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March 5, 2014

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Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
The Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
Financial and Consumer Services Commission of New Brunswick
Registrar of Securities, Prince Edward Island
Nova Scotia Securities Commission
Superintendent of Securities, Newfoundland and Labrador
Registrar of Securities, Northwest Territories
Superintendent of Securities, Yukon Territory
Registrar of Securities, Nunavut

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Dear Sirs/Mesdames:

Re: CSA Notice and Request for Comments on proposed amendments to National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (NI 31-103) and Companion Policy 31-103CP (31-103CP) and National Instrument 33-109 *Registration Information* (NI 33-109) and Companion Policy 33-109CP (33-109CP) published for comment on December 5, 2013 (CSA Notice)

OSC Notice and Request for Comment on Proposed Amendments to OSC Rule 35-502 *Non-Resident Advisers* published for comment on December 5, 2013 (OSC Notice)

We are pleased to provide the members of the Canadian Securities Administrators (CSA) with comments on the proposed amendments to NI 31-103 and NI 33-109 and their related companion policies and forms as set out in the CSA Notice. Please note that we also are providing the Ontario Securities Commission (OSC) with comments on the proposed amendments to OSC Rule 35-502 as set out in the OSC Notice. Our comments

are those of individual lawyers in Borden Ladner Gervais LLP's Investment Management practice group and do not necessarily represent the views of BLG, other BLG lawyers or our clients.

We support the CSA's efforts to amend the various instruments to make technical adjustments and clarify intentions, and consider many of the proposed amendments to be very helpful in resolving ambiguities and providing additional guidance. We particularly appreciate the efforts of the CSA to include in NI 31-103CP, guidance that was previously released by way of staff notice, thereby allowing it to be subject to industry review and comment.

We have specific comments on the proposed amendments relating to:

(i) exempt market dealers

(ii) the international sub-adviser exemption

(iii) the international adviser and international dealer exemptions

(iv) the restriction on the use of an exemption in one Canadian jurisdiction by a firm if it is registered in another Canadian jurisdiction

(v) the guidance provided by the CSA on what constitutes "relevant investment management experience" for the purposes of meeting the proficiency to become registered as an advising representative and an associate advising representative

(vi) the guidance provided by the CSA on which "outside business activities" for a representative must be included on the representative's NRD record and managed by the firm under its conflicts of interest policies

(vii) the proposals of the OSC to amend OSC Rule 35-502.

In our view, the proposed amendments in these areas lack, in some cases, a policy rationale and have the potential to cause unintended consequences or impact capital markets participants in an undesirable way.

We also set out below certain technical issues that we see with some of the proposed changes.

1. Exempt market dealers (EMDs)

Our concerns with the proposed amendments to s. 7.1 of NI 31-103 and s. 7.1 of 31-103CP relating to the permitted activities of an EMD are two-fold.

(a) The proposed restrictions on the activities of EMDs with respect to trades of securities under a prospectus.

(b) The drafting of the proposed amendments to NI 31-103 and the drafting of the proposed amendments to 31-103CP appear to be inconsistent and capable of being misunderstood, which will give rise to significant compliance concerns for EMDs.

The CSA Notice explains that the proposed restrictions on EMDs are intended to deal with the concerns that CSA staff articulated in CSA Staff Notice 31-333 *Follow-up to Broker Dealer Registration in the Exempt Market Dealer Category* and will prohibit EMDs from conducting brokerage activities, which is described as trading securities listed on an exchange in foreign or Canadian markets. In our view, the proposed amendments go beyond what the CSA originally articulated in CSA Staff Notice 31-333, and are not consistent with what EMD's (and LMD's before them) have historically been permitted to do.

We understand that the CSA's position is that EMDs *can* trade in prospectus qualified securities that are listed, quoted or traded on a marketplace, provided that these securities are distributed (i) to investors that qualify for an exemption from the prospectus requirement, and (ii) pursuant to an exemption from the prospectus requirement – which means that the EMD's client does not get the benefit of purchasing under the prospectus despite the fact that a prospectus for the securities exists.

We do not understand the policy rationale for allowing an EMD to trade in non-prospectus qualified securities with an accredited investor but not allowing an EMD to trade in prospectus qualified securities with the same accredited investor (e.g. as a selling group member). The effect of the proposed restriction could be to (i) increase regulatory burden and decrease access to capital for issuers, and (ii) result in inefficiencies, lack of investor protections (i.e. protections offered under securities laws to investors who purchase under a prospectus) and increased costs for investors. Consider for example:

(a) An issuer who, in order to access capital available from accredited investors that are clients of EMDs, after having gone to the expense of preparing a prospectus offering, may now have to go to the additional expense of preparing a non-prospectus offering (e.g. subscription agreement, offering memorandum, exempt distribution report filing) in order to access capital from the accredited investors.

