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September 24, 2010

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
Superintendent of Securities, Yukon Territory
Registrar of Securities, Nunavut

Delivered to:

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Dear Sirs/Mesdames:

Re: ***Proposed Amendments to National Instrument 81-102 Mutual Funds and National Instrument 81-106 Investment Fund Continuous Disclosure and Related Proposed Amendments to Disclosure Instruments – Comments of Borden Ladner Gervais LLP***

We are pleased to provide the members of the Canadian Securities Administrators (the CSA) with comments on the proposed amendments to National Instrument 81-102 *Mutual Funds* (NI 81-102) and to National Instrument 81-106 *Investment Fund Continuous Disclosure* (NI 81-106), as well as the two investment fund disclosure instruments (National Instruments 81-101 and 41-101) published for comment on June 25, 2010.

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Our comments are those of lawyers in BLG's Investment Management practice group and do not necessarily represent the views of other lawyers, the firm or our clients, although we have incorporated feedback received to date from our clients into this letter.

In most cases our comments completely support the proposed amendments, but we point out some additional revisions that we believe are necessary in order to achieve the CSA's goal of reducing the number of common exemptions that have been routinely granted in the past few years. Our comments largely follow the ordering of the CSA's Notice and Request for Comment.

After we provide some comments on the CSA's proposals, we point out some other common exemptions/concerns with the instruments that we have brought to the attention of the CSA over the years, with the hope that the CSA will turn their attention also to these issues.

1. **Support for the Amendments to Facilitate the Offering of Exchange-Traded Mutual Funds (NI 81-102)**

We are in complete agreement with the CSA's proposals to build in the commonly granted exemptions necessary to facilitate offerings of exchange-traded mutual funds. However we note that the CSA have not included some relief that is commonly granted, including:

- Relief to permit purchase and redemption orders for securities of the funds to be transmitted to the exchange on which securities of the fund are listed, instead of the "order receipt offices" of the funds.

- Relief to exempt exchange-traded mutual funds from filing the compliance reports required under section 12.1 of NI 81-102.

2. **Support for the Amendments to Permit Mutual Funds to Invest in Other Mutual Funds on Revised Conditions (NI 81-102)**

We are in complete agreement with the CSA's proposals to amend NI 81-102 to broaden mutual funds' ability to invest in other mutual funds, including the proposed revised conditions.

However we note that many in the industry have sought, to date, unsuccessfully, permission that would allow a public mutual fund to invest in another mutual fund that is not publicly offered (a pooled fund), even in circumstances where such relief was in the best interests of the top public mutual fund, through reduction in costs, more efficiency in investments, etc. We urge the CSA to consider this issue further, particularly where the underlying pooled fund is managed by the same portfolio manager as the top fund, is only offered to accredited investors and is subject to the same investment restrictions as public mutual funds (generally this is agreed to in the constating documents of the pooled funds). This type of investing would not constitute "indirectly" distributing the pooled fund to the public, but rather would allow the top mutual fund to more efficiently meet its investment objective in the best interests of top fund investors.

The amendments to section 10.6 (suspension of redemptions) which would permit a clone fund to suspend redemptions if the underlying fund to which its performance is linked has suspended redemptions is useful, but we believe this section would be clearer if it mirrored paragraph (a), so that a top fund could suspend redemptions if one or more mutual funds in which the top fund invests which represent more than 50 percent of the market value of the top fund themselves suspend redemptions. There are many "asset allocation" funds in the market place which invest in a number of underlying funds.

We also note that OSC staff in 2008 indicated to one of our clients that section 2.5(7) of NI 81-102 was being administered as if it contained the words bolded in this sentence "…. if the purchase or holding is made in accordance with this section **or in accordance with exemptive relief granted from this section".** In our view, this would be a very helpful clarification, even if the CSA simply clarified its view that exemptions from applicable securities legislation are not required when exemptions are being sought from section 2.5, in the Companion Policy to NI 81-102 without necessarily amending section 2.5(7).

3. **Support for the Amendments to Permit Limited Short Selling (NI 81-102)**

We support the codification of the many exemptions that permit mutual funds to engage in limited short selling.

We strongly recommend that transitional provisions be included to clarify that mutual funds that have already have this permission via exemption and hence have disclosed this practice in their prospectus and to investors, from the requirements of section 2.11. As presently written, it is ambiguous whether these mutual funds need to comply with this section, even when they have already given the disclosure and the notice under the applicable exemption. We think the CSA cannot have intended this result and hence we recommend clearer drafting in this regard.

