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**VIA EMAIL**

December 17, 2014

The Secretary  
Ontario Securities Commission  
20 Queen Street West  
19<sup>th</sup> Floor, Box 55  
Toronto, ON M5H 3S8  
comments@osc.gov.on.ca

Dear Sirs/Mesdames:

**RE: OSC Request for Comments – Proposed Amendments to OSC Rule 13-502 Fees and Companion Policy 13-502CP Fees – Published for Comment September 18, 2014**

We are lawyers in the Investment Management practice group of Borden Ladner Gervais LLP and we work with many registrants and investment fund managers that are registered or exempt from registration and/or issue securities in Ontario. We have followed and commented on the various changes to the regulatory fees payable by those entities to the Ontario Securities Commission (OSC) over the years. Our comments should not be taken as the views of BLG, other lawyers at BLG or our clients.

We have the following comments on the proposed amendments (the Proposed Rule) to OSC Rule 13-502 Fees (the Fee Rule) and its Companion Policy. Our comments are designed to reinforce our overall views that the Fee Rule must be simplified. Over the years it has become overly complex and certainly very difficult to understand and ensure compliance.

**1. Blacklines**

We welcome the summary of proposed amendments that is set out in the request for comments, however a blackline highlighting the specific changes, and, in particular, the specific changes to the fees would be appreciated. This is in line with other amendments

to legislation published for comment by the OSC. The encryption on the Proposed Rule and the Fee Rule means that we cannot create our own blackline.

## **2. Fee increases**

While we appreciate that the OSC would like to make investments in infrastructure over the next few years, including improvements in information technology, we submit it is unfortunate that the OSC, which is meant to operate on a cost-recovery basis, proposes to use an annual growth factor of 5% over the current budget in connection with fee increases. Capital market participants do not have a similar ability to institute such a growth factor in their own businesses and that 5% is more than double the rate of inflation. We would urge the OSC to consider a more reasonable fee increase such as one tied to inflation.

## **3. Participation fees – Elimination of the reference financial year**

We wholeheartedly support the OSC's proposal to remove the reference year concept from the Proposed Rule. We welcome the return to using the most recently completed financial year data for the purpose of calculating the amount of capital markets participation fees payable. This change will ease the burden for registrants as fees will be more closely aligned with the registrant's current revenues. In addition, this change will reduce much of the confusion faced by registrants over the past two years when calculating their Ontario capital markets participation fees.

## **4. Affiliate exemptive relief**

We support the proposal that will result in only one fee being charged in connection with exemptive relief that affects affiliated registrants engaging in an activity together. We submit that affiliated registrants who engage in similar activities, even if they do not engage in the activity together, should also pay only one fee since the legal analysis for such relief will also be similar.

## **5. Change from management sign-off to Chief Compliance Officer or equivalent sign-off**

It is not necessary or desirable to require the chief compliance officer of a firm to certify the capital markets participation fees payable by a registrant. The responsibilities of a chief compliance officer of a registered firm are set out in section 5.2 of NI 31-103. These responsibilities include establishing and maintaining policies and procedures for assessing compliance by the registrant, and individuals acting on its behalf, with securities legislation and monitoring and assessing compliance by the firm, and individuals acting on its behalf, with securities legislation. These responsibilities are at a

firm-wide level, with a view to ensuring compliance of the registrant, and individuals acting on the registrant's, with securities legislation.

We note that an authorized signatory of the registrant is currently required to certify participation fees. We submit that the decision regarding which member of a registered firm should certify the participation fees is best left to the registrant itself, especially when authorized signatories are enshrined in a firm's constating and organization documents. Requiring the Chief Compliance Officer to sign this document creates an unnecessary layer of complexity with no increase in investor protection or benefits.