(b) An EMD works with a company through its early stages and assists the company to raise capital through private placements but when the company reaches the stage where it is going to go public, it cannot trade the initial public offering shares to its clients. As a result, the issuer may not have the same access to that pool of capital, and/or investors face increased costs and inefficiencies by having accounts with multiple dealers in order to access such investments.

In addition, the wording of proposed ss. 7.1 (5) of NI 31-103 seems to suggest that an EMD can trade in prospectus qualified securities that are not listed, quoted or traded on a marketplace (e.g. mutual funds) however, the wording of the proposed amendment to Part 7.1 of 31-103CP seems to suggest otherwise. In Part 7.1 of 31-103CP it says

"*Exempt market dealers are not permitted to*

- *participate in a distribution of securities offered under a prospectus*
- *…"*

These activities should be conducted by investment dealers."

We request that the CSA clarify this issue.

Even if the CSA disagrees with the comments above, we think that a drafting fix is necessary to the following statement made in 31-103CP, which fix is necessary to ensure clarity. We have included the additional words we think are necessary (they are underlined below):

"*Exempt market dealers are not permitted to*

- …..
- *directly or indirectly, participate in a resale of securities traded on a domestic or foreign marketplace whether the transaction is on-exchange or off-exchange, <u>unless the transaction requires reliance on a further exemption from the prospectus requirement</u>.*

……"

2. International sub-adviser exemption

We do not believe there is a justifiable policy basis for restricting the proposed exemption to international firms that are not registered as an adviser in any Canadian jurisdiction. Unlike firms registered as advisers, or firms relying on the international adviser exemption, (i) international firms relying on the proposed sub-adviser exemption would not have any unsupervised direct contact with clients in the jurisdiction, and (ii) the clients' registered advisers agree to be responsible for any loss arising out of the failure of the sub-adviser. Given these additional protections, we see no policy reason to limit the use of the exemption in the proposed way. Requiring registered advisers to register in additional jurisdictions where they may be only acting as a sub-adviser to another registered adviser increases the costs for these advisers without any corresponding increase in investor protection in those jurisdictions.

We note that OSC Rule 35-502 currently can be relied upon by a Canadian adviser which is registered in one province, but also wishes to act as a sub-adviser to another registered adviser in Ontario. Since the first adviser may not have any other clients in Ontario, it does not want to go to the expense of becoming registered in Ontario, so will rely on the sub-adviser exemption available under OSC Rule 35-502. We consider this to be an appropriate result.

3. International dealer and international adviser exemptions

In response to the issue for comment identified by Ontario, we are not aware of these exemptions being used outside of their purpose – i.e., to provide sophisticated Canadian investors with greater access to foreign securities and advisory services. We are not

aware of these exemptions being used by foreign entities located in Canada to provide services to investors outside of Canada. In our view, the OSC's proposed condition that permitted clients have a "real and substantial connection to the Canadian jurisdiction" is not necessary given the way the exemption is practically used and the controls embedded within the exemptions themselves.

4. Restriction on use of registration exemptions

We do not understand the policy rationale behind the "all or nothing approach" to the availability of registration exemptions as set out in proposed sections 8.0.1 (General condition to dealer registration requirement exemptions), 8.22.2 (General condition to adviser registration requirement exemptions) and 8.26.2 (General condition to investment fund manager registration requirement exemptions) to NI 31-103, and do not find the proposed guidance in Part 8 of 31-103CP provides clarity.

The CSA's proposals will remove the availability of dealer, adviser and investment fund manager exemptions to registered international firms in respect of the very activities for which the exemption is provided, despite the fact that such firms meet the conditions of the exemptions, simply because they are registered in another jurisdiction for a different purpose. Why should an international advising firm be registered in a province where they may have one pension plan client, if they are registered in another province to provide discretionary advice more generally? These proposed restrictions will result in increased regulatory burden and costs for firms, which may in turn limit access to these firms for Canadian investors, given that some international firms may decide not to operate in Canada.

These restrictions would be problematic for many non-resident firms that participate in Canada's capital markets. In our experience, many such firms have large operations with distinct business lines and distinct groups of employees that service those business lines. Although these firms may be registered in a jurisdiction of Canada for a specific purpose in respect of a particular business line, they may choose to rely on registration exemptions in other jurisdictions of Canada in connection with other lines of business or other activities. For example, a firm may be registered as an EMD in a single jurisdiction in order to participate in a unique market within that jurisdiction or perhaps because it has employees resident in that jurisdiction, but it may also legitimately want to rely on the international dealer exemption in another jurisdiction in order to trade foreign securities with a large institutional investor that is resident in that jurisdiction (such as a pension fund; which is not an uncommon situation). In such an instance, the employees working in the business line that would rely on the international dealer registration exemption may have nothing to do with the firm's business that is carried on under the EMD registration, and they may not have the proficiency necessary for registration as a dealing representative of an EMD if registration was required.

