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April 5, 2007

VIA EMAIL

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Saskatchewan Financial Services Commission
Manitoba Securities Commission
Ontario Securities Commission
Autorite des marches financiers
Nova Scotia Securities Commission
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Dear Sirs/Mesdames:

Re: Proposed National Instrument 41-101 General Prospectus Requirements and Related Amendments – Comments of Borden Ladner Gervais LLP

We are pleased to provide our comments on proposed National Instrument 41-101 *General Prospectus Requirements* and the related amendments made to various instruments as published by the Ontario Securities Commission (OSC) and the other members of the Canadian Securities Administrators (CSA) for comment on December 22, 2006. Our comments primarily focus on the portions of proposed NI 41-101 and the

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related instruments that relate to investment funds, although we also comment on several more general aspects of the proposals.

Before we provide you with our specific comments, we would like to emphasize our support for the CSA's work to harmonize the regulation of reporting issuers. Given that most reporting issuers distribute their securities on a national basis, it is imperative that regulation regarding such distributions is the same (identical) in each province and territory. We are also strongly in support of comprehensive national rules, as opposed to narrower, more focused, rules (whether or not they are national). One comprehensive rule is significantly more cost-effective from a compliance perspective than several more focused regulations or rules each dealing with different aspects of a distribution (particularly where those regulations are found in different places - legislation, regulation, rules and/or policies). We note, however, that the OSC intends to maintain much of the regulation of securities distributions within the *Securities Act* (Ontario). While it would be preferable for the legislation of Ontario to be conformed with the legislation and regulation of the other provinces, we understand the position of the OSC. Given that this position will likely not change in the foreseeable future, we strongly urge the CSA to retain the notes and explanations contained throughout NI 41-101 that describes the situation in Ontario. These notes and explanations will be of assistance in the future when new readers attempt to comply with proposed NI 41-101.

We also are in favour of consolidated national rules that are tailored to the specific characteristics of investment funds, as reporting issuers, and we strongly support the approach of the CSA in preparing and proposing NI 41-101 as it relates to investment funds.

We congratulate the CSA for publishing proposed NI 41-101 and for the proposed repeal of the rules noted in the December publication. We hope that the CSA consider our comments in finalizing the instruments. We would be pleased to discuss our comments with you further. We note that many of our comments are designed to ensure additional national consistency of the applicable rules as well as additional tailoring of the specific rules to the unique characteristics of investment funds, including the various types of investment funds.

Please note that we comment on the proposed instruments in the order of the instruments. Where applicable, we note which comments are of more significance (as opposed to our more technical comments).

Comments on Proposed NI 41-101

1. *Section 1.1 – Definition of "derivative"*. We note that this definition is largely the same as the definition of 'specified derivative" contained in National Instrument 81-102 *Mutual Funds*, but it is missing some of the concepts provided for in that National Instrument. In the interests of national consistency of rules, we urge the CSA to consider ensuring that the term as defined in NI 41-101 is consistent with the term as defined in NI 81-102, including the CSA policy discussion of that term provided for in the companion policy to NI 81-102.

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2. *Section 4.3(1) Review of unaudited financial statements.* We have two comments on this section – one technical and one substantive. From a substantive, policy perspective, we understand that many investment fund industry participants are strongly opposed to any mandatory requirements for auditor review of interim financial statements. As you know, National Instrument 81-106 (section 2.12) takes a disclosure approach to this issue. Interim financial statements must either be accompanied by a notice that explains that no auditor has reviewed the statements or, if they have reviewed the statements, then the interim statements must be accompanied by a written review report. There is no explanation given by the CSA for this policy change (to make review reports of interim statements mandatory, if those interim statements are "included" with, or incorporated by reference into a prospectus of an investment fund) and we respectfully submit that the CSA needs to outline a strong case for this policy change if, indeed, this change is intentional. We understand that reviews of interim statements are costly and require time to complete (a minimum of 10 days is needed from the date that the fund's manager has completed the interim statements and delivered them to the auditor). In effect, this means that the 60-day time frame for finalizing and filing interim financial statements (from the fund's interim financial period end) is compressed to 50 days, which we understand is an extremely short time frame and one that is close to impossible to meet. We also understand that even auditors of investment funds do not believe that reviews of interim statements provide benefits for investors that would justify the additional costs.

   From a technical perspective, section 4.3 speaks of interim statements that are "included" in a long form prospectus. Form 41-101F2 allows most investment funds to not "include" financial statements in the prospectus – rather these statements are incorporated by reference into the prospectus. The language of section 4.3 is not clear as to the CSA's intent and we would submit that the language would reasonably support an interpretation that financial statements incorporated by reference into a long form prospectus are not "included" with the prospectus and therefore do not need to be reviewed by an auditor.

