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Delivered by email: comments@osc.gov.on.ca, consultation-en-cours@lautorite.qc.ca

British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
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
Superintendent of Securities, Northwest Territories
Superintendent of Securities, Yukon
Superintendent of Securities, Nunavut

Attention:

The Secretary
Ontario Securities Commission
20 Queen Street West
19th Floor, Box 55
Toronto, ON M5H 3S8

Me Anne-Marie Beaudoin
Corporate Secretary
Autorité des marchés financiers
800, square Victoria, 22e étage
C.P. 246, Tour de la Bourse
Montréal (Québec) H4Z 1G3

Re: CSA Notice and Request for Comment re: Proposed Amendments to National Instrument 81-102, Companion Policy 81-202 CP, Related Consequential Amendments and Other Matters Concerning National Instrument 81-104 and Securities Lending Repurchases and Reverse Repurchases by Investment Funds (the "CSA Notice")

Thank you for the opportunity to comment regarding the proposed amendments to National Instrument 81-102 set out in the CSA Notice. Although there are many issues raised by the proposals in the CSA Notice, we will address the most substantive matters in this letter. Please note that these comments do not necessarily reflect the views of all lawyers of the firm or of our clients.

In our view the CSA should carry out further consultation and research about the proposal to extend many of the same rules that apply to mutual funds to non-redeemable investment funds (or closed-end funds). While we agree with some of the proposed rule changes (e.g. with respect to custody, conflicts of interest and advertising) we consider that the CSA's proposals do not take into account the fundamental differences between mutual funds and non-redeemable investment funds. In our view, these differences suggest that there should not be identical or even similar regulation of the two forms of investment funds in the ways proposed by the CSA.

Fundamentally, non-redeemable investment funds and open-end mutual funds are different in a number of ways including: (i) non-redeemable investment funds are generally closed after an initial relatively short selling period (which also means that they are limited in their ability to grow as discussed further below); (ii) they are created with input from different participants (i.e. for a non-redeemable investment fund offering in addition to the issuer and issuer's counsel there are Agents and Agents' counsel and in many cases a portfolio manager and their counsel versus an open end fund that often has only the issuer and issuer's counsel involved); (iii) they have different liquidity requirements; and (iv) different distribution channels. Based on these inherent differences we are of the view that there does not necessarily need to be a "level playing field" between non-redeemable investment funds and open-end funds. We are of the view that they are different investment vehicles intended for different groups of investors, and with different inherent risk, operational structures and investor expectations and accordingly different rules are appropriate.

In particular, we do not believe that the CSA staff have made a case for these changes based upon an investor protection rationale.

Organizational Costs

It is important to recognize that the rationale for the prohibition on mutual funds paying organizational costs is that investors invest in mutual funds over time and therefore it would be inequitable for only the first investors to effectively pay for the organizational costs of a mutual fund. It is not the same for non-redeemable investment funds.

Although securities laws do not currently restrict the cost of an offering to be paid by the applicable non-redeemable investment fund, for most non-redeemable investment fund IPO's, the agency agreement limits the fund's exposure of the initial organization costs (not including the Agents' fees) to a maximum of 1.5% of the gross offering size. To mandate that all the organization costs of an offering should be paid by the Manager (and that none of the costs should be paid by the applicable fund) would be a significant change to current market practice. We expect that this change would deter managers from launching new funds and have the effect of reducing the number of participants in the non-redeemable investment fund market. Alternatively, it could result in a significant increase in the management fee to compensate the Manager for incurring the organizational costs.

To encourage and maintain participants in this area it is imperative that the costs (or a portion thereof) be borne by the fund and leave it to the market to help determine what the applicable percentage should be (i.e. currently a maximum of 1.5% of the gross proceeds of an offering).

We strongly believe that this determination should not be dictated by the regulators. In our view, the CSA has not demonstrated a policy problem that needs to be resolved in the ways proposed by the suggested rule amendments.

