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Ladies and Gentlemen,

Re: Request for Comments on Proposed Multilateral Instrument 32-102 *Registration Exemptions for Non-Resident Fund Managers* ("**MI 32-102**" or "**Exemption Proposal**"), Companion Policy 32-102CP ("**CP 32-102**") *Registration Exemptions for Non-Resident Investment Fund Managers*, and Proposed Multilateral Policy 31-202 *Registration Requirement for Investment Fund Managers* ("**MP 31-202**" or "**Policy Proposal**")

In response to the request for comments on the Exemption Proposal and CP 32-102 issued on February 10, 2012 by the securities regulators of Ontario, Quebec, New Brunswick and Newfoundland and Labrador (collectively, the "**Exemption Jurisdictions**") and the simultaneous request for comments on the Policy Proposal by the securities regulators of British Columbia, Alberta, Saskatchewan, Manitoba, Prince Edward Island, Nova Scotia,

Northwest Territories, Yukon and Nunavut (collectively, the "**Policy Jurisdictions**"), we are pleased to submit the following comments.

This letter represents the general comments of certain members of our securities practice group (and not those of the firm generally or any client of the firm) and are submitted without prejudice to any position taken or that may be taken by our firm on its own behalf or on behalf of any client.

We commend the continued efforts of the securities regulators in both the Exemption Jurisdictions and the Policy Jurisdictions (collectively, the "**Regulators**") on registration matters generally and in responding to many of the issues we raised in our previous comments on proposed amendments to NI 31-103 *Registration Requirements and Exemptions* (now *Registration Requirements, Exemptions and Ongoing Registrant Obligations)* ("**NI 31-103**"), *Registration of International and Certain Domestic Investment Fund Managers* of October 2010 (the "**October 2010 Proposals**") in our letter dated January 13, 2011 ("**Previous Comment Letter**") and raised by others in their earlier comment letters.

Overall, we are supportive of the approach proposed to be taken by the Policy Jurisdictions, which confirms that it is a matter of interpretation as to when the investment fund manager ("**IFM**") registration requirement is triggered in a jurisdiction, but makes it expressly clear that the presence of security holders and the solicitation of investors in a jurisdiction do not automatically require an IFM to register in the jurisdiction. With respect to the approach proposed to be taken by the Exemption Jurisdictions, for the reasons set out below, we respectfully submit that, in lieu of adopting their current proposal, the Exemption Jurisdictions should adopt the Policy Proposal. Failing this, we recommend that the Exemption Jurisdictions: a) introduce in the Exemption Proposal a "grandfathering exemption" similar to the October 2010 Proposals or other appropriate grandfathering provisions; b) eliminate the proposed requirement to file a "Notice of Regulatory Action"; and c) expand the definition of "permitted client" for the purposes of the Exemption Proposal.

a) *Harmonization*

We would urge the securities regulators of the Exemption Jurisdictions to harmonize their approach with that of the securities regulators of the Policy Jurisdictions. The long stated goal of harmonizing, streamlining and modernizing registration requirements and exemptions across all Canadian jurisdictions is an important one and it is not clear that the matter of non-resident investment fund manager registration and exemptions is an area where there should be material differences in approach. We believe the proposed approach in the Policy Jurisdictions reflects the legislative construct and its appropriate interpretation.

As discussed in our Previous Comment Letter, the formulation of the IFM registration requirement under local securities legislation suggests that there must be an element of "mind and management" undertaken by an entity that is the IFM. The securities regulators in the Policy Jurisdictions, in our view, have reflected appropriately this concept of a sufficient jurisdictional nexus such that IFM registration would be required when the IFM is conducting activities in a jurisdiction consistent with the functions of an IFM.

b) *Grandfathering provisions*

In the October 2010 Proposals, the Canadian Securities Administrators ("**CSA**"), had proposed amending section 1.3 of 31-103CP to read:

> Investment fund managers that do not have a physical place of business in a jurisdiction and **have not actively solicited** [emphasis added] in that jurisdiction **after September 28, 2011** [emphasis added], and meet certain other conditions, will not be required to register.

At the time, September 28, 2011 was the date on which the registration exemption for non-resident IFMs would expire. We note that there are no grandfathering provisions included in the Exemption Proposal. We strongly recommend that if the approach in the Exemption Proposal is taken, which we do not recommend, the securities regulators in the Exemption Jurisdictions include a grandfathering provision.

As proposed, the Exemption Proposal would require an IFM to register in one or more of the Exemption Jurisdictions if "either the investment fund or the investment fund manager distributes or **has distributed** [emphasis added] investment fund securities in the jurisdiction".[1] We respectfully submit that to impose a registration requirement on an IFM now, when at the time of a distribution to investors in Canada in the past there was no registration requirement, is inappropriate.