   In any event, we recommend that the CSA revert to the disclosure regime provided for in NI 81-106 concerning auditors' review of interim financial statements. This means that section 4.3 would need substantive amendments.

3. *Section 4.4(2) Approval of financial statements and related documents.* We recommend that the CSA provide further clarity around its intentions in using the words "included in the long form prospectus" as they relate to financial statements. Given the ability to incorporate financial statements by reference into the prospectus contained in Form 41-101F2, it is not clear to us whether those financial statements are "included" in the filed long form prospectus.

4. *Subsection 6.6(5) and (7) Amendment to a final prospectus.* We agree with the reference to LSIFs, commodity pools and scholarship plans in subsection (7), but we recommend this exclusion be made more general – that is, applicable to every investment fund (or other issuer) that is distributing securities under a prospectus on a continuous offering basis. We believe the same justification that underpins

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subsection (7) for the named categories of investment funds also would apply to other issuers that are distributing securities on a continuous basis.

5. *Section 12.1(2) Application and definitions.* Part 12 is not applicable to mutual funds. We do not understand why this reference is included and recommend that all investment funds be exempted from this Part on the same policy reasoning as why mutual funds are exempted from this Part.

6. *Section 13.3 Advertising for investment funds during the waiting period.* We do not understand why this provision (which we note has been adopted from section 15.12 of NI 81-102) has been included in proposed NI 41-101 and we recommend it be deleted and investment funds be subject to the general policy of the CSA described in the Companion Policy, like other issuers. Investment funds, as reporting issuers, should not be subject to such different and restricted regulation on advertising. Investment funds do not pose any greater concern regarding advertising during the waiting period than other issuers and the rules should be the same. We understand that the CSA may wish to continue with section 15.12 of NI 81-102 for mutual funds (given the CSA's views on the nature of mutual fund investing), but the fact that mutual funds have this more restrictive regulation should not be extrapolated for other types of investment funds unless there is a established and justifiable policy reason.

   Please see our comment (29) below which sets out our views on Part 6 of the Companion Policy to NI 41-101.

7. *Part 14 – Custodianship of Portfolio Assets of an Investment Fund.* We do not comment on whether or not the CSA should include this Part in proposed NI 41-101, which we note is identical to Part 6 of NI 81-102. We urge the CSA to correct some of the difficulties and out-dated regulation that is contained in Part 6 of NI 81-102, which are particularly enhanced when considered in the context of investment funds other than mutual funds.

   (a) The custodian provisions for investment funds do not take into account the fact that many investment funds have the ability to borrow and have loan facilities in place. Generally under the terms of these loan facilities, the investment fund is required to grant a security interest over its assets in favour of the lender. In order to perfect a security interest over assets that are securities or other financial assets, these assets need to be held in a "securities account" under the *Securities Transfer Act*. The custodian provisions in NI 41-101 need to accommodate the fact that investment funds will grant security interests over their assets and that their securities and other financial assets will need to be held by a securities intermediary in a securities account that is governed by a control agreement, all as required under the *Securities Transfer Act* and the PPSA.

   (b) Many investment funds enter into OTC derivatives and grant security interests in favour of counterparties. Although subsection 14.8(3) of proposed NI 41-101 allows an investment fund to deposit with a counterparty portfolio assets over which it has granted a security interest,

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this is only in connection with a particular specified derivatives transaction. However, the ISDA regime that governs derivatives is based on a master ISDA agreement and credit support agreement, under which a number of derivative transactions may be outstanding at any given point in time. It is not practical nor administratively feasible to require each security interest and its related collateral to be held in connection with only one particular derivative transaction, as the fund and the counterparty, as well as the underlying documents, all work on an aggregate basis.

(c) We recommend that subsection 14.6(3) be deleted as out-dated regulation. This provision was written for mutual funds originally when the predecessor instrument to NI 81-102 was first amended to provide for custody rules for mutual funds. The filing was deemed necessary to ensure regulatory oversight over compliance with the new rules. Given that those changes are well over 10 years old and the regulators have complete discretion to review custodial arrangements as part of their compliance review functions, we submit that this provision is out-dated and adds to the regulatory burden without any justifiable regulatory need.