Another example of where such a restriction would be problematic which occurs frequently is the non-Canadian portfolio manager who relies on the international adviser exemption in many jurisdictions to advise clients on non-Canadian mandates but registers in one jurisdiction to advise a client that has a Canadian-focused mandate.

In our view, there is no evidence that permitting a firm to be registered as a dealer or adviser in a jurisdiction and to rely on an international dealer or adviser registration exemption in another jurisdiction increases the risk of client confusion or causes the firm to apply different conduct and oversight rules to the activities. We note that under the regulatory regime for distributions in Canada, an issuer can distribute under a prospectus in one Canadian jurisdiction and at the same time distribute under a prospectus exemption in another Canadian jurisdiction if the issuer so chooses. The relevant exemptions are granted to firms meeting certain criteria in relation to their activities with permitted clients, which are treated under NI 31-103 as being of such a level of sophistication that they do not need the protections afforded by the registration requirements. The registration requirements in this situation therefore do not serve an investor protection goal, nor do they increase the efficiency of the capital markets. Rather, they will cause increased costs for such non-resident firms (through the costs of obtaining and maintaining unnecessary registration in multiple jurisdictions) and may result in those firms deciding not to carry out such activities in Canada. This would deprive Canadian investors of access to certain foreign securities and advisory services which was one of the reasons for the international dealer and international adviser exemptions in the first place.

5. Additional guidance on what constitutes "relevant investment management advice"

At various stages during the development of NI 31-103, we commented on the need for a greater understanding by the CSA of the type of individual employed by many registered advisers, which we will generically refer to as a "client relationship" representative. These individuals do not actually manage client assets, they make no decisions about which investments will be made by the registered adviser for the client's account, but we are unable to advise our clients that these client representatives do NOT "advise" others within the meaning of applicable laws. These individuals generally meet with clients, take clients through account opening and set up, and may work with the client to establish investment policy statements, among other things. It has been our experience that the CSA staff who administer the registration rules and consider registration applications have particular difficulty in considering registration applications for these individuals, particularly when these individuals have little to no specific securities analysis or research experience. We are often asked to have these individuals provide a description of their specific "stock picking" experience notwithstanding these individuals may have extensive experience working directly with clients in a securities or financial services business – either at a dealer firm or other heavily client focused business, and even when their experience is augmented by a full CFA, we have found it very difficult to have these individuals registered, even in an associate advising representative category.

We do not find the additional guidance provided for in s. 3.11 and s. 3.12 of 31-103CP, although extensive, addresses these client representatives. The category of "associate" advising representative does not fit well for these representatives – they are still asked for their specific experience around actual portfolio management, which they may not have – and certainly do not need in their specific position.

We request the CSA continue its consideration of this issue (we recognize and appreciate to some extent, the proposed guidance is intended to give comfort as to when the CSA will consider NO registration is necessary) – perhaps through convening an industry committee to better understand the categories of employees at a portfolio management firm. We recommend serious consideration be given to a new category of registration at a portfolio management firm – being that of a client relationship representative or a counselling representative. This will allow specific tailored proficiency for this category of registration. Alternatively, we recommend acknowledging that for these individuals, they can be registered in the "associate advising representative" category, but that the CSA will accept that these individuals may have alternative "relevant investment management experience" that is indeed "relevant" to the specific duties of these individuals, but which may not the "relevant" if they were to do the actual portfolio management activities.

6. Outside Business Activities

We have no issue with the concept that representatives should disclose to the regulators and their firm, their "other" employment and business activities outside of the firm – and that the firm should take steps to ensure that conflicts of interest are avoided. However, we consider the additional guidance provided in section 13.4 of NI 31-103CP to be taking this to the absolute extreme, particularly when it comes to charitable, social or religious organizations that a representative may be associated with. Our experience is that the actual application of policies such as this guidance is very much capable of differing opinions and interpretation, with the opinions of the individual and the firm being discounted by staff who view a particular social or religious volunteer role as being a "position of influence" giving rise to access to potential clients (and presumably abuse). We recommend a more tempered approach, which will allow a representative to become involved in social, charitable or religious activities, without having to report back to the regulators and his/her firm on his activities when there is no conflict. We consider this guidance, and the current administration of that guidance, to be verging on an undue restriction on the non-business aspects of a representative's life, which is both unwarranted and without a regulatory policy rationale.

7. **OSC Rule 35-502**

We have no objection to the "sub-adviser" exemption being deleted from OSC Rule 35-502 and included in NI 31-103. We see this as a very positive development (subject to our comments above) allowing Canada's securities laws to move further towards greater harmonization.

