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August 27, 2013

Via 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

(collectively, the "CSA")

Attention:

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

Dear Sirs and Mesdames:

RE: CSA Notice and Request for Comments

Introduction

Thank you for the opportunity to provide comment to the issues raised in the March 27, 2013 CSA Notice and Request for Comment (the "Notice") concerning Phase 2 of the CSA`s modernization project (the "Modernization Project"). We have also in the following discussion taken notice of CSA Staff Notice 11-324 published on June 25, 2013 (the "Extension Notice") which extended the comment period in respect of the Notice and clarified the specific proposed amendments to National Instrument 81-102 ("NI 81-102") in which immediate comment was being requested. We have also been consulted and have reviewed the submissions of the Investment Industry Association of Canada and various of its members in submissions dated August 2, 2013 and August 22, 2013. For these reasons we have limited ourselves to general comments concerning the Notice and to those matters that the CSA invited comment in the Extension Notice.

Wildeboer Dellelce LLP is a law firm formed in 1993 which delivers business law services to Canadians with a particular emphasis on small and emerging public companies. We have enjoyed working with numerous teams of professionals assisting them in designing and offering innovative financial products to retail and prospectus exempt investors. In Canada the preponderance of retail savings and investment products are sponsored by Canadian financial institutions. Even the mutual fund industry, which for many years enjoyed broad sponsorship by smaller organizations, has over the past 20 years seen a dramatic concentration in its ownership in favour of large public companies and financial institutions. The one area where we have seen broad-based creation and development of investment products by smaller organizations has been in the area of non-redeemable or closed end investment funds ("CEFs"). We believe that, absent compelling reasons, it is essential that any re-regulation of this area not disturb this dynamic.

General Comments

Need for Re-Regulation

CEFs have existed in Canada since the 1930s. Since the development of a modern mutual fund regulatory regime in the 1970s, CEFs and their managers have been regulated by securities regulatory authorities in a manner which recognized the differences with mutual funds. Mutual funds create a unique set of challenges to the CSA because they require an issuer to return an investor's capital almost immediately and that retraction is to be done with reference to the net assets of the issuer. For this reason, mutual funds have traditionally been the entry point for retail investors seeking to invest in risk assets. CEFs however usually provide liquidity to their investors in the manner similar to all other publicly listed issuers - if an investor wishes to dispose of their holdings they must find a buyer and a price at which someone will contract for their securities. It is because of these very real differences that regulators to date in Canada have focused regulation of CEFs on structural protections for investors while relying upon prospectus disclosure to address the particular aspects of a CEF`s operations. It is only in the area of mutual funds that the CSA has felt that specific operational rules, including investment restrictions, were required to displace the disclosure and market regulation rules applicable to all other reporting issuers.

The most important structural protections enjoyed currently by investors in CEFs are as follows:

1. **Custody** - to minimize the chance of fraud in the affairs of a CEF, the custody requirements of NI 81-102, section 5 were largely imported into section 14 of National Instrument 41-101.

2. **Continuous disclosure** - since the advent of National Instrument 81-106 in 2005, all investment funds offered by prospectus have been subject to the same continuous disclosure regime.

3. **Conflicts of Interest** - since the advent of National Instrument 81-107 in 2006, CEFs have had to establish independent review committees and adhere to the same operational requirements as mutual funds.

4. **Registration** - since the advent of the creation of the category of investment fund manager in 2009, managers of CEFs have had to meet the same registration requirements as for the managers of mutual funds. Entities supplying investment

counsel and portfolio management services to CEFs have had to maintain registration as an adviser under provincial securities legislation since the 1970s.

We expect that the CSA Proposals which augment and reinforce these structural considerations for all investment funds will be broadly supported by industry as they reinforce the fiduciary standard to which the participants are held. This re-regulation, particularly where it recognizes the important differences between CEFs and mutual funds, is therefore welcome.

More problematic are the proposals set forth in the Notice where they advance substantive regulation of CEFs in areas where modern securities regulation has never invoked proscriptive requirements. The Notice recognizes the important differences between CEFs and mutual funds. The CEF industry in Canada has thrived particularly in the past 20 years. This success has been built on innovative, well-constructed products which have been designed to meet investor needs not satisfied by other retail investment products or by investment in public company securities. There is a powerful argument that these products represent a "way station" for mutual fund investors on their way to investing in public company securities in the same manner that mutual fund investing bridged investors from deposit and guaranteed products to equity exposure in the 1980 and 1990s. With respect, Canadians have charged the CSA with assisting with the development of an active and transparent market, such as currently exists for CEFs. The CSA should be very careful in advancing operational requirements without compelling evidence that the current regime requires change.