There is also the possibility that imposing a registration requirement for the IFM now will lead parties to conclude that the cost of compliance, with a requirement they did not expect at the time that the economics of the fund were structured, is too onerous and seek to compel Canadian holders of investment fund securities to redeem or otherwise dispose of existing holdings with potentially serious adverse tax consequences and a narrowing of investment opportunities for Canadians. Further, and as discussed in our Previous Comment Letter, the imposition of a retroactive IFM registration requirement on many non-Canadian investment funds that no longer solicit Canadian investors would be unlikely to add much regulatory benefit, but would likely add unbargained for costs to the detriment of certain Canadian-resident investors.

A grandfathering provision is essential to make the permitted client exemption in section 4 (the "permitted client" exemption) work as contemplated by the notice[2] where the securities regulators of the Exemption Jurisdictions state that it is not intended that the notice to clients be given to existing investors. As proposed now, even if an investment fund managed by a non-resident IFM had only one investor in an Exemption Jurisdiction, for example, a Canadian pension fund, if that investor's investment was solicited prior to MI 32-102 coming into force, the non-resident IFM would not have the benefit of the "permitted client" exemption because the conditions in section 4(2)(d) and (e) would not have been satisfied. We do not believe that this outcome is intended or appropriate.

We recommend that the Exemption Proposal should grandfather all situations where securities of an investment fund were distributed to investors in an Exemption Jurisdiction

[1] See MI-32-102, Introduction

prior to the date of the adoption of the Exemption Proposal as it will only be at that date that the rule is clear.

c) *Notice of Regulatory Action*

In the Exemption Jurisdictions, IFMs relying on the exemption from registration in subsection 4(1) would be required to file a completed Form 32-102F2 *Notice of Regulatory Action* ("**Form 32-102F2**") within 10 days of the date on which the IFM began relying on the exemption. In the context of an exemption from registration that is tied to the relative sophistication of investors in an investment fund, we would submit that this proposed requirement is excessive. There is no parallel requirement by the Policy Jurisdictions, an approach which we support.

If the filing of a Form 32-102F2 is retained in the Exemption Jurisdictions, we make the following observations and suggestions. In the Exemption Jurisdictions, the proposed Form 32-102F2 would require that IFMs relying on the "permitted client" exemption disclose, among other things, violations of securities regulations, settlement agreements and ongoing investigations of the IFM, its "predecessors" or "specified affiliates" (collectively, "**Reporting Entities**"). The breadth of the definition of Reporting Entities makes it unlikely that an IFM which is part of a large financial services firm would be able to report the information required by Form 32-102F2 in a complete and accurate manner without significant and burdensome internal due diligence, if in fact the information could be obtained. The ability of an IFM to obtain information about a firm that is a "specified affiliate" because it is owned as to 21% by the firm's parent, for example, is uncertain.

As an aside, while we note that the definitions provided in Form 32-102F2 for the Reporting Entities are consistent with the definitions contained in Form 33-109F6 *Firm Registration* ("**Form 33-109F6**"), it is our experience that similar significant conceptual difficulties are experienced by firms completing Form 33-109F6. We note that comparable disclosure is not required of international dealers or international advisers relying on the exemptions from registration contained in section 8.18 and 8.26 of NI 31-103.

We would urge that the Exemption Jurisdictions not require the filing of the proposed Form 32-102F2 and, if it is to be retained, that the scope of the required disclosure be narrowed to material regulatory matters affecting the IFM filer only.

Finally, we would urge the securities regulators in the Exemption Jurisdictions to consider permitting an IFM that is registered, or relying on an exemption from registration in a foreign jurisdiction, with substantively similar reporting requirements as those contained in the Form 32-102F2 to file a copy of the IFM's substantively similar domestic reporting form in lieu of the Form 32-102F2. We believe that such an approach would provide the securities regulators in the Exemption Jurisdictions with adequate disclosure and eliminate potential costly and burdensome duplicative reporting obligations.