8. *Section 15.1(1) Incorporation by reference*. We strongly urge the CSA to mandate that scholarship plans incorporate financial statements (current and subsequent) by reference into their prospectuses, as is required for other investment funds, including mutual funds subject to NI 81-101. We do not understand the policy rationale for excluding scholarship plans from this requirement. Scholarship plans are commonly distributed to the most "retail" of investors; investors who one can reasonably assume are simply overwhelmed by the amount of disclosure given to them on account opening (including mandatory tax information for scholarship plans). We fail to see the need for scholarship plan investors to receive financial statements on their initial investment considering the average investor's difficulty in comprehending financial statements and understanding their relevance, when other retail products (such as mutual funds) were given the ability to exclude these statements from prospectuses many years ago. If investors do not need to receive financial statements on a continuous disclosure basis (NI 81-106), we fail to see the relevance of financial statements on an initial investment.

   From an investor protection perspective, it is better, in our view, for continuous disclosure documents to be included by reference in a prospectus, since then the statutory liability scheme that applies to prospectuses would apply continuously to these documents.

9. *Section 17.1(3) Pro Forma Prospectus*. We are concerned that this subsection is "buried" in Part 17 and we recommend that it be moved to Part 9 Requirements for Filing a Prospectus so as to facilitate ease of reference and compliance.

10. *Section 20.1*. We strongly recommend that this transition provision be amended to include a reference to a pro forma prospectus, since many investment funds in

continuous distribution may wish the reduced regulatory burden of complying with the new disclosure format in their next renewal cycle.

11. *Appendix A Personal Information Form*. We recommend that NI 41-101 be clarified to provide that if any individual has filed a personal information form in the three years previous to the applicable filing, he or she does not have to complete the new Form. As the rules are drafted, it is unclear whether any individual who completed an "old" personal information form would have to complete a "new" personal information form upon the coming into force of proposed NI 41-101. We believe it would be most appropriate to include a positive statement in the transition section indicating that no "new" form needs to be filed if an "old" form was submitted during the applicable period before the relevant filing. We note that the "new" form is significantly more detailed than the older form, which in our view, will significantly increase the regulatory burden on issuers in having to ensure the appropriate individuals complete the form. For this reason, we believe that the above-noted transition clarification is very important for investment funds that are in continuous distribution.

Comments on Proposed Form 41-101F2

12. While we agree that one form, tailored to the unique characteristics of investment funds, is a very important step, we believe Form F2 does not go far enough in distinguishing between the various types of investment funds, many of which are quite distinct and different from each other. The fact that Form F2 was developed based on the simplified prospectus and AIF forms of NI 81-101 means that it is biased towards "mutual fund-like" investment funds. We urge the CSA to expand instructions (5) and (8) to clarify that all investment funds must determine whether or not a particular disclosure item is relevant, material or even applicable to their business. If the investment fund reasonably concludes that the disclosure item is not, then it need not include the heading or anything about that disclosure item. Many of our comments on the Form simply result from our being unclear as to the CSA's intentions for including (or not) the relevant disclosure.

    Similarly, all investment funds should be given the flexibility to include specific information that is applicable to their business necessary to make the disclosure in the prospectus "full, true and plain". Instruction (8) refers to "investment funds that are special purpose vehicles". In our view this reference should be deleted and made applicable to all investment funds. For example, there is much in Form F2 that will need modification to reflect the very unique structure and distribution mechanisms of scholarship plans and, without this instruction, scholarship plans may find it very difficult to use this Form.

13. We do not believe that it is necessary that investment fund prospectuses follow a prescribed order of disclosure (instruction 11). The very specific ordering for simplified prospectus of mutual funds was mandated for very different reasons - to ensure consistent drafting of simplified prospectuses for products that have many of the same characteristics and to allow investors to easily compare these very similar products. The same cannot be true of the diverse universe of other investment funds and we believe that this instruction is unwarranted and should

be deleted. We note that other reporting issuers may tailor the prospectus form as they see fit.

14. *Section 1.3 Basic Disclosure about the Distribution*. The mandated disclosure indicates in brackets that an investment fund must describe what kind of investment fund it is. While we do not disagree with this concept, we do believe that investors will be confused with funds being described using legalistic words that will have not much meaning for them – "non redeemable investment fund" is a regulatory phrase and one that is not used in the ordinary course in the investment community, including by sales representatives. We recommend that labour sponsored investment funds, scholarship plans, and perhaps commodity pools be named as such (since the marketplace generally uses those terms), but that closed end funds or exchange traded funds be permitted to use commonly used terminology to describe such funds.