This caution is reinforced by the fact that to our knowledge there has been no crisis affecting investors in CEFs which has given rise to the Modernization Project. If, as a result of the Modernization Project, CEF sponsors are foreclosed from advancing innovative investment products for Canadians then the CSA will have undermined rather than have executed upon its regulatory mandate. The CSA in such circumstances should not be attempting to "level the playing field" with other investment products but seeking to import the structural protections necessary to continue to make these products the valued investment option they have become for Canadians. If the operational proposals in the Notice are advanced in their current form then, because of the advantages mutual funds enjoy (their continuous offering through a larger mutual fund sales force), it can be expected that CEFs will become of much less interest to Canadian retail investors and their advisers.

Process

To be able to evaluate the proposals set forth in the Notice, industry participants need to understand whether they will be able to operate in their current forms under proposed amendments to National Instrument 81-104 ("NI 81-104"). These proposed amendments would create a new category of "Alternative Fund". Substantive re-regulation of CEFs requires industry participants to determine if their current platforms are not compliant with revised NI 81-102, that they will be able to operate within the strictures of proposed NI 81-104 for Alternative Funds or that they will be provided with relief from these requirements for so long as they operate CEFs formed prior to March 29, 2013. In the absence of such clarity it will be necessary for sponsors of such CEFs to: (i) change the fundamental investment objective of the fund(s) to comply; (ii) change the fundamental objective of the fund(s) to cease to be an investment fund; or (iii) terminate the fund(s). The detailed proposals surrounding Alternative Funds, including the transitional provisions, need to be understood before any of the NI 81-102 proposals, other than the structural ones noted above and below, should be pursued.

Matters for which CSA has requested specific response

In the Extension Notice, the CSA specifically requested commentators to address the following:

Investment Restrictions

For the reasons above, we recommend that the Modernization Project embrace the differences between CEFs and mutual funds by following through on structural harmonization while leaving investment restrictions to be customized through the negotiation between the sponsor and the investment dealer syndicate offering the product. There is no compelling reason to replace a prospectus disclosure regime augmented with advice from registered advisers of investment dealers ensuring compliance with suitability and know-your-client requirements.

Organizational Costs

This proposal has attracted a great deal of industry attention. As numerous other submissions have highlighted, the sales process, launch cycle and initial cost structure of CEFs is very different from mutual funds or Exchange Traded Funds. A significant portion of the initial costs of a CEF arise as a result of paying regulatory fees or ensuring that the prospectus disclosure complies with existing CEF regulation. For this reason the cost containment objectives of this proposal are unlikely to be realized while having the effect of raising entry costs to less well-capitalized market participants. Those groups able to finance projects will need to raise the cost of successful projects to pay for the cost of unsuccessful projects. Since other investment alternatives exist, if CEFs become higher cost it can be expected that fewer CEF offerings will be brought forward as investors seek lower cost alternatives.

Conflict of interest provisions, Approvals and Custodianship

In principal the application of these provisions of NI 81-102 to the operations of CEFs should proceed provided that the differences in the investment strategies and investment techniques of CEFs can be accommodated.

The proposed restriction around limiting CEFs to borrowings from Canadian Financial Institutions could prove problematic to the extent that it restricts CEFs and their portfolio managers or sub-advisors from being able to source their financing needs from foreign lenders who may be more familiar or comfortable with the underlying asset class or who can provide competitive pricing and terms. This is especially the case in circumstances where independent Canadian CEF sponsors are bringing U.S.-based asset managers to Canada through sub-advisory arrangements. In many instances, the U.S. asset manager has existing financing relationships in place that would be disrupted through the introduction of rules around how CEFs can structure or manage their financing needs. To the extent these actors or their lenders are subject to similar regulatory regimes, it remains unclear how the stated objectives of the Notice would be enhanced on this basis.

Sales and Redemptions

It is in the best interests of investors in CEFs that CEFs be permitted to periodically re-open to new investment. As you have noted in the Notice, the industry in the past ten years has consistently required that any re-opening be done so that net proceeds are at least equal to the net asset value per security of the CEF. In most markets the securities of a CEF trade at a discount to the net asset value per security. This makes prospectus offerings extremely infrequent for most CEFs. The most economic method for CEFs to re-open is therefore to appeal to their current investor base for further proceeds. If the CSA is concerned that such re-

openings are coercive it would seem a better course of action to stipulate a maximum discount to the trading price that could be utilized in any such warrant or rights offerings rather than an outright ban on this method of financing.

Securityholder Matters

Since these relate to structural requirements it would seem possible to advance these proposals before the scope of the Alternative Fund requirements are understood.

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We look forward to your deliberations in this matter. We are obviously available to discuss any of our thoughts in greater detail with you at your convenience. If you have any questions please contact Ronald Schwass (rschwass@wildlaw.ca/416.361.4789), Geoff Cher (gcher@wildlaw.ca/416.361.4793) or Nick Gray (ngray@wildlaw.ca / 416.847.6920)

Yours truly,

“Wildeboer Dellelce LLP”