Borden Ladner Gervais LLP
Scotia Plaza, 40 King Street W
Toronto, ON, Canada M5H 3Y4
T 416.367.6000
F 416.367.6749
blg.com

Borden Ladner Gervais

January 13, 2011

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:

John Stevenson
Secretary
Ontario Securities Commission
20 Queen Street West
19th Floor, Box 55
Toronto, ON M5H 3S8
jstevenson@osc.gov.on.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
consultation-en-cours@lautorite.qc.ca

Dear Sirs/Mesdames

Re: CSA Notice and Request for Comments – Notice of Proposed Amendments to National Instrument 31-103 *Registration Requirements and Exemptions* – Registration of International and Certain Domestic Investment Fund Managers

We are writing this letter on behalf of the Securities & Capital Markets Group of Borden Ladner Gervais LLP (BLG). As such, we are pleased to provide the Canadian Securities Administrators (CSA) with this letter commenting on the proposed amendments to National Instrument 31-103 *Registration Requirements and Exemptions* (NI 31-103) published for comment on October 15, 2010. Our comments 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.

As we outline in more detail below, we are opposed to the proposition outlined in the draft amendments that an investment fund manager (domestic or international) must be registered in multiple jurisdictions in Canada simply because the securities of the applicable funds managed by that fund manager are marketed and distributed in those jurisdictions.

We have had the opportunity to review drafts of the comment letters provided to the CSA by the Investment Funds Institute of Canada, Capital International, Inc. and Orbis Investment Management and we completely agree with and support the comments made in those letters. We also assisted the RESP Dealers Association of Canada (the trade association for the scholarship plan industry) to prepare its comment letter to the CSA and our comments echo those of the members of that association.

Proposed New Requirements for Domestic Fund Managers

Under the draft amendments, an investment fund manager that has a head office in Canada would be required to register in another province or territory "if the domestic fund has security holders that are local residents and the domestic fund manager, or the fund it manages, has actively solicited local residents to purchase the securities of the funds." This registration would be in addition to the presently required registration in the province where the fund manager's head office is located. For many of our clients, this would mean they would need to be registered as investment fund managers in each province and territory of Canada.

We believe that the requirement to register in the local jurisdiction should not be based on whether the investment funds have security holders that are local residents or the fact that the funds or their managers have actively solicited local residents to invest in the funds. Rather, we believe that a fund manager should be required to register only in its principal jurisdiction and any other jurisdiction in which it carries out some material element of investment fund manager activity or in which the investment fund under management is located. We believe that the correct approach is the current one. An investment fund manager must register in the jurisdiction where it is carrying out the activities as an investment fund manager, which for many of our clients will be the jurisdiction where their head office is located and the funds are actually managed.

We are opposed to these proposals for domestic fund managers for the reasons set out below.

1. Proposals do not reflect applicable legislation

We believe that the CSA's proposed approach does not recognize that an investment fund manager acts as an investment fund manager only in the province(s) where the funds are located and/or where the funds are actually managed. For many participants in Canada's investment fund management industry, the various investment funds are all subject to and established under the laws of a single province and each manager manages the funds *only* in that one province, where its head office is located.

The legislation at issue in most provinces and territories requires an investment fund manager to be registered in the province if it is "acting as an investment fund manager" in that province or territory. For example, section 25(4) of the *Securities Act* (Ontario) states that unless a person or company is exempt, "the person or company shall not act as an investment fund manager unless the person or company is registered in accordance with Ontario securities laws as an investment

fund manager". Using any reasonable plain language legislative interpretation, an investment fund manager must carry out the functions of an investment fund manager in order to be construed as "acting as an investment fund manager" in the particular province or territory. The CSA's proposed approach expands the common sense meaning of "acting as an investment fund manager" by mixing in concepts related to distribution of and trading in securities, which we consider inappropriate, given that distribution and trading are concepts that apply to dealers and not to the functions of an investment fund manager. Merely distributing and trading in securities of an investment fund does not mean that the investment fund manager is "acting as an investment fund manager" in those provinces and territories.