Warrant Offerings

It is our understanding that the proposed change to prohibit a fund from issuing warrants is based on the potential dilutive effect of warrants on existing investors. This proposal ignores the benefits of the use of warrants to increase the size of a fund and the fact that investors benefit equally in that they will each have the opportunity to sell or to exercise the warrants, just as it is for permissible rights offerings. Most notably, increasing the size of the fund can provide better liquidity to all investors and also potentially spreads out the costs of the fund to a greater number of investors.

The CSA have indicated that funds can raise additional proceeds by offering additional units of a fund. However, in practice most declarations of trust provide that a non-redeemable investment fund may issue additional units at a price that provides net proceeds no less than equal to NAV. Since many funds trade at a discount to NAV, there are relatively few funds that can effectively raise new money under such circumstances. Warrants may facilitate raising new money for a fund. Although the exercise price of a warrant is also determined based on net proceeds equal to NAV, the warrants may not be exercised for a period of time after pricing which allows for the market price of the units to increase such that unitholders may have an incentive to exercise the warrants rather than purchasing additional units in the market. In our view the potential negatives of dilution to existing investors should be weighed against the benefits of the ability to increase the size of the fund through warrant offerings.

Investment Restrictions – Concentration Restrictions

As the CSA notes in the CSA Notice, many non-redeemable investment funds have adopted a concentration restriction that limits their investment in an issuer to an amount equal to 10% of NAV at the time of purchase. However, there are some funds that may go higher than the 10% threshold (e.g. 15%). If the CSA's proposals become law, in such circumstances these funds and similar new funds may no longer qualify as non-redeemable investment funds which may not be the desired outcome for the issuer nor may it be the intention of the CSA. Accordingly, if the CSA considers such regulation necessary, we recommend that the threshold be set at least 15% or higher, as appropriate.

Investment Restrictions – Liquidity

Although the CSA Notice suggests that the CSA is proposing to permit non-redeemable investment funds to invest a larger portion of their assets in illiquid securities, the proposed amendments do not seem to reflect that. In our view the need for liquidity for a non-redeemable investment fund should apply in order to ensure that the fund will be able to meet redemption requests, but should not otherwise affect their ability to invest. For example, the investment in a security that is subject to a hold period should not be restricted if the hold period is to expire before the next redemption date for a fund.

Investment Restrictions - Borrowing

Although there are currently a number of non-redeemable investment funds that would fit within the CSA's proposed restriction on borrowing, limiting borrowing to 30% of NAV will likely move some funds that would otherwise qualify as a non-redeemable investment fund into the alternative fund regime. This may or may not be the desired effect the CSA is trying to achieve. Accordingly, we strongly urge the CSA to re-consider if imposing any limit on borrowing is appropriate.

CSA Policy – Control Restrictions

We take issue with the proposal to include new section 3.2.1 into the Companion Policy of NI 81-102. This proposed "policy" guideline will bring into question the activities of fund managers who consider it appropriate to take a more activist approach in managing mutual funds and we recommend that the CSA engage in more consultation before finalizing this policy pronouncement, which is not explained in the CSA Notice. Considerable uncertainty for activist fund managers will arise if this policy is brought into effect.

Alternative Fund Regime

While we are intrigued by the concept of an "alternative" funds regime as described in the CSA Notice, we find it difficult to comment on this regime without more fully understanding what the alternative fund regime will look like. We look forward to reviewing the proposed rule changes to NI 81-104 once they are published for comment. In preparing the proposed rule changes, we urge the CSA to re-consider the following existing rules that are established in NI 81-104, both of which we consider have served to hold back the development of "commodity pools" or "alternative funds":

- The need for additional dealer proficiency in distributing these funds. Are the existing requirements the right additional proficiency requirements? We consider that additional consultation is necessary on this matter.

- The need for a "long-form" prospectus for these investment funds. We don't understand why the simplified prospectus/Fund Facts regime shouldn't apply to these funds.

If you have any questions concerning these comments please contact Michael DeCosimo (mdecosimo@blg.com/416.367.6222), David Surat (dsurat@blg.com/416.367.6195), or Rebecca Cowdery (rcowdery@blg.com /416.367.6340).

Sincerely,

"Borden Ladner Gervais LLP"