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**VIA E-MAIL**

December 31, 2009

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

**Attention: Mr. John Stevenson, Secretary**

Dear Sirs/Mesdames:

**Re: Proposed Amendments to OSC Rule 13-502 Fees**

We are writing in response to the request for comments on the proposed amendments to OSC Rule 13-502 – *Fees* (the "**Proposed Rule**"). Thank you for providing us with an opportunity to provide comments on the Proposed Rule.

Invesco Trimark Ltd. ("**Invesco Trimark**") is a wholly-owned subsidiary of Invesco Ltd., a global asset management firm with over \$418.8 billion in assets under management as of November 30, 2009. In Canada, Invesco Trimark manages approximately \$30 billion in assets, the majority of which are attributable to Ontario.

As an investment fund manager and portfolio manager, Invesco Trimark pays Capital Markets Participation Fees ("**CMPPFs**") as well as various Activity Fees (including for registrations, prospectus filings and applications) and, as such, we are directly impacted by the Proposed Rule. We note that in 2009, Invesco Trimark and its Canadian affiliate, Invesco Trimark Dealer Inc., paid almost \$600,000 in fees to the Ontario Securities Commission ("**OSC**") representing approximately 0.9% of the fees (excluding late fees) received by the OSC in 2009. We are aware that other mutual fund managers have paid similar or greater proportions of the OSC's revenues and we are concerned that the mutual fund industry bears a disproportionate amount of such revenue. It would be helpful to gain a better understanding of this if the OSC provided information about revenue generated from the different groups of capital market participants and the costs of each branch of the OSC attributed to each such group.

As summarized below, we have several concerns with the Proposed Rule. We note with interest that the OSC projects average annual expense increases of 4% during the subject period, following annual increases in expenses since 2006. We have seen no evidence to suggest that the OSC has recently conducted a meaningful examination of its costs with a view to determining what costs can be better controlled or eliminated altogether so as to avoid fee increases. This is of interest because every single person

regulated by the OSC has conducted such an exercise over the last two years. It is irresponsible for the OSC not to engage in such an exercise and then publish the results prior to seeking fee increases. (We would also request the OSC to evaluate the costs to Ontario participants of the OSC not participating in the Passport system.)

On a positive note, we would like to commend the OSC for listening to the concerns expressed by those who commented on the previous proposal relating to OSC Rule 13-502. We believe that demonstrated precisely how the comment process is supposed to work. We are also extremely pleased to see that the OSC has adopted some of those comments into the Proposed Rule, namely the elimination of the concept of the Reference Fiscal Year. We believe that was a poor idea then and remains a poor idea now. We cannot predict our revenue from year to year and any rule that has the potential impact of freezing our actual fees based on a high revenue year is simply a bad idea. Recent market events are an excellent example of the unintended consequences that might arise. In contrast, if revenues for all investment fund managers increase (as would be the case in a bull market) and fees are locked in based on a low revenue reference year, then all investment fund managers pay less fees than they would have if fees were based on actual revenues. However, certain investment fund managers will on a relative basis pay a higher CMPF in percentage terms if their assets under management have not increased at the same rate as other investment fund managers. This ultimately results in favouring large investment fund managers. Further, the OSC could be denied fees to which it otherwise would be entitled which ultimately could have resulted in a surplus which could be used to benefit all registrants equally rather than some registrants disproportionately (ie. the OSC should consider an across-the-board fee reduction thereby benefiting all registrants). Eliminating the Reference Fiscal Year concept strikes a good balance between the interests of the OSC and the interests of the fee payors.

Insofar as the Proposed Rule affects Invesco Trimark, our concerns relate to the following:

- a) The increase in CMPFs will primarily be borne by investors;
- b) The timing of and rationale for increasing CMPFs;
- c) Unfairness of CMPF structure; and
- d) The rationale for increasing certain Activity Fees.

### **The Increase in CMPFs will Primarily be Borne by Investors**

As you are aware, CMPFs in Ontario replaced the payment of fees paid by mutual funds based on gross sales. As such, for fund managers who charge fund operating expenses based on a cost recovery methodology, CMPFs are charged to the funds themselves based on reasonable allocation methodologies. As such, increases in CMPFs are directly borne by investors in the Funds.

This increase is frustrating in our case as we have made tremendous efforts over the past decade to reduce fund operating expenses, achieving average savings of 20 basis

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points during that time. Our biggest obstacles, and biggest threats, to continuing that trend comes from governmental and quasi-governmental activity, including:

- National Instrument 81-106 – *Investment Fund Continuous Disclosure*;
- National Instrument 81-107 – *Independent Review Committee for Investment Funds*;
- the anticipated introduction of harmonized sales tax on advice provided to investment funds; and
- the anticipated introduction of regulations relating to the point of sale initiative.

The mutual fund industry is under constant pressure with respect to fees and expenses. With respect to expenses, Invesco Trimark has done a tremendous job in controlling and reducing expenses paid by investors. It is disappointing, however, that as we clear items off the expense ledger, our regulators, and provincial government, seek to fill that void. While some of the initiatives that contribute to these costs are good for investors, many are of dubious value. We suggested above that the OSC evaluate its costs of operations (Is it necessary to be headquartered in downtown Toronto where office space is expensive? Are staff salaries/compensation at appropriate levels given typical workloads and the non-monetary benefits of working for the OSC? Are discretionary expenses properly controlled?); included in that should be a cost-benefit analysis of all regulation, especially initiatives introduced in the last decade. Some form of cost-benefit analysis is conducted when regulation is proposed. It is important that with the passage of time that analysis be re-visited to determine if both the costs and the benefits are what were assumed. If the actual results have not been the success that was anticipated then consideration must be given to eliminating or reducing that particular regulatory burden.

