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Via e-mail

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:

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Dear Sirs/Mesdames:

Re: CSA Notice and Request for Comments (the CSA Notice) on Proposed NI 51-103 Supplementary Prospectus Disclosure Requirements for Securitized Products, Proposed NI 51-106 Continuous Disclosure Requirements for Securitized Products, Proposed Amendments to NI 52-109 Certification of Disclosure in Issuers' Annual and Interim Filings, Proposed Amendments to NI 45-106 Prospectus and Registration Exemptions and NI 45-102 Resale of Securities, and Proposed Consequential Amendments published for comment on April 1, 2011

We are pleased to provide the members of the Canadian Securities Administrators (CSA) with comments on the above-noted proposed instruments (collectively, the Proposed Securitized Products Rules).

These comments are those of certain individual lawyers in Borden Ladner Gervais LLP's Securities and Capital Markets Practice Group and do not necessarily represent the views of the firm, other individual lawyers in the firm, or the firm's clients.

Below we provide comments on general policy issues raised by the CSA and on certain specific questions set out in the CSA Notice.

General

General principles followed by the CSA in developing the Proposed Securitized Products Rules (Question #1)

The three principles used by the CSA in developing the Proposed Securitized Products Rule – (i) access by investors in securitized products to timely and relevant information about the products, (ii) transparency in the securitization market, and (iii) rules that are proportionate to risk – are appropriate principles for the CSA to follow when considering regulatory requirements. However, these principles should be applied in the context of the existing regulatory regime and where there are existing regulatory tools available to address the CSA's policy concerns those tools should be used to their fullest extent before new rules are considered. In the case of regulation directed at a specific product, the existing distribution and registration regime in Canada already address many of the issues that the CSA is purporting to address with the Proposed Securitized Products Rules. With respect to the distribution regime, National Instrument 45-106 *Prospectus and Registration Exemptions* (NI 45-106) sets out a comprehensive approach to prospectus exemptions and rather than making that regime more complex through the product-focused approach in the Proposed Securitized Products Rules, the CSA should focus on refining the existing exemptions to address their concerns. And, with respect to the registration-related issues raised in the CSA Notice, National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (NI 31-103) sets out proficiency, know-your-client (KYC), know-your-product (KYP) and suitability requirements that address many of those issues.

In our comments below we elaborate on how the existing requirements address some of the issues that the Proposed Securitized Products Rules purport to address.

Definition of "Securitized Product" (Questions #5, 6 and 7)

The use of a broad definition in regulatory requirements can often result in unintended consequences. This imposes costs on industry participants as it is usually industry that identifies the unintended consequences and then is required to go to some expense to work through the unintended consequences with the regulators.

The proposed carve-outs for covered bonds (because they are primarily obligations of a financial institution and so do not seem to raise the same policy concerns as standard securitized products) and non-debt securities of mortgage investment entity (because they are the subject of another CSA policy project) do not provide sufficient guidance on the CSA's specific concerns. If securitized products are guaranteed by a financial institution are the same policy concerns as standard securitized products raised? Similarly with respect to securitized products that are guaranteed by the Government of Canada or the government of a jurisdiction of Canada?

The proposed "securitized product" definition is also broad enough to capture a single syndicated loan secured by a pool of receivables and over-the-counter derivatives though it is unclear from the CSA Notice whether these products raise the same policy concerns that the Proposed Securitized Products Rules purport to address.

We encourage the CSA, if the proposal proceeds, to identify those securitized products which the proposed requirements are really intended to apply to and provide very clear guidance on the features of those products that raise policy concerns in order to assist industry in applying the rules.

The Proposed Prospectus Disclosure Rule

Registration (Question #17)

Under the current Canadian registration regime, prospectus qualified securitized products are generally only able to be traded by investment dealers (i.e. IIROC members) and exempt market dealers unless the product qualifies as "specified debt" for purposes of the dealer registration exemption set out in section 8.21 of NI 31-103 (the specified debt exemption) (and the equivalent exemption under the Ontario *Securities Act*)in which case it could be traded by anyone, without any registration, pursuant to the terms of that exemption.

The registration regime for investment dealers and exempt market dealers and their dealing representatives imposes robust proficiency, KYC, KYP and suitability obligations (subject to the ability of permitted clients to waive a suitability assessment by their dealer) on such dealers and registered individuals, the object of which is to ensure that these dealers and registered individuals are fully proficient in the products in which they trade. In our view there is no policy basis for restricting either investment dealers or exempt market dealers from trading in prospectus-qualified securitized products when each are subject to such robust requirements that, amongst other things, require them to understand the complexity of the products before they trade in them.

The most likely registration exemptions which could be used by an entity to trade in securitized products are the "Northwestern Exemption"[1] (this is limited to certain Canadian jurisdictions) and the specified debt exemption in NI 31-103 referred to above.

