined in NI 81-102 be used consistently, where appropriate.

3.6 Notes to Financial Statements

We have two comments on the provisions of section 3.6.

(a) It is unclear from paragraph (1)4 what information must be included in the notes to the financial statements in respect of soft dollar arrangements. The term 'soft dollars' is not defined nor is the term addressed or explained in the Companion Policy. In addition, it is unclear whether only a description of the soft dollar arrangement is required or whether the notes must disclose an amount of commission that is "paid" in respect of soft dollar arrangements and, if the latter applies, how this amount is to be calculated.

(b) Paragraph (1)5 appears to require a breakdown of fees and services that are paid out of the management fee, but we believe this requirement is unclear. We have already commented on the definition of "management fee". We believe that an illustrative example of how this will work and be

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presented in the financial statements should be included in the Companion Policy, so that it may be complied with in the manner contemplated by the CSA.

Section 3.11 Incentive Arrangements

It is unclear why section 3.11 is necessary. In our view, the items listed should be added to the lists of items to be included on the statement of net assets and the statement of operations. We also note that performance and incentive fees are a line item already on the statement of operations and that if there is to be another line item relating to this subject it should be clear what the difference is in respect of these two items.

We also wonder if industry participants will understand what is meant by the phrase "current value of an incentive arrangement or compensation". As you know, NI 81-102 regulates "incentive fees" or "fees that are determined by the performance of the mutual fund". Does section 3.11 mean something else?

Section 3.12 Group Scholarship Plans

If the CSA retains the defined terms relating to group scholarship plans, NI 81-106 should use them consistently. In subparagraph 3.12(a)(i), the term "scholarship agreements" is used. This term is not defined – does this mean something different than education savings plan, which is also defined as an agreement for payment of scholarship awards? Similarly, in subparagraph 3.12(a)(i)(C) the term "scholarship plan" is used and not defined. Is this meant to be something different than the defined term of group scholarship plan?

In subparagraph 3.12(a)(iii), a statement of scholarship awards paid to beneficiaries must be disclosed. Does this mean a cumulative statement or a statement for the applicable year only? This should be made clear.

Subsection 3.12(b) is a new requirement. Again, the term "plan" is used, does this mean something different than an education savings plan, a group scholarship plan, or a scholarship agreement? What purpose does this disclosure serve? Is this a statement just for the applicable year or over the entire life of the "plan"? What type of "description" is the CSA looking for? What further information is required if the group scholarship plan must already reconcile scholarship awards paid to beneficiaries with its statement of operations?

Part 4 Management Reports of Fund Performance and Form 81-106FI

Certain of the required disclosure in Form 81-106F1 is repetitive and should be deleted, given the intended purpose of these reports. Form 81-106F1 states that the management reports of fund performance are intended to supplement the financial statements of an investment fund. We also understand that the management reports are intended to supplement, not duplicate, the information in a fund's prospectus and annual information form. In addition, we understand that the regulators intend that the text of a management report will be only a few pages in length.

On this basis, we suggest that certain items of required disclosure may be unnecessary. Specifically, we suggest that a summary of the investment objective and strategies of a fund is unnecessary and potentially misleading. We submit that an investor in a fund already knows the investment objectives of that fund. Furthermore, to ask a fund to summarize its investment objectives and strategies could result in inaccuracies or misleading disclosure. We suggest that a fund should either replicate its entire investment objective and strategies from the prospectus or else it should not be required to disclose them. On the understanding that the management report of fund performance is to be a short document, we recommend that you delete these items of disclosure from the requirements of Form 81-106F1.

Please confirm that if an investment fund did not experience a material change or a significant change (both terms are used in Item 2.2, however, since the defined term "significant change" has been deleted from NI 81-102 and is not used in NI 81-106, we recommend this term be deleted from Form 81-106F1) during a year, no disclosure would be necessary under Item 2.2.

We recommend that the discussion under item 2.3(1)(f) be amended to clearly indicate that the obligation to disclose "details of transactions involving related parties to the investment fund" is meant to capture transactions involving the portfolio assets of a fund and is not meant to capture ownership of fund securities by a related party. We suggest that the definition of "related party" in section 1.1 of NI 81-106 is confusing in that it refers to the list of related parties contained in section 4.2 of NI 81-102. While the context of section 4.2 of NI 81-102 makes it clear that this section is intended to refer to the portfolio assets of a fund, NI 81-106 does not have a similar context. We believe that it would be better if NI 81-106 defined the term "related party" in section 1.1 and then clarified in item 2.3(1)(f) of Form 81-106F1 that the disclosure is in relation to transactions from or to the portfolio of the fund.