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[2] See MI 32-102, Summary of the Proposed Instrument; Notice to permitted clients.

d) *Outsourcing*

As discussed in our Previous Comment Letter, the IFM registration requirement does not readily square with how many fund vehicles are commonly structured outside of Canada, including; limited partnerships administered by corporate general partners, limited liability companies, corporate vehicles and other special types of collective investment schemes (e.g., European UCITS and other umbrella investment companies). In our Previous Comment Letter, we highlighted that many of these vehicles have boards of directors or equivalent governance bodies such that the fund vehicle itself or the individual members of its governing body might technically be "a person or company that directs the business, operations or affairs of an investment fund" and therefore be subject to the IFM registration requirement. While we recognize that our concern has been somewhat mitigated by the inclusion of outsourcing comments contained in "Annex A" response #4 of the Policy Proposal and in "Annex C", section 4, of the Exemption Proposal ("**Outsourcing Comments**"), we believe that further clarification of the Outsourcing Comments is required based on the following. As written, the Outsourcing Comments in both the Policy Proposal and the Exemption Proposal state (without substantive difference):

> We agree that the delegation of certain functions by an investment fund manager, on its own, would not require the investment fund manager to register in the jurisdiction where the service provider is located. However, the investment fund manager is responsible for these functions and must supervise the service provider. Further, if an entity delegates or outsources activities to a service provider to such a level that the service provider is directing or managing the business, operations or affairs of an investment fund in the jurisdiction, **then the service provider must also register as an IFM** [emphasis added].

The Outsourcing Comments, therefore, seem to indicate that in certain circumstances, two entities may require IFM registration even though only one entity is performing the IFM function. We believe that it would be helpful if the Regulators would provide guidance on which outsourced activities would attract the IFM registration requirement in their jurisdictions and clarify that the provision of "normal shareholder services" would not require IFM registration in their respective jurisdictions.

e) *Sponsoring Filer*

Due to the structure of many non-Canadian fund vehicles, we would recommend that the securities regulators in the Exemption Jurisdictions consider the concept of a "sponsoring filer" for situations where there are multiple IFM's within the same group of investment funds. Such a practice would avoid multiple duplicate filings covering the same affiliated entities yet would capture and provide the securities regulators in the Exemption Jurisdictions with the required information.

f) *Employees as Investors*

Some investment funds permit employees of the fund, the IFM or their affiliates to invest in the fund either under the "accredited investor exemption" or the "employee

exemption" contained in NI 45-106 *Prospectus and Registration Exemptions.* These individuals may not be "permitted clients" as defined in NI 31-103. We suggest that for the purposes of the "permitted client" exemption the definition of "permitted client" be expanded so that investments by such employees in the jurisdiction not preclude reliance by the IFM on the "permitted client exemption".

g) *Technical Comments*

We would also recommend that the securities regulators in the Exemption Jurisdictions take this opportunity to clarify:

Part 2: Section 3 MI 31-102:

The reference to "if it does not have a place of business" is confusing. The language should parallel substantially that in section 4(2)(a) so the introductory language to section 3 should read:

> The investment fund manager registration requirement does not apply to a person or company acting as an investment fund manager of an investment fund <u>if the investment fund manager does not have its head office or its principal place of business in the local jurisdiction and if one or more of the following apply...</u>

Part 2: Section 4(1) MI 31-102:

For clarity we recommend that the text in the second line be rephrased to read: "...if all the securities of the investment fund distributed <u>by the investment fund</u> in the local jurisdiction were distributed...". The change would eliminate the uncertainty related to resales by investors who acquired their securities in the investment fund under a prospectus exemption as these kinds of distributions are not intended to give rise to issues for the IFM.

Part 2: Section 4(2)(b) MI 31-102:

We recommend deleting clause (b) regarding the jurisdiction of formation of the IFM. We submit that the jurisdiction of formation of the IFM is irrelevant to the analysis. For an Exemption Jurisdiction, there is no apparent reason to distinguish a British Columbia incorporated IFM from a Delaware incorporated IFM where they each have their head office and principal place of business in Bermuda and securities of a Bermuda fund are otherwise sold to a permitted investor in the Exemption Jurisdiction in compliance with section 4.

Part 2: Section 4(2)(e) MI 31-102:

We agree with the comments of the securities regulators in the Policy Jurisdictions that IFMs do not have a relationship with the security holders of the funds they manage that makes the notice of the non-resident status to the security holders necessary and would recommend that the same approach be followed by the Exemption Jurisdictions by deleting section 4(2)(e) of the Exemption Proposal. As there is no client nexus between the investor in the fund and the IFM itself, the requirement to provide

the notice may imply some form of contractual privity which does not exist, or otherwise confuse the investor on this issue. One alternative to emphasize the non-registered status of an IFM may be for the Exemption Jurisdictions to require appropriate disclosure in any offering document that is provided, along the line of what is now required under section 7.11 of Ontario Securities Commission Rule 35-502 *Non-Resident Advisers*.

To the extent that the current approach in the Exemption Proposal is maintained, the comments in the notice of MI 32-102, namely that IFMs would be required to notify only new permitted clients making an investment after the coming into force of MI 32-102 and would not be expected to notify existing permitted clients who have invested in the fund at the time of coming into force of MI 32-102, should be reflected in the wording of section 4 of MI 32-102.