2. Proposals are contrary to CSA position taken for portfolio managers

The proposed approach is also contrary to the approach the CSA took for portfolio managers in finalizing NI 31-103. The CSA's approach for investment fund managers, in our view, reverts back to the so-called "look-through" or "flow-though" approach to registration for advisers in the context of advising investment funds. Before NI 31-103 was finalized, some members of the CSA, most notably the Ontario Securities Commission, took the position that advice to an investment fund flowed through to the investors of the fund, which effectively required advisers to be registered in the jurisdiction where securities of the investment fund were sold. With the final publication of NI 31-103 in July 2009, the CSA acknowledged that the investment fund, rather than the individual security holders of the fund, is the client of the adviser. As a result, adviser registration in this context is only required in the province or territory where the adviser and the investment fund are located. We believe the same principles must apply to investment fund manager registration. It seems particularly odd to us that the various portfolio managers of investment funds would not have to be registered in each province or territory where the funds are distributed, but the investment fund managers would.

3. Proposals not justified given existing regulation of fund industry

In our view, the reasons given by the CSA for requiring registration of investment fund managers in multiple provinces and territories are not thoroughly explained. In addition, we do not believe that regulatory oversight and investor protection would be enhanced by requiring a fund manager to register in additional jurisdictions in which it does not actually carry out fund manager activities.

In our view, each provincial/territorial securities regulator already has significant jurisdiction and control over the relevant entities involved with an investment fund which are most relevant and important for local residents:

1. The dealer who interacts with local residents is registered in the local jurisdiction – the local securities regulator can take action if there is perceived to be a problem in how the securities are being distributed in the jurisdiction.

2. If the funds are distributed via prospectus, the funds are reporting issuers in each province and territory in which the prospectus is receipted – the local securities regulators can take action if there is perceived to be a problem with the disclosure given to local residents in a jurisdiction.

3. If the funds are distributed in a local jurisdiction pursuant to a prospectus exemption – the local securities regulators can take action against the funds if there is perceived to be a problem with this distribution by denying the funds the right to rely on the prospectus exemptions.

In addition, we submit that if a securities regulator in a province or territory perceives there to be a problem with the management and administration of an investment fund, then it has remedies available to it – namely, cease trading the securities of the funds, refusing to issue a receipt for the prospectus for the funds and/or denying reliance on prospectus exemptions. These are all very powerful regulatory tools in our view and are more appropriate than requiring the fund manager to be registered in the local jurisdiction.

4. Proposals will increase the regulatory burden and costs

We recognize that the CSA has explained that most investment fund managers can rely on the passport system to register in multiple jurisdictions with a single filing with the principal regulator. However, we point out that registration as an investment fund manager in multiple jurisdictions is not without additional cost and administrative burdens, given that fees would be associated with this additional registration in each province and territory of Canada, and in some cases, individual jurisdictions will have their own rules for fund managers to understand and comply with. As currently drafted, the proposed amendments would simply add to the fee burden borne by the managers of investment funds, which ultimately will flow through to the fund investors, without, in our view, adding to the regulatory oversight of industry participants.

We also point out that the investment fund industry in Canada pays significant regulatory filing fees in each province and territory, some of which fees can be expected to be bound by investors in the funds and -- as we point out above – these fees can be expected to increase if the CSA's proposals are adopted:

(a) Dealers pay annual regulatory fees for the firm and each dealing representative operating in each province and territory in which they are registered.

(b) The funds pay regulatory filing fees to renew their prospectus every year and/or to file reports of private placements and other disclosure documents in every applicable jurisdiction.

(c) The investment fund managers pay annual regulatory fees for the firm in its head office province.

(d) The portfolio managers pay annual regulatory fees for the firm and its various representatives in the provinces/territories in which they are operating.

5. Proposals do not reflect exemptions from registration

The CSA's proposed approach raises difficulties for entities that may be relying on an IFM exemption in one jurisdiction – but where its funds are distributed in more than one jurisdiction. For example, the CSA's proposals do not recognize the exemption from IFM registration provided for in section 35.1 of the *Securities Act* (Ontario).