In the Summary of Comments, the CSA states that "we have made the provision of forward-looking information optional to the fund". Item 2.5 does not appear to be optional. We suggest the CSA explain the optional nature of this disclosure in the instructions, if indeed disclosure under this Item is optional.

Item 4.4 provides for special instructions regarding performance for group scholarship plans. In our view, the anticipated disclosure for a group scholarship plan is not relevant nor will it result in useful disclosure for participants in a group scholarship plan. In particular, the required disclosure on the best and worst total return for any six month period would appear to be meaningless information for a scholarship plan participant. As you know, beneficiaries in a group scholarship plan generally receive the principal invested and interest on deposits upon becoming eligible. On any early termination of an agreement, only the principal is returned. We urge the CSA to reconsider the application of these disclosure requirements to scholarship plans, or explain their importance.

Items 3 and 4 of Part C of Form 81-106F1 (Content requirements for interim management report of fund performance) suggest that the financial highlights tables and the past performance charts provided in the annual management reports are to be repeated in the interim reports, with an additional column with the interim results. Please confirm this understanding is correct or clarify the drafting. We believe industry participants

would benefit in understanding why this information is to be repeated (if we are correct in our understanding); it would appear to be unnecessarily duplicative information.

Part 5 Delivery of Financial Statements and Management Reports of Fund Performance

Although we understand the goal of the CSA regarding delivery of disclosure documents and notifications to securityholders, we believe that the details of Part 5 to NI 81-106 need to be re-examined.

We are particularly concerned about the apparent obligation on investment funds and their managers to contact "beneficial owners" of securities (beneficial owners are otherwise contacted through the operation of NI 54-101). The term "beneficial owner" is not defined and could give rise to confusion, particularly since NI 81-106 exempts an investment fund from the provisions of NI 54-101 with respect to continuous disclosure if it complies with the provisions of NI 81-106.

In our comments below on Part 18, we refer to section 10.2 of the Companion Policy to NI 81-102, which explains the use of the term "securityholders" in NI 81-102. By using the term "registered holders" do you mean the term as used in NI 54-101 or the term "securityholder" as used in NI 81-102 and explained in section 10.2 of the Companion Policy to NI 81-102 or something else? We also note that the term "securityholder" is used occasionally in Part 5 (for example in subsection 5.2(6)) when both beneficial owners and registered holders are discussed. We note that NI 54-101 defines "beneficial owners" appropriately, in contrast to registered holders or "securityholders". We believe, at a minimum, that the definitions should be clarified.

We assume that NI 81-106 is intended to require investment funds to identify and communicate as described in Part 5 with beneficial owners as well as registered holders. While some traditional mutual funds do have information concerning beneficial owners, the information is often not complete. Further, other types of investment funds do not have access to beneficial owner information which is in the possession of a registered securityholder, generally a dealer. NI 81-106 must either provide a method for investment funds to obtain the required information or not ask the investment funds to do something they are unable to do.

We also believe that users of NI 81-106 would benefit from a clear explanation in the Companion Policy as to the rationale of the CSA in establishing the three different procedures in Part 5, distinguishing between them and setting out the expectations of the CSA.

5.1 Delivery of Certain Continuous Disclosure Documents

Subsection (1) requires an investment fund (which would include a pooled fund) to send the listed documents to registered holders and beneficial owners. Subsection 5.4(1) provides a deadline for sending these documents to registered holders or beneficial owners. We believe that the language should be the same in each case so that the interpretation is consistent.

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As mentioned above, most investment funds do not have access to complete information about the beneficial holders of their securities. Those investment funds whose securities are held and traded in the same way as equity securities should be able to rely on the processes set forth in NI 54-101 for requests for beneficial ownership information. For other investment funds, such as traditional mutual funds, the processes in NI 54-101 do not fit as easily. Securities issued by these funds are not held through CDS. Often, the mutual fund has beneficial ownership information but it may be out of date. Many of the mutual fund dealers who sell mutual fund securities operate on a paper order basis and not in a nominee name environment, with the result that they are not accustomed to the NI 54-101 beneficial owner request processes. In order to avoid duplicate mailings and to maximize the accuracy of mutual fund mailings, there should be a method by which the mutual fund can obtain updated accurate information for its mailings as well as accommodate those beneficial owners who do hold through nominee name accounts. A more in depth look at the various beneficial ownership scenarios would permit a more flexible and useful process for mailings to beneficial owners by various investment funds.

Subsection (2) gives an investment fund an exemption from subsection (1) if they follow one of two procedures—the standing instruction route or the annual instruction procedure. Subsection (3) further restricts subsection (2) by stating that an investment fund can only use the annual instruction procedure, if "it is impracticable" to send the documents via the standing instruction route. We do not understand nor do we see any necessity for this provision, which we note is not explained in the materials accompanying NI 81-106 or the Companion Policy. When would it be considered "impracticable" to use the standing instruction procedures? It seems that an investor would be well served by either method and investment funds should be able to choose which to use.