Part 2: Section 4(3) MI 31-102:

Section 4(3) provides that: a person or company that relied on the exemption in subsection (1) during the 12 month period preceding December 1 of a year must notify the securities regulatory authority in the local jurisdiction, by December 1 of that year, of the following:

a) the fact that it relied upon the exemption in subsection (1);
b) for all investment funds for which it acts as an investment fund manager, the total assets under management expressed in Canadian dollars, attributable to securities beneficially owned by residents of the local jurisdiction as at the most recently completed month.

It has been our experience that the formulation of the similar "annual notice" requirement in sections 8.18(5) and 8.26(5) of NI 31-103 is confusing, particularly if the firm in fact had no placement activity or clients in the jurisdiction even though it had hoped to have such. We would recommend that this requirement be reformulated as a notice that the firm intends to rely on the exemption in the next 12 months.

While we question both the practicality and the necessity of the proposed reporting obligation contained in section 4(3)(b), we would recommend that the Exemption Jurisdictions provide clear guidance with respect to the preferred method of calculation of assets under management and the concept of "securities beneficially owned" in this report.

Finally, in the event that section 4(3)(b) is adopted, we suggest for Ontario that consideration be given to adding the disclosure requirement as a line item on the Form 13-502F4 *Capital Markets Participation Fee Calculation* with appropriate guidance on the required calculation.

Part 4: Section 6 and 7:

We would recommend revising the text of these sections more along the lines of what is now section 16.7(3)(b) of NI 31-103 to clarify that if application is made by the noted

dates the IFM registration requirement does not apply until the application has been accepted or rejected.

Form 32-102F2:

We would suggest that if the Form 32-102F2 is intended to replicate the Form 33-10F6 that a definition of the term "parent" (which appears in the definition of "specified affiliate") as it is defined in Form 33-109F6, is added to Form 32-102F2.

We also note that there is no separation between the information required to be provided in question 3 of Form 32-102 and the signature panel which immediately follows.

Ontario Capital Market Participation Fee:

We would recommend that the Ontario securities regulator clarify the capital market participation fee calculation requirements for IFMs that will rely on the exemption from registration. As currently drafted, the calculation of the fee is somewhat ambiguous due to the definition of capital markets activities in Ontario which is defined in section 1.1 of Ontario Securities Commission Rule 13-502 *Fees* ("**Rule 13-502**") as:

> "capital markets activities" means
>
> (a) activities for which registration under the Act or an exemption from registration is required,
> (b) acting as an investment fund manager, or
> (c) activities for which registration under the Commodity Futures Act, or an exemption from registration under the Commodity Futures Act, is required.

We suggest that, for greater certainty and in order to conform with the definition of "Ontario percentage" contained in section 1.1[3] of Rule 13-502 which clearly suggests that the calculation of the Ontario percentage is based only on revenue attributable to capital markets activities in Ontario, subsection b) of the definition of capital markets activities in Ontario be amended to read: "acting as an investment fund manager in Ontario, or..."

In addition, we would recommend that the Ontario securities regulator provide guidance with respect to the requirement that unregistered IFMs file Form 13-502F4 within 90 days of the unregistered IFM's year end based on audited financial statements. It has

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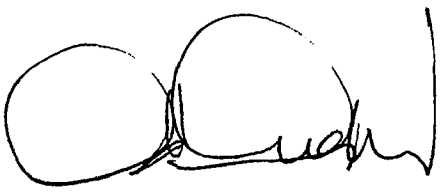
[3] See section 1.1: "Ontario percentage" means, for a fiscal year of a participant (a) if the participant is a company that has a permanent establishment in Ontario in the fiscal year, the participant's Ontario allocation factor for the fiscal year expressed as a percentage and determined on the assumption that the participant had a taxation year that coincided with the fiscal year and is resident in Canada for the purposes of the ITA, (b) if paragraph (a) does not apply and the participant would have a permanent establishment in Ontario in the fiscal year if the participant were a company, the participant's Ontario allocation factor for the fiscal year expressed as a percentage and determined on the assumption that the participant is a company, had a taxation year that coincided with the fiscal year and is resident in Canada for the purposes of the ITA, and (c) **in any other case, the percentage of the participant's total revenues for the fiscal year attributable to capital markets activities in Ontario.** [emphasis added]

come to our attention that in some jurisdictions audited financial statements are not available within 90 days of the IFM's year end.

We thank the Regulators for the opportunity to comment on the proposals and would be happy to discuss these issues further.

Submitted on behalf of members of the Securities Practice Group at Stikeman Elliott LLP by,



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