

March 27, 2003

Mr. John Stevenson, Secretary  
Ontario Securities Commission  
20 Queen Street West  
19<sup>th</sup> Floor, Box 55  
Toronto, Ontario  
M5H 3S8

Dear Mr. Stevenson:

**Re: Proposed Amendments to Ontario Securities Commission Rule 31-502 - Proficiency Requirements for Registrants, Rule 31-505 - Conditions of Registration and Rule 35-502 – Non-Resident Advisers**

Thank you for the opportunity to respond to the Ontario Securities Commission's (the "Commission's") *Proposed Amendments to Rule 31-502 – Proficiency Requirements for Registrants, Rule 31-505 – Conditions of Registration and Rule 35-502 – Non Resident Advisers (the "Proposed Amendments")*. **Open Access Limited (OAL)** applauds the Commission's consideration of the practical application of the Rules in the industry, which is a crucial aspect of the Rules' efficacy in protecting investors from loss due to negligence, incompetence and undue costs.

**Summary**

**OAL** agrees in principle and in detail with the Proposed Amendments. Due to its unique operations and services, **OAL** also believes that these Proposed Amendments are the appropriate venue in which to address the overlap in the provision of investment services by firms who operate outside the scope of the Commission's authority, to ensure that as the industry inevitably grows and changes, investors are protected and the Commission is proactive in addressing current and potential issues. Specifically, **OAL** proposes that the Commission should consider further amendments to the Rules that would tailor Compliance staff proficiency requirements according to the categories of securities in which the adviser deals. The Commission has already made great strides in this area, particularly in its support of the Mutual Fund Dealers Association (the "MFDA"), and in its education of the MFDA regulatory staff. However, as **OAL**, by virtue of its unique services, has discovered, there is a gap in regulation pertaining to Investment Counselors/Portfolio Managers who offer an integrated service consisting of both a discretionary-managed investment option and a self-directed option, both of which are

comprised of funds managed by other IC/PM's who, by definition, are governed by the Rules set out by the Commission. *OAL* believes that the Rules regarding fiduciary duty (especially "Know-Your-Client" Rules) are essential; as a result, *OAL* wishes to remain under the jurisdiction of the Commission, rather than seeking registration elsewhere (i.e., under trust company or insurance company legislation). Indeed, this point is so important that we implore the Commission to provide Amendments that will address these issues, without being so cumbersome as to cause unreasonable costs that might result in an investor moving to an adviser who is regulated outside of the Commission, and therefore being denied of the important protection provided by the Commission.

To answer some of these concerns in part, *OAL* proposes that the Commission consider the following additions to its Proposed Amendments under review:

- 1) Rule 31-502, Rule 31-505 – qualifications of the Compliance Officers, Ultimately Responsible Persons, and Designated Persons should be specific to the types of securities offered by the firm. Suggested proficiency requirements:
  - a. IC/PM firms whose discretionary authority is confined to managed funds should require that the Chief Compliance Officer and the Ultimately Responsible person have successfully completed Level 1 of the CFA program and relevant experience.
  - b. IC/PM firms who manage portfolios of securities other than managed funds should require that the Chief Compliance Officer and the Ultimately Responsible person have the more stringent proficiency requirements as set out in the Proposed Amendments.

**Background:**

*Open Access* Limited is an independent group retirement plan provider, offering corporate employers (plan sponsors) a complete outsourcing solution for their group retirement savings plans, deferred profit sharing plans and defined contribution pension plans.

The *Open Access* Limited product was developed in response to extensive independent research conducted across Canada among participants in corporate retirement plans and through focus groups of senior management of plan sponsors.

The *OAL* product is designed to provide plan participants with choice, control and communication. Through the use of a numerically scored Know-Your-Client questionnaire, participants are directed to a managed portfolio that best suits their investment objectives and risk-assessment profile. These managed portfolios are comprised of brand-name mutual and index funds (and at some future time may contain third party pooled funds); *OAL* does not offer proprietary funds. Alternatively, investors may choose a self-directed plan. In these cases, *OAL* annually reviews the investors' investments in conjunction with the Know-Your-Client data.

Most of *Open Access*' competitors in the marketplace are either insurance companies or banks/trust companies. These firms typically offer a limited selection of funds to group

retirement plan participants. Because these firms fall outside the jurisdiction of the Commission, they do not follow the compliance proficiency requirements or the due diligence of “Know-Your-Client” regulations. *OAL* holds that this is inappropriate; however, in order for *OAL* to be able to offer these important services in this marketplace, it is important that the proficiency requirements are not over-prescribed such that the costs of maintaining staff with such proficiencies is prohibitive to offering a competitively priced service. This can be achieved without compromise to the investor through the definition of proficiency requirements according to the types of securities managed by the IC/PM.

### **Recommendations for the Proposed Amendments**

As an IC/PM, *OAL* offers a valuable service to plan participants who in most cases would not be in a position to participate in managed accounts, as generally this service is restricted to institutional accounts or high net worth individuals. Obviously, *OAL*'s ability to continue to offer this service to non-high-net-worth participants is highly dependent on its ability to maintain reasonably low operating costs. This is a primary reason for *OAL*'s contention that the Proposed Amendments should be further detailed to specifically address proficiency requirements according to the securities that the IC/PM manages.

It is obvious that a greater degree of expertise would be required of an IC/PM who manages say, equity securities or derivatives, than would be required of an IC/PM who manages portfolios comprised of mutual or pooled funds. *OAL* believes that the Proposed Amendments should recognize this difference. Requiring the same proficiencies of staff would result in unnecessary costs being passed on to the investor, as staff possessing expertise well beyond the scope of that required by *OAL*'s operations would nevertheless have to be compensated for that unemployed expertise. Further, IC/PM's who manage portfolios of funds are essentially “managers of managers”; as such, there is additional protection for the investor as the ultimate managers of the funds are appropriately governed by the Commission.

The role of a compliance officer exceeds those activities directly related to discretionary account management, rebalancing, fairness of allocation, soft dollar issues, allocation of brokerage, and the general scope of advisory and investment management duties. In some cases, *OAL* being one, IC/PM firms do not engage in many of these activities at all. Naturally, *OAL* agrees that the role of compliance must be fulfilled by individuals who are appropriately qualified and who possess a working knowledge of the Rules, with an ability to properly interpret and apply those Rules. It is important, however, that in the interest of protecting investors from undue costs or from exclusion from access to IC/PM services due to such costs, the Proposed Amendments tailor the proficiency requirements according to the types of activities performed by the IC/PM. *OAL* therefore submits that the Commission should consider further amendments such as the following:

Amendments to Rule 31-502: Proficiency Requirements for Registrants, Amendments to Rule 31-505: Conditions of Registration:

ICPM firms whose discretionary authority is confined to managed funds should require that the Chief Compliance Officer and the Ultimately Responsible person have successfully completed Level 1 of the CFA program and relevant experience.

ICPM firms who manage portfolios of securities other than managed funds should require that the Chief Compliance Officer and the Ultimately Responsible person have the more stringent proficiency requirements as set out in the Proposed Amendments.

It is progressive and appropriate that the OSC has recognized the practical proficiencies that are earned through industry experience. **OAL** believes that its recommendations for further amendments are in keeping with this approach.

We would be pleased to provide further details regarding these issues to assist the Commission in its efforts to devise Amendments that are effective and proactive. Should you have any questions or comments, please contact the undersigned at (416) 364-3532 or Maureen Harvey, Compliance, at (416)364-8494.

Sincerely,

Catherine A. Darmody  
Treasurer & CFO