5.2 Sending According to Standing Instructions

We have several comments on this section:

(a) In several places the phrase "deemed to have been received" is used in the context of standing instructions. Is this intended to incorporate the deemed responses from investors referred to in subsection (5)3 and subsection (6)? If so, this should be clarified.

(b) Subsection (2) requires documents to be sent according to the standing instructions, but does not articulate a deadline. Is subsection 5.4(1) intended to apply? If so, this should be clarified.

(c) Subsection (3) refers to an infinite universe of registered holders and beneficial owners "each person or company that was a registered holder or beneficial owner of securities issued by it before this Instrument came into force". This should be amended to describe a holder or owner of securities on a date after NI 81-106 comes into force that is chosen by the investment fund as a record date for holders who will receive the mailing contemplated by the subsection.

(d) Is subsection (3) intended to be mandatory for all investment funds, including those investment funds that have concluded that the standing instruction procedures are impracticable and who wish to use the annual instruction route or wish to send all documents out? This needs to be clarified.

(e) Please see our comments below on section 18.5 in connection with subsection (3).

(f) Please clarify how the CSA expects an "investment fund" to comply with subsection (4), given the broad scope of this requirement. Is this requirement mandatory for all investment funds? Please see our comment in (d) above. Also, the investment fund will have the same difficulty determining who becomes a beneficial owner as it may have in determining who its beneficial owners are at any time, as discussed in our submissions above. The dealer may not provide the investment fund with the identity of the beneficial owner, making compliance with the provision by the investment fund impossible to that extent.

(g) Please clarify the meaning of paragraph 2 of subsection (5). How will these instructions be received?

(h) How can instructions received in connection with another investment fund be deemed to be instructions received about a second investment fund, even one under common management. Please clarify the expectations for paragraph 4 of subsection (5).

(i) What is intended with the words "despite subsection (5)" in subsection (6), given that subsection (5) refers to subsection (6)? Isn't "no response" a deemed response? Shouldn't a document outlining the effect of a negative response be required to set an appropriate reasonable deadline for responses?

(j) How can a securityholder change a "deemed instruction" as contemplated in (7) and (8)?

(k) Subsection (9) does not appear to be workable in practice. This requires an investment fund to send "at least annually" a reminder saying that the investment fund is sending documents to the investor in response to instructions (or deemed instructions) [this does not contemplate that the investment fund is NOT sending any documents due to standing instructions] "and" explains how the investor can change the instructions.

5.3 Sending according to Annual Instructions

We understand the essential difference in practice between the procedures set out in section 5.2 and 5.3, given that in both cases annual notices are required, to be that in section 5.3, the investment fund must ask for (and presumably receive) specific instructions. But section 5.3 does not establish the responsibilities for the investment

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fund if the securityholder does not send back any response, although we note that subsection 2.6(2) of the Companion Policy indicates that materials do not need to be sent to a securityholder who does not return the form. We believe NI 81-106 must provide for this result by rule. Fundamentally, we do not understand why the CSA has made a distinction between these procedures. Further it is not clear why NI 81-106 sets forth precise delivery requirements for an annual instruction, but not for standing instructions. Clear requirements are needed in both cases.

Part 6 Quarterly Portfolio Disclosure

We have two overall comments on the provisions under Part 6.

1. We believe that readers of NI 81-106 would benefit from an explanation by the CSA of the policy rationale for requiring this quarterly portfolio disclosure given that:

   (a) the quarterly disclosure does not form part of the fund's disclosure record, as it is not incorporated by reference into the prospectus of the fund nor is it even mentioned in the prospectus and the statements are not filed on SEDAR (note that we are not recommending that the CSA change this approach)

   (b) investment funds will provide complete statements of investment portfolio on an annual and semi-annual basis with their financial statements

   (c) a risk exists that sophisticated investors will use more frequent summaries of investment portfolio to "shadow" the actions of a portfolio manager, thereby effectively profiting from the expertise and skills of the portfolio manager, at the expense of the funds and

   (d) it is not clear whether or not other investors would even know about these statements to ask for them or view them on applicable websites.

2. Why is an investment fund required to determine its NAV at the end of the applicable quarters? What is an investment fund expected to do with this information—no disclosure requirement appears to be provided for in NI 81-106? What is intended by this requirement, given section 14.2 of NI 81-106 which requires an investment fund to calculate net asset value on a daily or weekly basis, as specified?

Unless there is a regulatory purpose for the requirements contained in Part 6 that has been demonstrated to justify the costs of complying with them, we recommend that Part 6 be deleted.

