June 20, 2007

British Columbia Securities Commission
Alberta Securities Commission
Saskatchewan Financial Services Commission
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marches financiers
Nova Scotia Securities Commission
New Brunswick Securities Commission

c/o John Stevenson, Secretary
Ontario Securities Commission
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Dear Sirs/Mesdames,

Re: National Instrument 31-103 Registration Requirements and related forms

BMO Nesbitt Burns Inc. ("BMO") appreciates this opportunity to provide comment, on our own behalf and on the part of certain of our related entities, on the Canadian Securities Administrators' proposed National Instrument 31-103 - Registration Requirements and related forms (collectively the "Instrument"). This letter addresses many of our concerns in the area of "registration reform". However, it is not an exhaustive list. We look forward to the opportunity to provide further comment as the CSA develops and refines the Instrument based on the comments received through this consultative process.

As a general comment, we note that many sections in the Instrument provide exemptions for registrants subject to SRO oversight. We strongly recommend that the CSA work with the SROs to create a regulatory framework that is consistent amongst SRO and non-SRO members.

Also, one of the stated goals of the Instrument is to standardize requirements among jurisdictions. While we are generally in support of such an initiative, we are also aware that certain regulators, either in their governing legislation or by local practice, recognize various

methods of ensuring compliance with the spirit of some requirements – which have benefits to dealers and registrants. One example is section 5.25(1) of the Instrument. Certain jurisdictions currently allow dealers to rely on client-name statements sent by mutual fund companies to satisfy the requirement for client statements to be sent every three months (where the dealer can verify that the client is receiving the statements from the fund companies). We have processes built around such local practices and, where such local practices are effective and not causing any risk to clients, we would prefer to see the new standards in the Instrument reflect the local practice.

Finally, we note that given the number of changes being proposed under the Instrument, many requirements will require transition periods of varying length in order for registrants to be in a position to comply once the Instrument is in force.

The remainder of this letter will address the various parts of the Instrument in turn.

Part I - Categories of Registration and Permitted Activities

1. Business Trigger

The new "business trigger" model will require any person or company who is "in the business of dealing or advising" in securities to register as a dealer or advisor. The theory behind this approach is that this will simplify the statutory registration exemptions by eliminating the need for exemptions based on occasional trades and reduce the need for relief applications. While we agree that this may be a positive outcome, we are concerned that the proposed definition will lead to considerable uncertainty. This business trigger model proposal is predicated upon the passage of amendments to existing securities legislation in each of the Canadian jurisdictions given that, among other matters, current legislation is based on the requirement to register for "trading" in securities and does not specifically address the scope of "being in the business" or how the business trigger will be applied. Moreover, the summary of legislative amendments proposed by the Ontario Securities Commission with the notice published by the OSC suggests that "dealing in securities" could include "any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of acquiring a security as principal or agent". Such a definition appears similar in scope to current "trading" definitions, creating uncertainties as to the scope of the business trigger (that is, it suggests that any participation in the acquisition of a security triggers registration).

For example, one of our affiliates, BMO Capital Corporation ("BMOCC"), a wholly-owned subsidiary of Bank of Montreal, is registered in Ontario as a limited market dealer. BMOCC has, as part of its organization, a small group of employees (referred to as "Financial Advisory Services") who provide M&A and divestiture services to Bank of Montreal corporate finance clients primarily. M&A advisory and divestiture services do not currently require any form of registration (nor would registration appear to be required for such activity under the Instrument); however, in the context of providing Financial Advisory Services, BMOCC will on occasion, where there is a capital raise involved, act as the facilitator between a corporate/institutional client and accredited investors. This activity has required BMOCC to register as a Limited Market Dealer in Ontario and to have its salespersons registered, because this incidental activity is considered an "act in furtherance of a trade". As indicated above, one of the goals of the "business trigger" model is to eliminate the need for exemptions (and therefore the need for registration) based on occasional trades. While BMOCC may, by providing advice in conjunction with a transaction which ultimately may result in a trade between other parties who are issuers or dealers, be deemed under current legislation to be acting "in furtherance of a trade" and be required to be registered as a Limited Market Dealer, it is important to note that BMOCC does not distribute any product or carry out any trade itself. To the extent the definition of "dealing in securities" remains similar to the current definition of a "trade", the stated goal of eliminating the need for exemptions (and thus registration) for occasional trades would not be achieved. It would in fact result in requiring such entities which are only occasionally involved in such activity to undertake costly and time consuming registration as Exempt Market Dealers and to ensure compliance with proficiency requirements for their sales force and compliance officers at an effort and expense which is in no way commensurate with any benefit, given the nature of the activity, the low volume of activity and the nature of the clients to whom such services are provided. We would request that the CSA ensure the definitions in legislative amendments match the stated objective of the Instrument and that such occasional activity not be captured in the "business trigger "model.

