Borden Ladner Gervais LLP
Scotia Plaza, 40 King Street W
Toronto, ON, Canada M5H 3Y4
T 416.367.6000
F 416.367.6749
blg.com

October 11, 2016

DELIVERED BY EMAIL

British Columbia Securities Commission
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

Delivered to:

Secretary
Ontario Securities Commission
20 Queen Street West
22nd Floor
Toronto, ON M5H 3S8
comments@osc.gov.on.ca

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
consultation-en-cours@lautorite.qc.ca

Dear Sirs/Mesdames:

Re: CSA Notice and Request for Comment

Proposed Amendments to National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (NI 31-103), Companion Policy 31-103CP *Registration Requirements, Exemptions and Ongoing Registrant Obligations* and National Instrument 33-109 *Registration Information* (NI 33-109) - published for comment July 7, 2016

We are lawyers in the Investment Management practice group of Borden Ladner Gervais LLP and we work with many registrants which are regulated by NI 31-103 and NI 33-109. We have closely followed and commented on the numerous changes to NI 31-103 and NI 33-109 that have been proposed and implemented in the past number of years. As you know Prema Thiele is a member of the OSC's Registrant Advisory Committee.

We are pleased to provide our views on the most recent proposals for amendments to these instruments that were published for comment on July 7, 2016. We appreciate your consideration of our comments notwithstanding that we are providing them after the end of the comment period (October 5, 2016). We also greatly appreciate the practice of the CSA over the past few years to publish blacklined copies of the complete instruments being amended. This significantly enhances our ability to grasp the significance of what is being proposed.

Our comments should not be taken as the views of BLG, other lawyers at BLG or our clients.

1. Comments on the New Proposals Regarding EMD Activities

We are very deeply concerned that one of the principal goals of the CSA with these amendments is to restrict EMDs from trading in securities of an investment fund, where that fund is a reporting issuer and can issue securities pursuant to a prospectus to retail investors. We have heard that this is the intention of the CSA not by reading the July Notice or the proposed rule amendments, but by speaking to some of our clients who understand from communicating with OSC staff that this is staff's intention. If this information is correct then we strongly urge the CSA to consider the following:

(a) We consider any final rule that is intended to have this result will not be valid under the rule-making procedures, since the CSA has failed to make this policy goal clear in this publication and has not explained why this should be the case at law and according to regulatory policy. Nowhere is this stated in the Notice and for the reasons we will outline below, the proposed rule does not actually have this effect. If this is the expected result, then we respectfully submit that the CSA must publish a clearer rule (for the reasons outlined below) again for another 90 day comment period and clearly explain that this is to be the result. This will allow for appropriate industry comment and feedback on this proposal. We did not read the proposed rule as being drafted with this effect, which means that

there is a significant likelihood that others did not read the rule in this way either. However, in our view, this additional publication should not be proceeded with because of the reasons we articulate in paragraph (c) below.

(b) The proposed rule does not have the above-noted effect, because the CSA failed to take into account that investment funds issue newly issued securities from treasury. The fact that securities are offered under a prospectus only means that if securities are to be issued to retail investors, the securities are so qualified for sale under that prospectus. There is absolutely no prohibition (nor should there be) on a fund issuing securities to accredited investors under prospectus exemptions, rather than under a prospectus. Securities of the same fund can be issued to retail investors under a prospectus and to accredited investors under prospectus exemptions. This has long been accepted by the CSA and is common knowledge within the legal and financial industry - well over 30 years in our estimation. This was also the OSC staff position for the period from 1993-2003 and we are not aware that this has ever changed. Therefore when the draft rule states as it does in paragraph (i) of section 7.1(2)(d) that an EMD may *act as a dealer by trading a security that is distributed under an exemption from the prospectus requirement* we read that as being appropriate and permissive. We felt the deleted words *Whether or not a prospectus was filed in respect of the distribution* were always unnecessary and thought these words were only being deleted because the CSA recognized this. In our view, this rule appropriately acknowledges that an EMD can act as an intermediary to trade with entities/individuals pursuant to prospectus exemptions on distributions (newly issued securities) of an investment fund, even though that fund also has a prospectus available. We point out that it is also very clear in the CP to NI 31-103 with the discussion under the heading *Trades that are distributions.* For example, the CSA state that:

> *…. Exempt market dealers are permitted to trade in securities if the trade is a distribution made under a prospectus exemption. This includes trading in securities of investment funds and reporting issuers provided the securities are distributed under an exemption from the prospectus requirement.*

We fail to see how the purported intention of the CSA is made clear in this discussion.

(c) More substantively, we strongly disagree with any policy rationale that would restrict EMDs from acting on trades on an exempt basis (i.e. under prospectus exemptions) in newly issued securities of investment funds. This has long been an appropriate practice and we know of many IFM/PM/EMD registrants who have the EMD registration in order to deal directly with accredited investors and other qualified investors in trading securities of their investment funds (where there also exists a prospectus for retail sales) pursuant to prospectus exemptions. We cannot see that there are any regulatory policy issues with this practice.