Part 7 Financial Disclosure – General

7.3 Toll-free Telephone Number or Collect Telephone Calls

We recommend that a fund manager be permitted to comply with the intent of this section by disclosing an email address where investors can send requests for additional information.

7.4 Binding of Financial Statements and Management Reports of Fund Performance

We do not agree with the prohibition on binding financial statements or management reports into a single bound document, if a fund manager believes to do this would be most efficient and cost-effective for the funds. Separating the statements could significantly increase costs to the funds. Practically, we do not see why these types of reports cannot be bound together much like the Part B sections in a prospectus. At the very least a fund should have the option of being able to bind the reports together or separately depending upon the cost effectiveness of each and the needs of its investors.

Part 8 Independent Valuations for Labour Sponsored or Venture Capital Funds

We are concerned about the potential additional costs for LSIFs in complying with the new independent valuation report requirements. It is our belief that the costs of such valuations are significant and perhaps prohibitive. We believe that investors in LSIFs, given that they have been in the marketplace for over ten years understand that their investments will be valued in a manner different from an investment in a mutual fund which invests predominantly in public market securities. The requirement that LSIFs provide independent valuations of the investment portfolio as a whole is inconsistent with the practices of the private equity investment industry and would mean that the expenses applicable to investments in LSIFs will be unnecessarily higher. This latter point is especially problematic given that the management expense ratios of LSIFs are by necessity and in fact quite high already in relation to other investment funds. To add to the costs of LSIFs could threaten their viability. In addition, the proposed valuations will require the cooperation of the private companies in which LSIFs invest and in circumstances where private companies have multiple shareholders which are LSIFs (which may have different financial year ends) the private companies themselves may be detrimentally affected by the time and effort required to assist with the valuations.

In addition, we understand that some audit firms may be unable or unwilling to act as the independent valuator due to issues of independence and liability.

Part 9 Annual Information Form

Section 9.2 Requirement to File an Annual Information Form

It is not obvious to us why an investment fund that is a corporation [that is, an investment fund that is “required by corporate law to hold an annual meeting of its securityholders”] is exempt from the requirement to file an AIF under NI 81-106. We assume (without necessarily agreeing) that this exemption is provided for since the applicable information

circular prepared by the investment fund in respect of that annual meeting would contain information about that fund that the CSA considers important and supplementary to the other continuous disclosure documents. In addition, by holding an annual meeting, the investment fund will give all investors an opportunity to attend the meeting and discuss relevant matters with management. We believe some clarity about this exemption would be useful in the Companion Policy to NI 81-106.

Section 9.3 Filing Deadlines for an Annual Information Form

An investment fund that is a trust [that is, one that does not fall under the exemption contained in paragraph (b) of section 9.2] would be required to file an AIF under section 9.2 as soon as its prospectus lapses according to law [one year after the applicable filing date of the most current prospectus] if no new prospectus is filed. We believe that section 9.3 must contain a realistic deadline for preparing and filing an AIF for the period that follows the lapse date of the most current prospectus. We believe that section 9.3 will work for investment funds that have not had a current prospectus for some time, but we see difficulties in complying with this deadline for the first period that follows the lapse date of a current prospectus.

An example will illustrate our concern with section 9.3. Assume the lapse date of an investment fund's most current prospectus is April 30, 2004. As of May 1, 2004, the investment fund must file an AIF pursuant to section 9.2 [because it does not have a current prospectus]. Assume also that the investment fund's most recently completed financial year is December 31, 2003. Without amendment, section 9.3 would appear to require the investment fund to have filed an AIF by March 31, 2004. This result does not appear to have been contemplated by the CSA and we believe it is obviously not realistic. We suggest that an investment fund in the scenario described above should be permitted to wait until its next financial year-end to prepare an AIF and be given 90 days from that financial year-end to file . Given the new continuous disclosure regime applicable to all investment funds, we believe that this delay would not be inappropriate.

Section 9.4 Preparation of Annual Information Form

1. The drafting of section 9.4 would appear to require that each applicable investment fund covered by section 9.2, prepare and file an AIF that contains disclosure only about its operations. However, we note the explanation in the Summary of Comments that "The Rule has been amended to remove the restriction preventing AIFs from being consolidated, combined or bound together". We do not believe section 9.4 permits this, particularly when subsection 9.4(2)(a) removes the general instructions of Form 81-101F2 dealing with multiple AIFs. We urge the CSA to clarify this and explain why this result is intended, if we are correct in our understanding. We note that under NI 81-101, a group of mutual funds under common management can prepare an AIF that contains disclosure about all of the mutual funds within that group. We recommend that NI 81-106 continue to permit this result. We see no regulatory purpose in requiring each fund that is under common management to prepare a separate AIF, as opposed to requiring each fund to be covered under an AIF document that covers multiple funds. This comment is particularly relevant given the disclosure that is to be included in an AIF (as proposed by subsection 9.4(2));

in our view, the AIFs for several investment funds under common management will be virtually identical. The CSA recognized this when finalizing NI 81-101 and mandating the AIF requirements for public mutual funds.