15. *Section 1.4 Distribution*. We recommend that the CSA clarify what kind of disclosure in response to this item is to be provided by scholarship plans, commodity pools and LSIFs, as well as other investment funds being distributed on a continuous offering basis. Subsection 1.4(1) "if the securities are being distributed for cash" would appear to require those funds to include the mandated table, much of which is not applicable to funds being distributed at a price equal to their net asset value next determined or for a fixed unit price (scholarship plans).

16. *Section 1.9 Market for Securities*. Will funds that are distributed continuously at NAV and are redeemable on demand have to include this disclosure? We believe this would be inappropriate and we recommend this point be clarified.

17. *Section 1.15 Documents incorporated by reference*. Please see our comment (8) above.

18. *Section 6.1 Management Discussion of Fund Performance.* We do not understand the reason for this section, which appears to require the repetition of the disclosure provided in the documents referenced, given that it would appear that all investment funds will either have these documents incorporated by reference or "included" with the prospectus.

19. *Section 7.2 Returns and Management Expense Ratio*. Not all investment funds calculate returns and MERs in the same way as mutual funds. If they do not do this, will they required to artificially include this disclosure? The term "MER" has meaning for investment funds (and for these products, must be calculated in a very specific way in accordance with NI 81-106, if it is to be disclosed). How should investment funds approach these concepts if they do not otherwise disclose or refer to MER? We recommend that the CSA clarify that this section does not apply to investment funds that do not calculate or disclose MER.

20. *Section 11.2 Short-Term Trading*. This disclosure would appear to be mostly relevant to funds that are redeemable on demand, which would lead us to conclude that scholarship plans, exchange traded funds and other non redeemable

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investment funds will not have to include any disclosure. Given our comment (12) above, we believe an explanation in this section to this effect would be warranted, given that Form F2 does not define what "short-term trading" is and why it is not considered appropriate for funds.

21. *Section 13.1 Prior Sales*. Why are labour sponsored investment funds and commodity pools specifically excluded from having to provide this disclosure? This would lead a reader to believe that scholarship plans and other funds that are redeemable on demand and distributed on a continuous basis would have to include this disclosure, which we submit would be highly irrelevant to these vehicles.

22. *Section 15.1(5) Cease-Trade Orders and Bankruptcies of the Investment Fund*. The heading does not fit with the disclosure required. One would anticipate that an investment fund that has been cease traded or gone bankrupt would not be filing a prospectus. The disclosure required by this item would require an investment fund to consider bankruptcies of its material controlling shareholders. We do not believe this is a practical or reasonable requirement given the nature of most investment funds and the shareholders in those funds.

23. *Section 15.1(6) Conflicts of Interest of the Investment Fund* and *(9) Conflicts of Interest of the Manager*. The heading of (6) does not fit with the disclosure required. Investment funds do not commonly have "conflicts of interest" – although their managers may. We recommend that (6) be deleted in favour of (9). We also recommend that the term "conflicts of interest" be defined by reference to the same term in NI 81-107 to provide for consistent usage of terminology.

24. *Section 16.1 Independent Review Committee*. The reference to "appropriate summary" in item (a) should be simply a "summary" to be consistent with the rest of the Form. We do not understand why the prospectus of an investment fund does not list the members of an independent review committee (paragraph d would appear to be an error). We also believe that the disclosure of fees (paragraph e) should be conformed with NI 81-107. There is no concept of "main components of fees" payable to IRC members and we recommend some clarity and consistency with Form F2 and NI 81-107.

25. *Section 23.3 Reporting of Net Asset Value*. The drafting of this section suggests that the CSA believe that mandatory reporting of net asset value is important. We recommend that the CSA clarify whether or not this is intended. If the fund does not propose to communicate NAV in the manner suggested in this item, may it state this? There may be investment funds where this information is not as relevant, particularly where NAV is not calculated often. Scholarship plans should be specifically excluded from this section, as has been done in section 23.2.

26. *Section 26 Use of Proceeds*. We recommend that the CSA either clarify that this section does not need to be complied with when the fund is in continuous distribution or by funds that are investing "net proceeds" in accordance with a stated investment objective or revise this section to delete irrelevant concepts.

The concept of "principal purpose" for net proceeds or "acquiring assets" is not particularly relevant for investment funds.

27. *Item 40 Documents Incorporated by Reference*. Please see our comment (8). If all financial statements and other continuous disclosure documents are incorporated by reference into a prospectus that qualifies continuously offered securities, then no financial documents will need to be included in a prospectus which will significantly reduce the amount of information that is delivered to an investor, allowing the investor to concentrate on the important information provided in the prospectus.