As you will know, many IFM/PM registrants were registered prior to 2002 (the establishment of the MFDA) as MFDs in order to do very limited trading, including trading in their funds under prospectus exemptions with accredited investors and under the prospectus with employees and others where a prospectus exemption was not available. Commencing after the implementation of the rule that required all MFDs to become members of the MFDA, the OSC then developed a standard exemption (essentially the same for all) that set out the conditions for limited trading without having to be a member of the MFDA. The only reason most of those IFM/PM/MFDs did not change their registration to EMD, was because of the desire to be able to continue to trade in securities of their funds to employees or other individuals where there was not a good clear prospectus exemption that they could rely on. Our point in raising this history with the CSA now is that if the CSA concludes that IFM/PMs must be registered as an MFD to distribute fund securities to clients, it makes absolutely no sense to require these firms to become members of the MFDA for the limited purposes for which they currently use their EMD registration. The same exemptions from MFDA membership would be sought and, in our view, there would be no policy reason to deny these exemptions, so long as the firm agreed to limit its activities. All this means, in turn, is that there is absolutely no policy rationale to require IFM/EMDs to give up their EMD registration – to become registered as MFDs and then to subsequently apply for exemptions from MFDA membership. We respectfully consider that this would be an undue and unjustified regulatory burden.

For the reasons outlined above, we urge the CSA to clarify this issue – and ideally clarify in the Companion Policy that an IFM/EMD can act on prospectus exempt trades with clients investing in their own (or their affiliates') investment fund(s).

2. Comments on Revised Section 8.6

We consider the amendments to section 8.6 of NI 31-103 to be completely appropriate. We are aware of registrants who rely on section 8.6 and these revisions are helpful. However, because of the above-noted confusion as to the CSA's intentions, we strongly urge the CSA to include in the Companion Policy a clarification that a registrant can trade in securities (newly issued securities) of its investment funds with a managed account, even in circumstances when the fund is a reporting issuer and also issues securities to retail investors under the prospectus. As you know, the fund will be issuing securities to the managed account under the "accredited investor" prospectus exemption permitted in Ontario since May 2015 and in all other provinces prior to May 2015.

We read the following parenthetical words provided in the Notice (which for the reasons outlined above are not, strictly speaking, correct) as having this meaning, but we recommend this be made crystal clear in the Companion Policy. The parenthetical words in the Notice in which we took comfort are: *(including, as is the case today, those distributed under a prospectus).*

We also urge the CSA to expand this exemption to apply if the funds are advised by an affiliate of the adviser (similar to what is proposed regarding affiliates of the IFM).

3. Comments on Proposed Custody Provisions

We would find it very helpful if the CSA further explained *why* they chose to develop specialized custodial provisions for registrants that are different from those for investment funds (in NI 81-102 and NI 41-101). The explanation provided in the Notice is not particularly illuminating. We particularly believe that custodial provisions for investment funds (given some registrants will use the same custody arrangements for their pooled funds and their public funds) should be the same for all investment funds. We answer the "issue for comment" noted on page 5 of the CSA Notice by urging the CSA to adopt the SAME requirements for all investment funds. We note that the provisions found in NI 81-102 have been understood by the industry, including the legal community, and have been largely workable for well over 20 years (the custody provisions applicable to public mutual funds predated the adoption of NI 81-102 in 2000.)

Although we believe industry participants will welcome the additional flexibility inherent in the NI 31-103 proposals (expanded categories of entities who can be custodians and sub-custodians), the proposed NI 31-103 custody provisions introduce new concepts such as:

(a) Custodians must be "functionally independent" for certain purposes – and there is no real explanation as to the meaning of that term.

(b) Firms may not "self-custody", although section 14.5.2 appears to allow just that if the firm qualifies as a Canadian custodian (as defined). "Self-custody" may be a commonly understood term, but we would be interested in understanding what the CSA thinks this means.

(c) Foreign custodians may be used only if a specified *reasonable person* test is followed. This is different from the test in NI 81-102 and NI 41-101 for instance. And what does the CSA mean when they make the following statement in the CP – *Where a foreign custodian is used, we will assess this practice on a case-by-case basis.* When will this assessment be made? And isn't this assessment something that should be left to the reasonable judgement of a registrant?

(d) The custodian requirements do not apply in respect of a *security that is registered only in the name of the client or the investment fund on the books of the security's issuer or the transfer agent of the security's issuer.* We feel registrants would benefit from an explanation from the CSA as to what this actually means – why is it necessary to say this? Does this mean that the custodian does not have to record anything on their books, if there is a book entry ownership of a security and no securities certificates issued?

(e) Similarly the custodial requirements will not apply to certain mortgages. One does not commonly think that "mortgages" are even capable of being held in custody, but is this exception to be read so that a custodian does not even have to record the mortgages in the custody account? Again, we feel registrants would benefit from a CSA explanation of this exception.