2. In our view, the requirement to prepare an AIF using portions of Form 81-101F2, will result in a somewhat unhelpful and uninformative continuous disclosure document. NI 81-101 divides the mandated disclosure about a mutual fund between a simplified prospectus and an AIF. Using only Form 81-101F2 will give only half the picture about an investment fund. We have not found any explanation of why the CSA chose to take this route, rather than using both Form 81-101F1 and Form 81-101F2 to create a more meaningful AIF form for non distributing investment funds.

Part 10 Proxy Voting Disclosure for Securities Held

10.1 Application

The requirement that investment funds maintain a proxy voting record and deliver such record to securityholders on request may be inappropriate for LSIFs and other venture capital funds which hold securities of private issuers. While LSIFs and other venture capital funds will frequently sign shareholder resolutions in lieu of meetings; in some circumstances they may be provided proxy materials. To the extent that the proxy voting record is intended to supplement the otherwise publicly available information regarding corporate actions of issuers held by investment funds this record would not be appropriate to apply to corporate actions of private issuers for which no information may be publicly available. In our view, sections 10.3 and 10.4 relating to the proxy voting record should apply only to proxy materials relating to meetings of securityholders of reporting issuers, rather than all issuers.

10.2 Requirement to Establish Policies and Procedures

Subsection (1) speaks of policies and procedures to be followed by the "investment fund" ["it"] in determining whether and how to vote proxies. We recommend this requirement be modified to require the fund manager to establish the policies and procedures which will be followed either by the fund manager or a portfolio adviser (if a third party manages the fund) to reflect the situation in practice. Each investment fund will not have its own policies and procedures; rather, the manager of the fund will have policies and procedures that would apply to all the investment funds it manages. The policies and procedures should clearly establish who has authority to make decisions about proxy voting—whether personnel of the manager, of the portfolio manager, of the custodian, etc. We note that policies and procedures will necessarily mean that managers will make decisions on individual proxies based on broad principles, since every scenario cannot be contemplated in advance.

What kind of "procedures" does the CSA contemplate that a manager establish in respect of changes to the proxy voting procedures (see paragraph (e))? It would be most unusual to signal a change in this type of policies and procedures directly to investors via a separate notice. We recommend that this paragraph be deleted. If this provision is not deleted, we recommend that the CSA indicate that disclosure on a prospectus renewal

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would be an acceptable way to notify investors of a change, unless the fund concludes a change in this policy is a "material change", in which case a prospectus amendment would be necessary.

10.3 Proxy Voting Record

The question of whether proxy voting for securities held by an investment fund should be disclosed has been discussed and commented upon by many, including the media, investor advocates and associations and fund organizations in both Canada and the United States. While we acknowledge that the proposed disclosure is an attempt by the CSA to promote accountability of fund managers, we question whether the disclosure of a proxy voting record is the best method of achieving that objective. As you know, managers and portfolio managers have a fiduciary duty to act in the best interests of the funds they manage. Given this responsibility, requiring a manager to disclose its proxy voting records could put the manager in an awkward situation. For example, a fund manager may decide to vote against a management proposal that it believes is not in the best interests of fund investors, yet the fund manager continues to need the cooperation of management of the corporation in order to carry out its due diligence on the corporation as part of its portfolio management function.

Given the number of securities held by investment funds, and the number of questions to be determined by proxy voting, the information in a proxy voting record could be overwhelming. Given the relative lack of interest in the proxy voting record expressed by participants in the COMPAS Inc study, we question the need for investment funds to commit the time and resources needed to compile such a record, particularly since the expense involved will adversely affect returns.

If the CSA believe maintaining a proxy voting record to promote accountability is important, we recommend that the CSA consider requiring funds to prepare the record and disclose it to the CSA members only.

10.4 Preparation and Availability of Proxy Voting Record

If, notwithstanding our comments above on the utility of maintaining and disclosing a proxy voting record, the CSA decide to implement this requirement and NI 81-106 becomes effective on December 31, 2004, we recommend that investment funds be given until July 1, 2005 to begin to maintain the first year's proxy record under this Part. We submit that investment funds need at least six months leadtime to change their systems and record keeping procedures before this requirement is effective. Obviously, investment funds cannot be expected to have maintained records before NI 81-106 comes into effect (as drafted, NI 81-106 would arguably require this, since it contains no transition timing on this matter).