It is difficult to determine how far the "business trigger" model will extend. Will it apply to research analysts, financial planners, asset allocation people and client relationship managers? Will the "business trigger" have any effect on non-registered individuals of registered dealer firms who rely on the exemption provided in the *Ontario Securities Act* (Section 35(2) - Exemption re securities) and similar exemptions in some other jurisdictions? These individuals are not currently required to be registered as salespersons provided they are dealing solely in

the exempt products defined in the Act, but we would like clarification if this will change based on the business trigger model. The pertinent section of the Companion Policy, while lengthy, needs to be clarified and elaborated upon.

In addition, the "business trigger" model seems to suggest that certain bank products/activities could result in the banks being subject to the Instrument. These activities include, but are not limited to, the sale of principal protected notes, index-linked GICs and provincial and Canada Savings Bonds, certain accommodation of trades, issuances of commercial paper and certain derivatives, securities lending and repo transactions. As a result of these activities/products, the application of the "business trigger" or the removal of the current exemption, banks may have to register as Exempt Market Dealers and comply with corresponding proficiency requirements. We are also concerned that registration as an Exempt Market Dealer will subject banks to other securities regulatory requirements (i.e. books and records, disclosure obligations, capital requirements and reporting etc.) As the banks are federally regulated it would be onerous, repetitive and unnecessary for the banks to also be subject to provincial regulation.

We accordingly submit that the CSA should ensure that the Instrument does not regulate banks in this regard, specifically with regard to:

- dealings with bank customers in index-linked GICs and principal protected notes that are regulated under federal law;
- dealings with bank customers in provincial and Canada Savings Bonds;
- activities undertaken within and by banks, such as accommodation trades and issuances of commercial paper, in respect of which exemptions have been available; and
- dealing with bank customers in certain derivatives, securities lending and repo transactions.

In applying the "in the business" factors to security issuers, the Companion Policy states, "…where an issuer employs or otherwise contracts with persons to perform activities on its behalf similar in character to those performed by a registrant,… the issuer is in the business of dealing in securities." This language is also overly broad as it suggests, for example, that an issuer contracting a broker dealer for the purposes of operating an employee share purchase plan, would require registration.

We therefore would ask the Instrument be revised to ensure that banks would not be subject to registration under the "business trigger" model and further clarification be made on the above noted points.

We also would strongly urge the CSA to ensure that the elimination of existing exemptions and the introduction of the "business trigger" does not cast the regulatory net too widely by removing specific exemptions that should remain in place or by revoking exemption orders that should remain in effect.

2. Exempt Market Dealer Category/ Limited Market Dealer Category

The Instrument introduces a new category called "Exempt Market Dealer" which would replace the existing Limited Market Dealer category. Currently certain of our related entities, BMO Harris Investment Management Inc., Jones Heward Investment Counsel Inc., BMO Capital Corporation, HIM Monegy, Inc. and Guardian Group of Funds Ltd. are registered as Limited Market Dealers in Ontario. These entities have been operating in this capacity for years and their staff members are experienced in this capacity. Employees of an Exempt Market Dealer would be required to comply with more stringent proficiency requirements. As most of the employees that work for these Limited Market Dealers are, in our view, satisfactorily experienced in their areas of business and do not require additional proficiency training or education than as required under the current regulation, we request a grandfathering to recognize the status of these individuals and minimize the impact, measured in both time and cost.

Also, certain products (such as evidence of bank deposits) are included in the definition of "securities" only under certain provincial securities acts. As a result of the Instrument's application across Canada, the sale of these products will now no longer be exempt from the registration requirement. As such, these products, which are currently sold through banks and their mutual fund dealers, will no longer be able to be sold without banks and these mutual fund dealers becoming registered. As these products remain under the sole regulatory jurisdiction of the federal government, we would suggest that the sale of these types of products be exempt from registration requirements.

3. Individual Categories

We are supportive of the streamlining of the individual categories of registration. However, as

the IDA is currently proposing its new individual registrations, which are not consistent with those in the proposed Instrument, we are concerned that confusion will remain even after the Instrument is in effect. We submit that the CSA should work with the IDA to harmonize their individual registration categories for consistency and to avoid market confusion.

The Instrument should also include definitions for all of the individual categories of registration as it is not clear under the Instrument what is encompassed by one category and excluded by another. For example; the definition of a dealing representative should confirm that this category is not meant to include research analysts, financial planners and individuals who carry out investment banking activities.