The Northwestern Exemption permits anyone to be in the business of trading any securities under certain prospectus exemptions (sec. 2.3 of NI 45-106 "accredited investor", sec. 2.5 of NI 45-106 "family, friends and business associates", sec. 2.9 of NI 45-106 "offering memorandum" and sec. 2.10 of NI 45-106 "minimum investment amount") without being registered but subject to certain conditions. Likewise, the specified debt exemption allows anyone to be in the business of trading specified debt, as defined in NI 31-103, without being registered. As the policy basis for these exemptions does not appear to be based on the complexity of the security but rather on things like the sophistication of the investor, the affiliation of the investor with the issuer and the quality of the issuer or guarantor it does not seem appropriate to restrict these exemptions based solely on the complexity of a

[1] The Northwestern Exemption is the dealer registration exemption available in the western provinces and territories for entities only carrying on business in the exempt market subject to certain conditions.

product. Presumably a sophisticated investor can decide for itself whether it understands the complexities of a product sufficiently enough to want to invest in it, and issuers/guarantors of the calibre set out in the specified debt exemption are generally considered safe issuers/guarantors and will likewise want to ensure they fully understand the product before issuing or guaranteeing it.

We do not think the CSA should be removing prospectus or registration exemptions on a product-by-product basis especially where the nature/complexity of the product was not the policy basis for the exemption in the first instance. Rather we encourage the CSA to consider the circumstances of an exemption, the policy basis for it, and whether refinements should be made to the exemption to address any gaps on an over-all basis not on a product-by-product basis.

The Proposed Exempt Distribution Rules

General Approach (Questions #27 and 28)

A product-centered approach to regulation is challenging given the evolving nature of products. Product-centered regulation must be drafted broadly in order to capture the evolving nature of products, but broadly drafted regulatory requirements often result in unintended consequences as discussed above which are costly to both industry and securities regulators as work is required to resolve the unintended consequences. It often also results in regulation being reactive rather than proactive.

As the CSA acknowledge in their Notice, securitization represents an important source of credit to the economy. The exempt market fulfills an important role in capital markets generally and restricting the ability of issuers to use the exempt market based solely on the type of product issued could affect the ability of many issuers to raise capital. The cost of doing a prospectus offering and the ongoing compliance costs of being a reporting issuer are significant and ultimately reduce the return to an issuer's investors.

We believe that securitized products should be able to be traded under both the prospectus-qualified regulatory regime and the prospectus-exempt regulatory regime. Each regime addresses different levels of investor sophistication through appropriate levels of issuer and product disclosure and appropriate types of market intermediaries and provides issuers with flexibility when raising capital. It is through the disclosure and registration requirements of each regime that the nature of any type of security (not just securitized products) should be addressed in order to ensure that investment opportunities are made available to all levels of investor, subject to the appropriate conditions, and that issuers are not unduly restricted in their access to capital.

The CSA should focus on ensuring a consistent approach nationally to the exempt market in any reform project it undertakes.

Who can buy (Questions #29 – 33)

Prospectus exemptions that are based on the sophistication level of the investor should not be applied or restricted on a product-by-product basis. Sophisticated investors are theoretically able to obtain the information and/or assistance they consider necessary in

order to make an investment decision regardless of the product. Whatever set of investors is considered by the CSA to have the necessary level of sophistication – the existing "accredited investor" definition from National Instrument 45-106 Prospectus Exempt Distributions (NI 45-106) or the "permitted client" definition from NI 31-103 or the "eligible securitized product investor" in the Proposed Securitized Products Rules – the concept of sophistication should be conformed across the CSA instruments. The minimum amount exemption in section 2.10 of NI 45-106 for example sets out a measure of sophistication that is different from and arguably inconsistent with the measure of sophistication required for the accredited investor exemption however, the same security could be distributed under both exemptions.

With respect to prospectus exemptions which are based on an affiliation – e.g. the private issuer exemption – rather than the sophistication level of the investor, it is likewise difficult to justify imposing a restriction based on complexity of a product since the product is not relevant to the policy basis for the exemption.

Please see our comments under Registration (Question #17) above which are also relevant to this section.

Registration (Questions #46 and 47)

Generally, the only categories of registrant that can trade in non-prospectus qualified securitized products are investment dealers (i.e. IIROC members) and exempt market dealers. As discussed above, the registration regime for investment dealers and exempt market dealers and their dealing representatives imposes robust proficiency, KYC, KYP and suitability obligations (subject to the ability of permitted clients to waive a suitability assessment by their dealer) on such dealers and registered individuals, the object of which is to ensure that these dealers and registered individuals are fully proficient in any products (prospectus or non-prospectus qualified) in which they trade. As with prospectus qualified securitized products, in our view there is no policy basis for restricting either investment dealers or exempt market dealers from trading in non-prospectus qualified securitized products when these dealers are subject to requirements that require them to understand the complexity of the products before they trade in them.

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We thank you for allowing us the opportunity to comment on the Proposed Securitized Products Rules. Please contact the following lawyers in our Toronto office if the CSA members would like further elaboration of our comments. We, together with other BLG lawyers who contributed to this letter, would be pleased to meet with you at your convenience.

- Prema K.R. Thiele (Toronto office) at 416-367-6082 and pthiele@blg.com
- Marsha P. Gerhart (Toronto office) at 416-367-6042 and mgerhart@blg.com

We commend the CSA on the work done to date and urge the CSA to continue to strive for complete national uniformity of applicable rules that recognize the national scope of most Canadian capital markets industry participants.

Yours truly,

Borden Ladner Gervais LLP

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