In addition, we recommend that an additional subsection be drafted that clarifies that an investment fund must prepare its annual proxy voting record for a year ending June 30 within 60 days following the end of that period.

We recommend that subsection (2) be redrafted as follows:

> "(2) An investment fund must promptly deliver or send a copy of the investment fund's proxy voting policies and procedures and its latest available annual proxy voting record to any person or company, on request, and without charge, within 10 days after receipt of the request. For greater certainly, an annual proxy voting record of an investment fund will be its latest available annual proxy voting record only after 60 days from June 30 in each year.

By this new subsection, it will be clear that an investor will receive the latest available proxy voting record, but that there will always be a 60 day time lag after the end of the applicable period. An investment fund would deliver its previous proxy voting record for any request made during the 60-day period that follows June 30 in each year.

We also recommend that an investment fund be permitted to post this annual record to its website and direct any investors asking for it to the website in full satisfaction of the delivery/sending requirement.

Parts 11 and 13

Our comments provided above concerning section 2.9 and the cross-references made in NI 81-106 to other instruments apply equally to Parts 11 and 13.

Part 12 Proxy Solicitation and Information Circulars

We note that Part 12 uses the term "securityholders" when prescribing the obligations of investment funds in relation to meetings of securityholders. We refer to our comments on Part 5 of NI 81-106. We believe the term "securityholders" used in this Part should have the meaning set out in section 10.2 of the Companion Policy to NI 81-102. It is not clear how Part 12 will operate vis-à-vis NI 54-101 given subsection 5.4(4) of NI 81-106. We believe that Part 12 should require investment funds to send meeting materials to their registered holders ("securityholders") and, as is contemplated in section 8.1 of the Companion Policy of NI 81-106, use NI 54-101 to have these materials forwarded to beneficial owners.

Since Part 12 appears to contemplate that investment funds can use NI 54-101 to contact their beneficial owners in sending meeting materials, we believe this emphasizes the confusion over Part 5 of NI 81-106 and the purported exemption from using NI 54-101 in delivering financial statements to beneficial owners.

We wish to point out a difficulty that multi-class mutual funds have experienced with using Form 51-102F5. Where votes for a meeting are tabulated at a "fund" level and not on a class-by-class level because no separate class votes are being held, we believe the disclosure required by Item 6.5 of Form 51-102F5 is unnecessary and potentially misleading and confusing. All that should matter in these circumstances is the names of the securityholders who hold more than 10 percent of the securities of the investment fund at an overall fund level. We urge the CSA to consider this comment and exempt investment funds from the class-by-class disclosure when meetings do not include a class vote.

Part 15 Calculation of Management Expense Ratio

We note that Part 15 apparently will apply to pooled funds. As we note above, we believe NI 81-106 should not apply to pooled funds at all, but if it does apply, it should not alter the status quo for regulation of pooled funds. We note that Part 15 of NI 81-106 imposes new methods of calculation of MERs for pooled funds that are not consistent with industry practice. For example, it is our understanding that, in general, pooled funds report MERs net of expenses but not net of management fees. This is, in part, due to the fact that the investment management fee is often negotiated and paid directly to the advisor by the investor and is not paid by the fund. In addition, we understand that it is not industry practice in the hedge funds industry, where incentive fees are prevalent, to disclose an MER that is net of performance fees. If the CSA conclude that NI 81-106 should apply to pooled funds (see our earlier comments on the applicability of NI 81-106 to pooled funds), we urge the CSA to exempt pooled funds from Part 15.

In addition, we recommend that the CSA consider whether the method of calculating MERs for an investment fund that invests in other investment funds, particularly on an active basis, will be possible. We understand that the calculation may work for a "passive" structure, but will not be practically feasible for an active fund of fund structure.

Part 18 Effective Date and Transitional

18.1/18.2/18.3

Please see our comments above about the effective date and the transition of investment funds to the new continuous disclosure regime.

18.4 Filing of Annual Information Form

Please see our comments above under Part 9.

18.5 Initial Delivery of Annual Management Report of Fund Performance

We have several comments on this section:

(a) In contrast to Part 5, which speaks of registered holders and beneficial owners of fund securities (please see our comments on this topic above), section 18.5 speaks of "securityholders". We assume that readers of NI 81-106 may be guided by section 10.2 of the Companion Policy to NI 81-102 which explains the use of the term "securityholders" in NI 81-102. A cross-reference to this policy provision would be useful.

(b) When must this notification be sent? We assume that it would be sent after the first annual management report of fund performance is filed, but this should be clarified.