#### **6. Activity fee for permitted individuals filing Form 33-109F4**

Permitted individuals, being the directors, chief executive officer, chief financial officer, chief operating officer, and shareholders, who have ownership or control of 10 percent or more of the voting securities of a registrant, are the mind and management of a firm. Given the senior role permitted individuals play at firms and the fact that they are not, in the strictest sense, "registered" (in the way that CCO, UDP and representatives of a firm are), we submit that the review of the Form 33-109F4s of permitted individuals is captured in the review of a firm's application for registration and that it is inappropriate to charge an additional activity fee for the review of such forms. Further, we note that only 2 other jurisdictions (Newfoundland - which does not charge a fee for persons who are only directors - and Nova Scotia) charge such a fee, but that fee is a quarter of the fee proposed by the OSC. We note that those jurisdictions do not also charge participation fees.

#### **7. Late fees**

The current maximum aggregate late fee of \$5,000 serves as a sufficient deterrent for firms to file documents in the time period specified by Ontario securities law, and is already prohibitively high. We strongly object to an increase to \$10,000, particularly since certain of the activity fees paid by registrants to file these documents are also proposed to be increased. There is no policy rationale to treat firms that are members of the three largest categories of registrants differently than other firms and such disproportionate treatment would be counter to the concept of fairness articulated in some of the other aspects of the Proposed Rule.

#### **8. Fee payment and filing deadline for "unregistered investment fund managers" (IFMs)**

We support the OSC's proposal to align the timing of an unregistered IFM's participation fee calculation filing and participation fee payments with that of other registrants and exempt international firms.

## 9. IFM fees paid in Ontario

We note that, in the last set of amendments to the Fee Rule, the OSC clarified that unregistered IFMs who have no investors in their funds in Ontario or who are relying on the “no active solicitation” exemption provided for in MI 32-102, do not pay fees under the Fee Rule. We completely support this position.

We submit that this position should also be clarified in connection with registered IFMs. An IFM should pay fees in Ontario only to the extent that the IFM has investors in their funds in Ontario and only on revenues generated in respect of these clients. We based this position on the following:

- Any other position would be at odds with the OSC’s position pre-2003 when the Fee Rule was first proposed to the industry. Prior to the Fee Rule, the OSC levied fees relating to distribution of mutual funds in Ontario as part of the prospectus renewal process. At that time, there was no question that these fees were in connection with investors in the funds in Ontario.
- Any other position leads to the incongruous result that fund managers (and funds) with a head office in Ontario pay fees to the OSC based on Canada-wide distribution, while also paying distribution fees in BC, Alberta and Quebec based on investors in these provinces. This is a duplication of fees and is not a fair result, especially given that many funds (and therefore their unitholders) pay these fees.
- Requiring funds to pay fees in Ontario based on head office location, instead of where investors are located, would unfairly penalize funds with managers located in Ontario. This is because a fund manager whose head office is located outside Ontario only pays fees under the Fee Rule based on the revenues from Ontario clients.
- We understand that a PM that only has offices in Ontario only pays fees for Ontario managed accounts and not for managed accounts in other provinces. Thus there’s inconsistent treatment between IFM’S and PMs.

**This issue needs to be clarified on an urgent basis and we would be happy to discuss this issue with staff further if they would consider that helpful.**

## 10. Currency Conversion

The conversion rule requires Bank of Canada rates to be used as at the date that revenue must be reported by a registrant, instead of the date that revenue was received by the registrant. This timing differential could have the unintended consequence of misaligning fees received by a registrant from its clients and fees paid by the registrant to the OSC. For example, if a registrant invoices a Canadian client on a quarterly basis (example \$250,000 per quarter) and then reports that revenue on November 15, the registrant would be required to convert the \$1 million total revenue as at November 15. If, instead,

the registrant had converted each quarterly payment when invoiced as at the prevailing rate of that day, the fees required to be paid by the registrant could be vastly different depending on the fluctuation of the Canadian dollar during the year. For example, using 2014 numbers, the registrant would have been required to pay approximately \$4500 more with the currency conversion taking place on November 15 than if they had converted at the quarterly mark. Consistent with the proposal to keep the filing fees paid by registrants in line with revenues received by registrants, the conversion guidance should be changed to permit the conversion as at the date revenues are invoiced/received by the registrant.

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Thank you for considering our comments. Please contact any of the undersigned if you would like additional information or wish us to elaborate on our comments.

Yours very truly,

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