28. *Item 40 Financial Statements*. It is not clear to us what the CSA intend for newly established investment funds – what financial statements are required – and are they required to be "included" in the prospectus or "incorporated by reference into the prospectus"? We recommend that this point be clarified, and subsection 41.1(3) expanded upon for investment funds that are required to incorporate by reference all financial disclosure.

Comments on proposed Companion Policy to NI 41-101

29. We urge the CSA to re-consider their policy pronouncements contained in Part 6 – in particular section 6.5, 6.6, 6.7. 6.8, 6.9. 6.10, in light of the developments in the securities marketplace generally since these policy statements were first formulated. Given the difficulties inherent in reviewing and easily comprehending a preliminary prospectus, including a preliminary prospectus for an investment fund, in our view, additional flexibility should be given to issuers, including investment funds, to outline the material information about a particular issue during the waiting period in documents that are not the preliminary prospectus. We do not believe these policy statements are regularly and consistently applied given their out of date nature and somewhat anachronistic stature.

Comments on Amendments to NI 81-101

30. *Section 1.3 amending section 2.2 of NI 81-101*. We know that the CSA take the position that a mutual fund can add new classes or series of units to its capital (where those classes or series are not referable to a separate portfolio) via an amendment, which we do not disagree with. However, we understand that the CSA also take the position that if these new classes are added at the time of the pro forma filing of the simplified prospectus, then a preliminary prospectus must be filed to qualify these new classes or series. In our view, this different approach to essentially the same issuer and regulatory activity is not justified. If it is possible to amend a prospectus to add new classes or series, then it should be legally possible (using the same interpretation of the applicable legislation) to add new classes or series to a pro forma filing. We strongly recommend that this issue be clarified as we suggest.

31. *Subsection 1.4(2) amending section 2.3 of NI 81-101*. We are unclear about the CSA's intentions with subparagraph (ii). We assume that you mean "personal

information for directors, officers of the mutual fund and its manager"? We strongly urge the CSA to clarify in the rules that where a fund manager has filed personal information forms (including, as we recommend in comment (11) above, the "old" forms) for a director or officer within the last three years in connection with another mutual fund filing (of the funds it manages), then it does not have to refile these with any new fund. We know that staff of the CSA take different (sometimes conflicting) positions on this issue, and we strongly recommend that this matter be clarified and the regulatory burden significantly reduced.

32. *Subsection 1.4(4) amending section 2.3 of NI 81-101.* Please see our comment (30) above concerning subparagraph (iv) (please note that this comment is applicable to other changes proposed to NI 81-101 – all provisions that refer to "personal information of the mutual fund" and filing requirements).

    We also urge the CSA to delete subparagraph (vi). This represents a change from current practice. A pro forma prospectus is, in essence, a "draft" prospectus, which means that no financial statements can be incorporated by reference into it. There are significant costs in obtaining an auditors' comfort letter and this cost is not justified by having to provide an auditors' comfort letter in connection with a pro forma filing.

33. *Section 1.5 adding section 2.7 to NI 81-101.* This is a substantive and very important comment. Please see our comment (2) above. The comments made above are particularly apt in the context of mutual funds. In the view of many auditors, the review of mutual fund interim financial statements is of little or no value and investors will bear the associated additional costs for no benefit.

Comments on OSC Rule 81-103

34. It is not clear to us why these rules are provided for in a separate instrument. We were unable to find similar proposed rules for the other provinces published with the main package of proposed rule amendments. We recommend that these rules be incorporated in proposed NI 41-101 and in NI 81-101 for ease of reference and compliance. We agree with the content of the proposed rules, but feel that it would serve the CSA's main objective (harmonization and simplification) if they were more centralized and readers understood these rules were national rules.

Other Comments

35. We understand that section 5.13 of proposed NI 41-101 does not apply to investment funds (including mutual funds) – we note however, that it would beneficial for the CSA to state this directly in the proposed rule if the CSA decide to retain this rule. We strongly recommend that this rule be abandoned for reporting issuers and support the comments provided by the Securities Law Subcommittee of the Business Law Section of the Ontario Bar Association in their letter of March 30, 2007. Please see the OBA comments on the certification requirements.

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36. We strongly support the OBA's comments with respect to the CSA's question 10 on eliminating the minimum waiting period. The minimum waiting period is particularly of little value to investment funds, many of which conduct little or no marketing from the preliminary prospectus.

We hope that the CSA find our comments to be of assistance in finalizing the proposed prospectus regime, particularly as it relates to investment funds. Please feel free to contact Rebecca Cowdery at 416-367-6340 and rcowdery@blgcanada.com if you have any questions with respect to our comments.

Yours very truly,

"Borden Ladner Gervais LLP"

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