(c) How will this notice relate to the notices required to be sent under Part 5? In order for the information to be understood and considered by investors and for delivery to be cost-effective, an investment fund manager must be

able to combine the information required by these sections into one notice. For example, if an investment fund has a December 31 year-end, and assuming NI 81-106 comes into force on that date, subsection 5.3(3) would require that notice to be sent to all registered holders and beneficial owners by March 31, 2005. Section 18.5 would require the investment fund to send another notice to "securityholders" (registered holders) by April 30, 2005, essentially duplicating the information in the earlier notice, but this time with a concrete example. Obviously, this would not be efficient or cost-effective and we urge the CSA to reconsider these notice requirements.

18.6 Revocation of Exemptions

Section 18.6 provides that an investment fund may not rely on certain exemptions, waivers or approvals that were granted before NI 81-106 comes into force and that relate to its continuous disclosure obligations. We commented on a similar provision proposed in proposed National Instrument 81-107 and we wish to reiterate our concerns in this regard.

We strongly urge the CSA to consider their authority to make this rule and even if the individual members of the CSA conclude that they do have the authority to make the rule, to reconsider both the necessity for and the breadth of the section.

We question the authority and the ability of the individual commissions to, in effect, revoke individual orders granted by a securities commission or director exempting the recipient of that order from provisions in securities regulation, without individual notice to the recipient and a hearing on the proposed revocation. Although an individual commission may make a rule that allows exemptions to be granted from requirements and may then later revoke this rule, we submit that this power does not give the commission the authority to revoke individual exemptions granted to applicants during the currency of the exemption rule.

We also question the purpose for this section. NI 81-106 imposes new rules that must be complied with regardless of any previously granted exemption.

We are aware that some exemptions granted from securities regulation may have been granted with "sunset provisions" relating to the coming into force of NI 81-106. These exemption orders would expire under their terms pursuant to these embedded sunset clauses. There is no need for any special rule "revoking" these orders. Apart from these "sunset" orders, we do not see any need for such a broad revocation rule, which, even if a proper rule, would have the effect of revoking many years of exemption orders granted. We submit that it is most uncertain exactly which exemptions would be revoked by this section. For example, would only NI 81-101 and NI 81-102 exemption orders be revoked? What about NP36 or NP39 exemptions, orders granted by individual CSA members under applicable securities legislation, or exemptions granted under NI 81-105 or other applicable rules?

Comments on "Consequential Amendments"

We have the following comments on the consequential amendments to the national and local instruments published for comment with NI 81-106**. This letter should be considered a comment letter on those publications and we ask that our comments be taken into account when finalizing those instruments.**

National Instrument 81-101 Mutual Fund Prospectus Disclosure, Form 81-101F1 Contents of Simplified Prospectus and Form 81-101F2 Contents of Annual Information Form Amendment Instrument

We have the following comments on this amendment instrument.

1. As we describe in more detail above (see our comments on Part 6 of NI 81-106), we do not understand the CSA's purpose in mandating quarterly summaries of portfolio holdings without requiring those documents to be filed with regulators or to become part of the securities regulatory prospectus scheme. Indeed, the proposed amendments to Items 3.1 and 3.2 of Part A to Form 81-101F1 do not require a mutual fund even to list these summaries in their simplified prospectus as being available. Again, we urge the CSA to reconsider the purpose and utility of the quarterly summaries of investment portfolio, particularly given the additional compliance costs for investment funds in preparing these documents.

2. We note that the CSA proposes to delete Items 8, 11 and 13.1 (of Part B of Form 81-101F1) from the simplified prospectus once NI 81-106 comes into force. We wish to point out that in our view the simplified prospectus plays a different role for investors in mutual funds, than does the continuous disclosure regime. This different role was recognized by the CSA in the CSA February 2003 Consultation Paper on point of sale disclosure for mutual funds and segregated funds. The purpose of the disclosure in the Items that the CSA propose to delete is to provide investors with information upon which they can base their investment decisions, in recognition that investors rarely receive or ask for copies of the financial statements when they make investment decisions. We submit that the CSA should not assume that this decision-making practice of investors will change with the advent of the new continuous disclosure regime. Without the information presently provided in simplified prospectuses as required by these Items, investors will be making investment decisions based on less—not more—information.

   We also point out that the CSA have signalled that they intend to develop new proposed rules dealing with point of sale disclosure in response to the Consultation Paper beginning in the Spring 2005. See CSA Notice 81-311. We submit that a better, more cost-efficient approach would be to deal with the continuous disclosure regime now with NI 81-106 and revisit the point of sale regime once the CSA has completed its consideration of the feedback received on the February 2003 Consultation Paper and as contemplated in CSA Notice 81-311.

