Borden Ladner Gervais LLP
Lawyers • Patent & Trade-mark Agents
Scotia Plaza, 40 King Street West
Toronto, Ontario, Canada M5H 3Y4
tel.: (416) 367-6000 fax: (416) 367-6749
www.blgcanada.com

BORDEN
LADNER
GERVAIS

May 29, 2008

Via Email

British Columbia Securities Commission
Alberta Securities Commission
Saskatchewan Financial Services Commission
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
New Brunswick Securities Commission
Registrar of Securities, Prince Edward Island
Nova Scotia Securities Commission
Superintendent of Securities, Newfoundland and Labrador
Registrar of Securities, Northwest Territories
Registrar of Securities, Yukon Territory
Registrar of Securities, Nunavut

Delivered to:

Gordon Smith
BC Securities Commission
PO Box 10142, Pacific Centre
701 West Georgia Street
Vancouver, BC V7Y 1L2
gsmith@bcsc.bc.ca

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

John Stevenson
Secretary
Ontario Securities Commission
20 Queen Street West
Toronto, Ontario
jstevenson@osc.gov.on.ca

Dear Sirs/Mesdames:

Re: Proposed National Instrument 45-106 *Prospectus and Registration Exemptions*, Companion Policy, Related Forms and Related Instruments, including OSC Rule 45-501 - Published for Comment on February 29, 2008

We are pleased to provide the members of the Canadian securities administrators (CSA) with certain specific comments on the above-noted proposed instruments (the Proposed Rule, the Proposed Policy and collectively, the Proposals).

BORDEN
LADNER
GERVAIS

These comments are those of lawyers in BLG's Securities and Capital Markets and Financial Services practice groups (in so far as our comments relate to matters important to our pension industry clients) and do not necessarily represent the views of individual lawyers, the firm or our clients.

Please note that some of our comments are on the national instrument, therefore we have sent this comment letter, as requested to the BCSC and to the AMF. Certain of our comments are on the OSC's proposed rule, therefore we have sent this comment letter also to the OSC.

1. **Too short a comment period on the Proposals**

We have not provided detailed comments on the Proposals owing to our decision to focus our review efforts on proposed National Instrument 31-103 *Registration Requirements* that was also released on February 29, 2008 and the draft legislation released by the Ontario government on April 25, 2008. In our view, given the amount of material that was published at the end of February (close to 1,000 pages of printed type), we found that the ninety-day comment period was insufficient to allow us to review the Proposals carefully and completely with our clients. We urge the CSA not to take the lack of comments on the Proposals to necessarily be agreement with the proposed changes. We note that as of 6:00 p.m. on May 28, 2008 no comments on the Proposals had been posted on the OSC's website. To us, this indicates a certain level of fatigue on the part of industry participants to review yet another large regulatory instrument where the proposed changes are only briefly explained and are not intuitively apparent.

2. **Proposals illustrate lack of harmonization**

It is obvious from even a cursory review of the Proposals that significant portions of securities regulation in Canada is not harmonized, even at a time when the Chairs of the British Columbia, Manitoba, Alberta and Quebec securities commissions are still commenting on their work that is said to foster harmonization and negate the need for a national securities commission. The Proposals are rife with intricate legal drafting necessary to deal with the fact that British Columbia, Manitoba, New Brunswick and other provincial regulators have taken different philosophical views about the registration reform proposals and other approaches to securities regulation. As we have said in each of our comment letters sent to the CSA in recent years, in our view, lack of harmonization of securities regulation among the provinces is the number one cause of increased regulatory burdens, increased costs and increased inability for industry participants to actually understand the laws that apply to them so that they have a reasonable chance to be in full compliance with Canadian securities regulation. We do not view the Proposals as being a positive move for Canada's capital markets.

3. **Definition of Accredited Investor – (paragraph (q) – fully managed accounts)**

In our view, in light of the registration reform proposals and in particular section 2.2 of proposed National Instrument 31-103, we strongly urge the Ontario Securities Commission to join with the rest of the CSA and drop paragraph (ii). The regulatory concerns previously identified by the OSC for this "opt-out" are, in our view, outdated,

speculative and based on erroneous assumptions about the portfolio management industry. If a registration exemption exists [i.e. advisers can trade securities of their pooled funds to accredited investors without dealer registration], so too should a prospectus exemption and vice versa. We note that the OSC has made no public statements about its retention of paragraph (ii) for several years. We believe that the concerns previously raised by the OSC have not come to pass in the other provinces (given the more flexible regime that applies in those provinces) which leads us to believe that the OSC's concerns are now outdated and speculative (i.e. based on concerns about what might happen, but which has not happened).