The CSA's proposals also raise issues for certain entities that are managing certain pension master trusts – where the master trust is formed and managed in one province, but is invested in by pension funds that are set up in other provinces. In our view, the managers of pension master trusts should be exempt from registration as an investment fund manager in any jurisdiction, given that these vehicles are not the same kind of vehicle nor do they raise the same kinds of risks, as more traditional mutual funds or closed end funds. We urge the CSA to consider implementing this form of overall exemption that would apply to entities that manage master pension trusts. We would be pleased to discuss this issue, which is very important in the pension community with members of the CSA.

6. Proposals for required notices are misguided

We are also strongly opposed to the proposed new notice requirement that would require all domestic investment fund managers to provide a notice to investors informing them of their non-resident status, as well as the risk that investors "may not be able to enforce legal rights" in the local jurisdiction. As we alluded to in our letter of September 30, 2010, we believe this kind of disclosure is inappropriate – and may be misleading to investors - for firms that operate in all provinces and territories of Canada. This requirement is meaningless for domestic non-resident investment fund managers and will raise questions and uncertainty in the minds of investors, where in fact there is little risk that legal actions initiated in one Canadian jurisdiction will not be enforceable in another.

Proposed New Requirements for Non-Canadian Investment Fund Managers

In a similar fashion as for domestic investment fund managers, under the CSA's proposals, the entity that is acting as the "investment fund manager" of an international investment fund that is distributed in any province or territory (usually as a result of a private placement) must be registered in that province or territory as an investment fund manager, even though the activity of management is being conducted in a location that is not in Canada and the fund has no other nexus with Canada.

As is well described in the comment letters of Capital International, Inc. and Orbis Investment Management, the CSA's proposals can reasonably be expected to have a significant deterring effect on the availability of international funds to Canadian investors, which we consider will be of particular concern to the institutional and high net worth investment community. We completely agree with the assertions made in both those letters that the current regulatory regime provides an appropriate balance for the institutional/accredited investor/private placement marketplace.

The comments we provide above regarding our reasons for opposing multiple registrations for domestic investment fund managers are equally applicable to our opposition to the proposal to require international investment fund managers to be registered in Canada:

1. The proposals do not reflect the legislation.

2. The proposals are at odds with the position taken by the CSA for international dealers and advisers.

3. The proposals are not justified given the current regulatory regime applicable to distribution of international funds (via prospectus exemptions and through registered dealers) in Canada. In particular for international fund managers, it is also important to note that in most developed regulatory regimes around the world where the funds being distributed are domiciled and managed, the fund managers and the functions of fund management are highly regulated.

4. The proposals will increase regulatory burdens and costs for international fund managers, which as we note above can reasonably be expected to significantly curtail international fund managers from deciding to distribute funds into Canada.

In addition to the above-noted comments, there are others that are unique to international fund managers:

5. The proposals would require international fund managers to comply with uniquely Canadian requirements, such as Canadian proficiency requirements for CCOs, Canadian bonding for the firm, Canadian-focused working capital tests, Canadian financial reporting, etc. All of this adds significantly to the regulatory burdens, which can be expected to lead to the conclusions that Canada is just "too much of a bother" for an international fund manager.

6. Compliance with the proposed new requirements can be expected to be extremely variable, given the uniqueness of the proposed requirements in a global context (that is, an international fund manager would not reasonably consider or realize that it would have to be registered in a province if its funds were issuing securities in a private placement) and the sheer number of funds distributing securities in the provinces in exempt transactions.

We urge the CSA to consider our comments and those comments provided in Capital International's and Orbis' letters and not implement the requirement for non-Canadian investment fund managers to register in the Canadian jurisdictions. Alternatively, we would hope that the CSA would adopt one of the alternatives raised by Capital International and Orbis in their letters.

****

Thank you for considering our comments and we would be very pleased to discuss them with you in more detail.

Please contact any one of the following lawyers (at the contact information provided below) if you have any questions about our comments or you would like to meet with us to discuss them.

Yours very truly,

Borden Ladner Gervais LLP

Securities & Capital Markets Group

Toronto:

Prema K.R. Thiele
416-367-6082
pthiele@blg.com

Marsha P. Gerhart
416.367.6042
mgerhart@blg.com

Rebecca A. Cowdery
416.367.6340
rcowdery@blg.com

Montreal:

Anick Morin
514.954.2532
amorin@blg.com

Vancouver:

Jason J. Brooks
604.640.4102
jbrooks@blg.com