Companion Policy 81-101CP Mutual Fund Prospectus Disclosure Amendment Instrument

In connection with the proposal to modify section 8.2 of the Companion Policy, we refer you to our comments below on the proposed changes to NI 81-102 regarding current section 7.4 of NI 81-102CP. If you accept our comments made on that section, section 8.2 to the Companion Policy of NI 81-101 will also need amendment.

National Instrument 81-102 Mutual Funds Amendment Instrument

We have the following comments on the proposed amendments to NI 81-102.

1. We were unable to find where the definition of "management expense ratio" will be used in NI 81-102, as amended. If the definition will not be used, we suggest it be deleted.

2. Please see our comments provided above on the definition of "material change" contained in NI 81-106 and our recommendation for a more complete explanation in the Companion Policy of NI 81-106. Whatever explanation is provided, we recommend it also be included in NI 81-102, given the use of this term in NI 81-102.

3. It is not clear what the CSA intend by deleting subsection 10.1(4) from NI 81-102. The requirement to provide annual disclosure to investors of redemption procedures still continues through subsection 10.1(3), yet the ability to provide this disclosure in financial statements or in the prospectus if these documents are sent to all securityholders has been taken away. Does the CSA intend for all mutual funds to send securityholders the notice contemplated by subsection 10.1(3) as a separate annual notice? This would not be a cost-effective or efficient requirement and would significantly increase the regulatory burden on mutual funds.

4. We note that the CSA propose to delete the valuation rules provided for in sections 13.4 and 13.5 without replacing them at this time. We recommend that the CSA provide some guidance on expectations for valuation of these portfolio assets by mutual funds during this interim period. We understand the difficulties raised with section 13.4, but do not understand the concerns about keeping section 13.5 in force until such time as the CSA complete the work on valuation promised in the Notice to NI 81-106.

Companion Policy 81-102CP Mutual Funds Amendment Instrument

Given that NI 81-106 will contain all the substantive regulation of investment funds vis-a-vis material changes, we recommend that section 7.4 of the Companion Policy of NI 81-102 be deleted and moved to form part of the Companion Policy to NI 81-106.

Multilateral Instrument 81-104 Commodity Pools Amendment Instrument

1. We understand that MI 81-104 is now in force in Quebec and we urge the CSA to take this opportunity to clarify this matter and rename MI 81-104 to reflect its national status.

2. We note that the CSA appears to propose to drop the requirement in MI 81-104 that commodity pools prepare quarterly financial statements, which are presently required due to the potentially volatile nature of commodity pools. We recommend that the CSA's intentions concerning commodity pools' financial statements be clarified in NI 81-106, perhaps by a companion policy explanation to the effect that NI 81-106 essentially treats commodity pools like other investment funds by requiring annual and semi-annual financial statements, although additional disclosure may be required, depending on the investment objectives and strategies.

National Instrument 51-102 Continuous Disclosure Obligations Amendment Instrument

We repeat our comment made above about the two definitions of "non-redeemable investment fund" and urge the CSA to come to an agreement on one national definition with clear parameters.

Related Amendments to Ontario Securities Regulation, Ontario Securities Commission Rule and Additional Information Requirement in Ontario

We have several comments on this portion of the package published with NI 81-106.

1. The amendments to section 5.2 of OSC Rule 41-502 needs to recognize the different filing deadlines for the transitional year proposed by NI 81-106.

2. We are unclear on the authority of the OSC to revoke paragraph 240(2)9 and amend paragraph 240(2)8 of the Regulation. By changing these paragraphs, it would appear that the Commission has given itself authority to make rules in the relevant areas applicable to labour sponsored investment funds, which it does not currently have. We question whether subsection 143(3) of the Securities Act (Ontario) gives the Commission the authority to override governmental policy as embodied in the relevant sections of the Regulation and the provincial legislation governing LSIFs. Arguably, amending these sections of the Regulation are not necessary to "implement" NI 81-106, since, it may be considered that the Commission does not have the authority to make the applicable rules concerning LSIFs in the subject areas.

3. We recommend that the Commission consider revoking section 54 of the Regulation as outdated regulation, given NI 81-101 and OSC Rule 41-502. Does section 54 serve any continued useful purpose, limited as it is to mutual fund prospectuses?

Proposed OSC Rule 81-801 Implementing National Instrument 81-106 Investment Fund Continuous Disclosure

We repeat our comments provided above in respect of the anticipated timing for the implementation of NI 81-106 as well as its application to pooled funds in Ontario.

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We hope that our comments will be considered as constructive by the CSA. Please contact any of the lawyers in our national Investment Management Practice Group if you wish to discuss our comments with us.

Yours truly,

"Borden Ladner Gervais LLP"

Investment Management Practice Group of
Borden Ladner Gervais LLP

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