- **UDP and CCO**

We do not believe the proposal to register only two individuals in senior management (an Ultimate Designated Person/Chief Executive Officer and a Chief Compliance Officer) will promote the desired culture of compliance, and ensure proficiency of persons performing management functions and carrying out responsibilities to see that the firm conducts itself in accordance with regulatory requirements. The Instrument appears to have excluded important management areas requiring day-to-day monitoring and management functions designed to achieve compliance with regulatory requirements, including senior management responsible for trading, sales, and corporate advisory and underwriting businesses, and control functions such as finance and operations. The following summary illustrates that there are ordinarily at least three key areas of management that contribute to a dealer's culture of compliance:

- Governance functions
    - Board of Directors
    - Chief Executives
    - Executive Management Team
- Systems and controls functions (Back-office)
    - Finance
    - Operations
    - Compliance
- Business Management functions (Front-office)
    - Sales
        - Research
    - Trading
        - Agency

- Proprietary
- Wholesale

- Investment Banking

In order to achieve the desired effect, the Instrument should address the objectives of promoting a culture of compliance and ensuring persons performing management functions have requisite proficiencies and tools to deal with employees who do not carry out their business in accordance with regulatory requirements. Rather than legislate the designation and registration of two members of management to carry out these responsibilities for an entire firm, it would be more effective and appropriate for the Instrument to impose responsibilities on the dealer and those persons responsible for its governance, including the board of directors, if management is found to be deficient. Alternatively, if the CSA continues to believe they are unable to accomplish their regulatory objectives without individual registration of certain members of a dealer's management team, the CSA should consider the Financial Services Authority model of registering individuals in senior management "controlled functions" (http://fsahandbook.info/FSA/html/handbook SYSC Senior Management Arrangements, Systems and Controls).

In addition, the Instrument prescribes that a dealer must designate and register only one individual as the Ultimate Designated Person ("UDP") and one individual as the Chief Compliance Officer ("CCO"). If individual registration of members of senior management is considered necessary, we strongly believe that this requirement should be amended to conform to the practice of the IDA that allows a dealer to designate and register more than one UDP and more than one CCO, where the dealer operates two distinctive businesses under separate management teams (commonly divided between retail client/wealth management business and institutional investor and issuer client/sales, trading and investment banking business). Currently, we have a separate UDP and CCO for our Private Client Division and Investment Banking Group. We believe that, if the Instrument requires the registration of designated individuals within management who are responsible for supervision and compliance monitoring to address the firm's compliance with regulatory requirements, those individuals should be the persons who truly do have those roles and responsibilities within a firm.

The Instrument or Companion Policy should provide guidance on what firms that lose their appropriately qualified UDP or a CCO should do in the interim period before a new UDP or CCO is appointed. It is our recommendation that an interim exemption should be available to firms to

allow the registration of individuals who do not hold valid proficiency until proficiency requirements are met.

The description of responsibilities of the UDP and CCO in the Instrument create a misplaced responsibility for supervision of the firm and its employees on the CCO rather than on the senior management team responsible for hiring, firing and remunerating those employees. Management of the business (front office) should be held accountable for the conduct of business personnel. Management of the respective control areas (Finance, Operations and Compliance) should be held accountable for the conduct of personnel within their respective areas. The Board of Directors, Chief Executive Officer and Executive Management Team should be accountable for the firm's overall conduct.

- **Associate Advising Representative**

We understand that this position covers client relationship managers who undertake activities such as filling out Know-Your-Client documentation, providing limited advice and slotting clients into model portfolios (with all such activities supervised by a portfolio manager). It is designed to capture the existing practice in some jurisdictions of providing a registration with conditions, in order to allow individuals gaining the requisite experience and education to work their way into the Portfolio Manager position. To the extent that these client service functions are undertaken, we strongly support this apprenticeship category, as it may assist market entrants in establishing a more clearly logical and defined career path and provide enhanced client service and support within member firms. If the activities undertaken by the individual are purely administrative, we do not believe a category is warranted. The Instrument should more clearly define the permitted activities and limitations of this category.

Part II - Fit and Proper Requirements

Proficiency

To the extent that the Instrument harmonizes proficiency requirements as between SRO and non SRO members, we support the provisions. Investors should receive consistent expertise from registrants, regardless of whether they operate primarily under SRO or CSA jurisdiction.

We would suggest the CSA consider exempting SRO members from the requirements under 4.2(2)(b). We believe that CSA and SRO expectations relating to time limits on examination

proficiencies and how relevant experience is measured could possibly vary and we believe providing a carve out for SRO members would eliminate the need for proficiency exemption filings in the future.

Part III - Conduct Rules

1. Account Opening and Know-Your-Client

We would like clarification on the definition of "reasonable efforts" used in section 5.3(2) and further guidance as to what "reasonable efforts" are and what tests we can rely on to ensure we are meeting this subjective standard.