(f) We have difficulties understanding the interplay of new section 14.5.3 and the revised section 14.6. What is intended with these sections? What would a registrant have to do differently from what they do today in holding client assets separate and apart from their own property?

(g) We feel that the paragraphs under "prudent custodial practices", particularly those under the headings "Delivery of custodial statements" and "reconciliation with custodians" are important expectations of the CSA and may be sliding into rules, as opposed to policy.

(h) Related to the comment in (g) – there is no recognition in the proposals of the concerns that were raised when CRM2 first came into force about which entity is expected to provide statements to clients. In earlier CSA notices there was discussion about the "client facing" firm having to do account statements – using CRM2 principles. What about the custodians? We believe that this important issue has not been addressed by the CSA.

4. CRM-2 Amendments

While we have no issue with the CSA clarifying existing provisions of the CRM2 provisions in ways that are consistent with the May 2015 blanket orders and/or the various FAQs, we do question the need for the CSA to impose new requirements that will necessitate amendments to reports and statements, which are only now being finalized (effective as of July 15, 2016).

(a) We find proposed sections 14.14 (5) (f) and 14.14.1 (2)(g) to be very problematic, given that the CSA exempted registrants from this disclosure in May 2015. Why is this necessary disclosure and how will it assist investors to understand their investment and their relationship with their chosen registrant firm? This is, in our view, very legalistic and regulatory disclosure that may mean something to a regulator, but we suspect means nothing to a client of a registrant. In any event imposing this requirement now, after registrants' have expended considerable resources in setting up their systems is, in our view, problematic and unnecessary.

(b) Similarly imposing new section 14.14.2 (2.1)[1] at this time, is very problematic. There is not much explanation from the CSA as to what this means, other than a reference to a footnote in the CP. Does the account statement have to denote with an asterisk each security where market value, not book value was used? Does the

[1] As an aside, we note that the numbering used in NI 31-103 has become over the years unduly complex and we urge the CSA to take the next available opportunity to renumber and streamline the section numbers.

statement have to indicate the applicable date of the market value? If this section is considered important, then we urge the CSA to explain that generic footnote disclaimers can be provided, without having to asterisk each security or provide specific information.

(c) The CSA provides clarity in section 14.17 of the CP that "employee bonuses" must be disclosed to clients in the report on charges and other compensation, but no further explanation as to what the CSA thinks these "charges and other compensation" are and when they should be disclosed. We cannot advise our clients on this provision, because we do not know what it means or what the CSA intends with this provision.

(d) In our view, the CSA should delete the reference in section 14.19 that a firm compare the client's actual rate of return to his/her targeted rate of return. As you know this is a controversial element of the targeted reforms proposed in Consultation Paper 33-404 and we believe that the CSA must not "advance" impose any of these requirements until such time as any reforms are finalized arising out of the Consultation Paper.

5. Amendments NOT made by the CSA

We note that the CSA has not included at least two elements of clarification that industry participants have been discussing with the CSA since CRM2 was first made effective.

(a) The list of "permitted clients" is too restrictive and does not include commonly-thought-of institutional clients. We know that the Portfolio Management Association of Canada has made prior submissions to the OSC staff in this regard and we urge the CSA to reconsider this list carefully.

(b) There is nothing in the Companion Policy (as there was in the earlier FAQs) about when an EMD would be required to provide the various statements (beyond a trade confirm and a "transactional statement") after a particular trade. The CSA provided useful feedback in the FAQs that registrants rely upon regarding the nature of a continuing relationship with a client and we strongly urge the CSA to include this in the CP.

6. Request for Comments on "CRM3"

We consider that it is not our place as lawyers to provide feedback to the CSA on the two questions posed by the CSA in the Notice about the need for further cost disclosures in the charges and compensation report. However, we do believe in the usefulness of clear and concise disclosure and completely agree that investors should understand their relationships with their chosen firms and advisors – and also the true cost of ownership when they invest in investment funds and related products, including the full MER (in dollar terms), particularly when this revenue is going to related entities of the particular registrant. We have no issue with the second concept, other than to ask whether the CSA is going far enough on this issue?

However, very importantly, we consider it would be improper for the CSA to move forward with this initiative (and require more changes to established templates for the required reports) until such as time as the CSA has landed on a position with respect to the targeted reforms (Consultation Paper 33-404) and with respect to embedded compensation inherent in investment fund management and distribution. Therefore, we strongly recommend that the CSA "park" this consultation until those decisions are made.

We 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. We, together with others at our firm who have considered the proposed amendments, would be very pleased to meet with you.

Yours very truly,

Rebecca Cowdery	Prema Thiele	Jason Brooks
416-367.6340	416.367.6082	604.640.4102
rcowdery@blg.com	pthiele@blg.com	jbrooks@blg.com