We also question why the aggregate market value of all securities of an issuer whose securities are sold short should not exceed 5 percent, instead of the normal concentration restriction of 10 percent. We can envision a situation where a mutual fund has an existing long position and wishes to also take a short position. If so, the provision as drafted would mean that such a strategy could only be used where the existing long position is less than 5 percent of the market value of the fund. We do not understand the policy rationale for such a provision.

4. **Comment on Money Market Fund Changes**

We do not propose to comment on the proposed changes to money market funds, other than to note that in August 2010, the SEC staff published a letter clarifying the treatment of short-term floating rate securities in the context of calculating a money market fund's weighted average portfolio maturity under the applicable US rules. We believe this would be useful clarification in respect of the differences between variable and floating rate securities also under the Canadian money market rules and would support similar clarifications being provided in NI 81-102. In our view, the existing rules, and the proposed rules do not provide the degree of clarity that is desirable in respect of these

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securities and we believe that clarifications similar to the SEC staff clarifications would be very useful for Canadian money market funds.

5. **Support for the Derivative Investment Changes (NI 81-102)**

We agree with the CSA's proposals to change the definition of "cash cover" and to remove the term limits for derivative instruments.

However, over the years we have brought other necessary or desirable clarifications to the attention of OSC staff regarding the derivative provisions. None of these changes have been made and we would be pleased to discuss additional clarifications with CSA staff.

6. **Comment on the Proposals regarding Disclosure of Net Asset Value (NI 81-106)**

We understand the CSA's wish to ensure greater transparency, particularly to investors in mutual funds, of the funds' net asset values through the proposed addition to section 14.2 of NI 81-106. However, we wonder whether this disclosure will be as relevant to other investors in other types of investment funds. We know that scholarship plans, for instance, do not have a concept of a "NAV" per unit of the plans; these investment funds are not unitized and therefore this disclosure will be of no benefit to subscribers and may even be misleading. We recommend that the CSA consider the relevance of this information for investors in other types of investment funds.

We also note a glitch in the CSA's proposals to amend NI 41-101. Unlike the proposed amendments to NI 81-101, the proposed amendments to NI 41-101 neglect to require disclosure about how an investor can access this information.

7. **Comment on Additional Amendments to Make to the Various Instruments**

As the CSA moves forward with finalizing these amendments and with its Phase 2 of modernizing rules that apply to investment funds we recommend the CSA consider the following amendments, all of which we have discussed with the CSA at some point over the years on behalf of our clients.

(a) Codifying the relief that is routinely granted to allow for investments in precious metals other than gold.

(b) Clarifying, throughout NI 81-102 and NI 81-101, the use of the terms "net assets" (which is not defined anywhere other than in NI 81-106F1) and "net asset value" (which is defined in NI 81-106). NI 81-102 uses the term "net assets" rather loosely throughout Part 2, which raises the issue about whether the CSA intend a reader to read this with the NI 81-106F2 definition in mind (which we know is not the case). Perhaps a statement could be added to the Companion Policy to NI 81-102 to clarify how this term should be interpreted to avoid future confusion.

(c) Item 9(1.1) of NI 81-106 provides for disclosure of the risks of large redemptions if more than 10 percent of the securities of a fund are held by

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a securityholder. With the increased popularity of funds being issued in series, we believe additional clarity should be provided to reinforce that this item requires disclosure only when one securityholder holds more than 10 percent of the market value of the fund, rather than 10 percent of the number of securities in any one class.

(d) With the coming into force of National Instrument 23-102, we believe it is appropriate for the CSA to amend section 3.6 of NI 81-106 to more clearly and appropriately require disclosure about the use of fund brokerage commissions in the funds' financial statements. In our view, many fund manager simply "work around" the difficulties in understanding exactly what is required by this section, but this results in potentially different disclosure depending on the fund manager's interpretation of this provision, which we note uses different terminology than NI 23-102. We believe that NI 23-102 should govern and that it does not make much sense from a regulatory policy perspective for two requirements to be so different, not to mention capable of differing interpretations.

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We thank you for allowing us the opportunity to comment on the proposed amendments to the various investment fund related instruments. Please contact either of the lawyers noted below if the CSA would like further elaboration of our comments. We would be pleased to arrange for the subject matter experts in our group to meet with you on the applicable topics at your convenience.

- Lynn M. McGrade at 416-367-6115 and lmcgrade@blgcanada.com
- Rebecca A. Cowdery at 416-367-6340 and rcowdery@blgcanada.com.

Yours truly,

"INVESTMENT MANAGEMENT PRACTICE GROUP"

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