### **Timing of and Rationale for Increasing CMPFs**

The timing and rationale of the proposed increase in all fees, including CMPFs, is dubious as (a) investors have not fully recovered from the losses they suffered in the 2008 market correction, (b) registrants and capital market participants have not returned anywhere near the profit levels they attained when fees were last set, and (c) the OSC does not appear to need the extra revenue that would be generated by the fee increases.

As we noted above, CMPFs are borne by investors in mutual funds in many cases. Similarly, renewal prospectus filing fees are borne by investors. Accordingly, a substantial portion of our regulatory fees are borne by investors as fund operating expenses. Numerous studies and surveys have demonstrated that mutual funds are one of the preferred investment retirement vehicles for Canadians. However, high operating expenses detract from investor returns and, in some cases, detract from investing in mutual funds. As many recent media stories and studies have highlighted, Canadians do not save enough for retirement; therefore, government policy ought to encourage savings and investment. While certainly not intended by the OSC, the effect of the proposed fee increases is to further exacerbate the above-noted situation by increasing fund operating expenses. We do not believe that is an appropriate result.

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In our previous comment letter on fee increases earlier in 2009, we remarked on the economic circumstances faced by mutual fund industry participants. While we are on the path to recovery, we are far from arriving at our destination. 2010 business plans continue to be highlighted by cost savings, although with some incremental increase in fund operating expenses from 2009 levels. However, prior to 2009, Invesco Trimark had reduced costs for 2007 and 2008. This is in stark contrast to the increase in costs experienced by the OSC over that period. We encourage the OSC to be more active on this front, by re-examining its operations to find savings and operate more efficiently.

It appears that even without the Proposed Rule, the surplus and \$20 million reserve available to the OSC would be sufficient to cover the OSC's projected expenses to at least the end of fiscal 2011. In our view, it would be appropriate at that stage for the OSC to reconsider the appropriateness of any fee increases. Even if it is necessary for the OSC to utilize a portion of its reserve prior to 2011, is the current state of the capital markets not sufficient reason for such utilization? That is, the objective of the fee increases appears to be to ensure that the reserve remains at \$20 million. This calls into question the purpose of the reserve. It seems to us that the purpose of a reserve is to ensure funding during difficult economic circumstances, implying that it is perfectly acceptable during those times to dip into the reserve and allow it to dwindle. When circumstances return to "normal" or it becomes accepted that there is a new, lower "normal", then it is time to consider how best to replenish the reserve. We've just been through the biggest market event and the greatest economic downturn since the Great Depression and, despite all that, the OSC still hasn't touched the reserve. Even with no fee increase, the OSC will not tap into the reserve until 2011, yet the OSC is budgeting to avoid using the reserve at all, other than in 2013. This is non-sensical. Under what circumstances would the OSC significantly use the reserve fund? We would argue that the current circumstances are exactly when the reserve should be used and it is premature to budget to maintain the reserve.

### **Unfairness of CMPF Structure**

On the face of it, it appears that the CMPFs for registrants like Invesco Trimark will increase by 9%. However, this is based on the assumption that revenues remain stable. Using the example of the \$200 million to \$500 million Ontario revenue tier, a registrant's Ontario revenue can decline by more than 50% without there being any decrease in CMPF. From a percentage of assets perspective (which is the measure of all costs in the mutual fund industry), this equates to a 100% increase in the CMPF. This yields an absurd result and is inherently unfair. In the inverse, one could conceivably double their revenue without any corresponding increase in CMPF.

We understand this structure is aimed at providing revenue predictability to the OSC, but we question whether that is an appropriate goal for a regulator and what the cost of attaining that goal ought to be. We believe that the current structure places far too much emphasis on that goal and that one of two changes should be considered: (a) CMPF should be based on a percentage of Ontario assets under management so that in the face of asset declines (which translate into revenue declines) regulatory fees do not yield a

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disproportionate impact; or (b) reducing the size of the tiers above \$200 million of Ontario specified revenue so that the upper limit of each tier is a 50% increase from the lower limit (i.e. \$200 million to \$300 million, \$300 million to \$450 million, \$450 million to \$675 million, etc.).

### **Rationale for Increasing Certain Activity Fees**

While we understand that increased complexity of issues arising in review of applications requires greater allocation of resources, we question the timing of the proposed increases for activity fees in the investment fund context. It has been our experience over the last year or two that the OSC is not entertaining novel applications, regardless of how well-reasoned these may be. We believe this is motivated in part by the forthcoming amendments to National Instrument 81-102 – *Mutual Funds*, which are intended to codify exemptive relief granted over the last ten years. That implies, therefore, that only applications based on precedent are granted and this does not require greater resources on a per application basis. Non-novel applications should generally not require enhanced resources as any concerns that the OSC may have had should already have been addressed in the initial, novel application. We would recommend that, until the Investment Funds Branch resumes granting relief for novel applications, activity fee increases for applications be postponed.

We appreciate the opportunity to comment on the Proposed Rule and would be pleased to discuss our comments with you in person at any time.

Yours very truly,

**Invesco Trimark Ltd.**



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