Our concern relates to what is "left" in OSC Rule 35-502 – we strongly recommend that the CSA consider "picking up" the orphaned requirements in this OSC Rule, which would allow the OSC to repeal this Rule. We note that s. 7.11 of OSC Rule 35-502 could very easily be picked up and moved to one of the prospectus rules for investment funds. It is not consistent with the CSA's harmonization objective to have very short (and easily missed) requirements buried in local instruments.

8. Notices under sections 11.9 and 11.10 of NI 31-103

We support the CSA's proposed amendments designed to streamline the process for the review of the notices required under s. 11.9 and 11.10 by requiring that the notices be filed solely with the particular firm's principal regulator. We expect that this will lead to efficiencies for registrants and firms acquiring interests in registrants.

However, we are concerned that the CSA proposes to remove the provisions of ss. 11.9(3)(a) and ss. 11.10(3) as they are currently drafted. We disagree with the comments in the CSA Notice, where the CSA states that "these exceptions would no longer be relevant or required". In our view, provisions should remain in NI 31-103 that give exemptions that would be appropriately used for internal reorganizations of groups of companies (i.e., the insertion of a holding company between a registrant and its parent, for example). In our view, there are no policy reasons for the CSA to be concerned about such acquisitions as neither the ultimate control and direction over the registered firm, nor the day to day business of the registered firm would change. Requiring that notices be filed in such situations is costly for registrants and does not serve an investor protection or other compelling purpose. We do not think the new references to giving these notices when the acquisitions "first arise" addresses this issue.

Further, we are concerned about the references to firms registered in foreign jurisdictions – that is, the proposed language in s. 11.9 of NI 31-103 states that notice is required for the first acquisition of 10% or more of voting securities of a firm "registered in any jurisdiction of Canada or any foreign jurisdiction" or of a "person or company of which a firm registered in any jurisdiction of Canada or any foreign jurisdiction is a subsidiary", or the acquisition of all or a substantial portion of the assets of a firm registered in any jurisdiction of Canada or any foreign jurisdiction". We do not understand the policy rationale behind this or the regulatory authority to object to such a transaction. In our view, this is a matter for the regulators of the foreign firm (or its parent) that is the subject of the acquisition. This appears to us to be a totally new requirement rather than the clarification of an existing requirement. We recommend that the references to firms registered in foreign jurisdictions be removed from the proposed amendments. We note that once a registered firm makes such an acquisition, the registrant's principal regulator would be notified of the transaction by way of an update to the firm's Form 33-109F6 information. Again, we do not see the benefit or policy rationale for firms to go to the expense of preparing a notice to the regulators and for the regulators to have the opportunity to object to such transactions.

9. Proposed amendment to section 8.5 of NI 31-103 and proposed section 8.5.1 of NI 31-103

The CSA Notice says that the amendments to s. 8.20 are intended to harmonize it with s. 8.5, and so we query whether there needs to be a new s. 8.20.1 to mirror proposed s. 8.5.1.

10. Proposed Short-term debt exemption

The orders referred to in the CSA Notice that provide dealer registration relief for trades in short-term debt by specified financial institutions are not restricted to trades with

permitted clients as defined in NI 31-103. It is our understanding that not all the trading that is done by financial institutions in reliance on the existing orders is with clients that would qualify as "permitted clients" and so if the proposed exemption is implemented as currently drafted we request that a transition period be provided to allow the financial institutions time to address the practical implications of such a restriction – e.g. from an operational perspective.

11. Proposed amendment to Form 31-103F1

We support including US money market funds as part of working capital, and request that the CSA take this opportunity to also consider including money market funds from other international jurisdictions which have similar robust regulatory regimes with respect to money market funds.

12. Proposed guidance on individuals who serve on a board of directors of a reporting issuer in section 13.4 of 31-103CP

We agree with the general concept of the CSA's guidance on the conflict of interest concerns that arise when a representative of a registrant acts as a director of or adviser to a reporting issuer. However, the guidance focuses on the conflict of interest concerns that arise as a result of a director having confidential information about the reporting issuer. We request that the CSA consider amending the language of the proposed guidance to make it clear that, generally (and not specific to confidential information), where a situation leads to a conflict of interest, a director's duty is always to act in the best interests of the reporting issuer. This is the case even where a director, as a representative of a registrant that may invest in the reporting issuer, wishes to advance the interests of investors in the reporting issuer.

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We thank you for allowing us the opportunity to comment on the proposed amendments. Please contact any of us at the contact details provided below if the CSA members would like further elaboration of our comments. We, together with other BLG lawyers who have considered the proposed amendments, would be pleased to meet with you at your convenience.

Yours truly,

"*Rebecca Cowdery*"
"*Marsha Gerhart*"
"*Erin Seed*"