If an adviser chooses to manage its clients' money more efficiently in pooled funds (mutual funds), we see no reason why the funds should be prohibited from issuing securities to fully managed accounts managed by the adviser for its clients. Whether or not the client is a discretionary or non-discretionary client of the adviser, the adviser has full K-Y-C and fiduciary duties. Pooled funds merely package the advice into a product format, but do not change the fact that the client is purchasing, and the adviser is providing, essentially advisory and portfolio management services.

4. Comment on the Availability of the Accredited Investor Exemption for Master Trusts, the only Beneficiaries of which are Pension Funds

We urge the CSA to recognize that "master trusts" established pursuant to income tax legislation by entities to allow registered pension funds to more efficiently manage their assets (in one vehicle rather than many) will be considered an accredited investor. These master trusts are relatively common in the pension industry. As the Proposed Rule is written, master trusts technically would not fall within:

- paragraph (i) (because they are not pension funds of registered pension plans),
- paragraph (m) (given the operation of subsection 2.3(5) of the Proposed Rule),
- paragraphs (n), (o), or (u), because the master trusts are not investment funds (as defined under securities legislation),
- paragraph (t), because, although the immediate beneficiaries of the master trusts are the pension plans, the ultimate beneficiaries of the master trust (through the pension plans) are the participants in the pension plan.[1]

While in our view, it would appear that the CSA would not object to master trusts being considered to be accredited investors from a policy perspective (given the fact that they are essentially similar vehicles to the other entities set out in the definition).

We recommend, in the interests of clarity, that the following additional type of entity be added to the list of accredited investors: *a person that has been established by pension funds referred to in (i) for the benefit of the beneficiaries of such pension funds.* We also

[1] Is there a drafting error with (t)? The phrase immediately after "all of the owners of interests" reading "direct, indirect or beneficial", should perhaps be "direct, indirect and beneficial" to be consistent with the CSA's intentions?

assume that the CSA will consider that this entity would be purchasing as principal even though has many ultimate beneficiaries (but this is not different from an investment fund), but if there is any doubt about this, we urge the CSA to add a reference to this new accredited investor being deemed to be purchasing as principal for the purposes of section 2.3 of the Proposed Rule.

5. **Comment on the Continued Non-Finalization of the CAP exemptions**

In past comment letters, we have commented on the fact that the CSA still have not finalized the so-called CAP exemption that was last published for comment in October 2005. We provided a comment letter on this proposed exemption (which we understood would become part of NI 45-106) but, to date, have not seen any response to that comment letter, and the others filed with the CSA in respect of that publication. We urge the CSA to consider the comments on the proposed CAP exemption and include the finalized exemption into NI 45-106, with any additional comment period necessitated by any material changes made to that proposal.

6. **Comment on section 2.9 of OSC Rule 45-501**

We have commented before on this section asking the CSA to consider why this rule remains an Ontario-only rule, rather than a national rule, but we do not believe we have received an answer to this comment.

In any event, in revising OSC Rule 45-501, we believe this section has been inadvertently changed. We urge the OSC to reconsider the original drafting of this section and at a minimum revert back to the original version of this section and change the word "and" which now appears between subparagraphs (i) and (ii) of paragraph (a) to an "or". Please see section 4.1(c) of OSC Rule 45-501 that we believe is correctly drafted.

7. **Comment on section 4.1 of OSC Rule 45-501**

Similar to our comment 5, the word "and" between paragraphs (c) and (d) of section 4.1 should be changed to the word "or" to be consistent with the other drafting of this instrument.

****

Please contact the following lawyers in our Toronto office if the CSA members would like further elaboration of our comments. We would be pleased to meet with you at your convenience.

- Rebecca A. Cowdery at 416-367-6340 and rcowdery@blgcanada.com
- Andrew Harrison at 416-367-6046 and aharrison@blgcanada.com

Yours truly,

"REBECCA COWDERY" *"ANDREW HARRISON"*

REBECCA COWDERY ANDREW HARRISON