There appears to be some inconsistency between the suitability requirements in section 5.4 (2) and the IDA requirements under Regulation 1300.4. In particular, full service brokerages are obligated under IDA Regulation 1300.4 to confirm that every order is suitable, unless relief from suitability has been obtained. The proposed section 5.4 is contrary to the IDA requirements as it appears to allow registrants to accept orders from a client that are unsuitable, provided that they inform the client that they believe that the transaction is not suitable. Although this provision would give registrants more flexibility in the acceptance of orders, we believe that the CSA should coordinate with the IDA to ensure there is consistency between the two policies, and that we are not placed at a disadvantage with respect to non-IDA members.

We believe that it would be appropriate to exclude all Institutional Clients (as defined in IDA Policy 4) and Accredited Investors (as defined in NI 45-106), except for those individuals that only qualify as accredited investors because they meet the financial criteria set out in subsections 1.1(j), (k), (l) or (m) of NI 45-106 from the client account opening and know your client requirements of Division 1. These investors should be subject to the same account opening and know-your-client requirements as clients that are not accredited investors.

2. Leverage Disclosure

IDA member firms are currently required to provide leverage disclosure to their clients; however, we do not receive a written confirmation or receipt of this. It would be a costly and time consuming undertaking to build systems that would properly identify and track these documents, as well as a more stringent requirement than any other disclosure document provided to clients.

3. Relationship Disclosure

We support the objective ensuring that clients have an understanding of the key aspects of their relationship with the firm. However, any proposed rules must be practical to meet the intended objective, minimize the cost burden and avoid unintended consequences. The standard should also be consistent in its application to all investors.

We have a number of concerns about the content of the proposed Relationship Disclosure Document ("RDD") and the fact that it does not appear to be entirely consistent with existing and proposed SRO requirements, including the IDA's proposed rules regarding the Client Relationship Model ("CRM").

It is our understanding that the CSA is in the process of making a determination about how to proceed with CRM. We believe that RDD should be put on hold until the CSA makes such determination. We believe that a thorough and meaningful cost-benefit analysis is required prior to moving ahead with the RDD and CRM proposals. This should include a clear identification of the perceived concerns and/or regulatory failures in the context of all current disclosures available to investors.

We have participated extensively in the CRM comment process and are supportive of the comments made by the IIAC with respect to the CRM. We are also supportive of the alternative model that has been proposed by the IIAC, which includes a non-customized industry wide RDD document for all account types that would be available and accessible to all investors.

Below is a summary of some of the key concerns that have been raised with respect to the CRM that we believe are equally relevant to the RDD proposals.

- **Documentation Volume**

Clients are currently receiving large quantities of material in the course of establishing and maintaining their relationship with a firm and advisor. The proposed RDD will add to that volume and could be viewed an additional administrative burden and disregarded by clients.

- **Customization and Duplication**

The proposed RDD appears to be overly prescriptive and requires individual customization depending on the type of account and type of client. While the intention of customization was to assist clients in understanding the relationship with their advisor, the numerous details and information that the proposed RRD contains may not result in client clarity in the relationship.

The proposed RDD duplicates some of the know-your-client form information such as objectives and risk factors. Specifically, section 5.12 (2) provides that the RDD must contain "the information that a registered firm is required to collect about the client under section 5.3 [know-your-client]." This apparent duplication has not been addressed.

- **Costs of Implementation and Supervision**

As a result of the increased volume of documentation and client data collection, there will be a corresponding increase in supervisory processes in ensuring that RDD's are properly completed and updated. In addition, there will be significant costs associated with mailing the RDD (and any required updates) to existing and future clients.

- **Increased Legal Liability**

The proposed RDD would become an integral part of the contractual relationship with the client, rather than a simple disclosure document. Accordingly, it could create new regulatory and contractual obligations and lead to increased liability exposure for advisors and firms. Additional thought and consideration must go into the purpose and content of the RDD and other important considerations such as whether the client should be required to sign or acknowledge the document. As noted above, it is essential that there be consistency between the requirements in NI 31-105 and existing and proposed SRO rules in the area.

- **Retroactivity**

It is not clear if the RDD requirements would be applied retroactively. In particular, would all

existing clients be required to enter into an RDD? If so, this would require significant time to repaper all existing client accounts, resulting in a significant cost to the industry and ultimately clients.

We would suggest that if the CSA proceeds with the RDD that it carve out an exception for Institutional Clients as defined in IDA Policy 4 and Accredited Investors (as defined in NI 45-106), other than individual investors that only qualify under subsections 1.1(j), (k), (l) or (m) of NI 45-106.

4. Record keeping/Document Retention

Activity records maintained as part of the books and records of the firm are currently well defined and easily retrievable. We submit that including "communications between a registrant and its client about particular transactions" within the activity category of transactions would create significant overlap between these records and those that are stored by an advisor as part of their client files. As well, this would create an administrative burden of categorizing and storing this information. In our industry, the majority of communications regarding transactions are verbal. How does the CSA contemplate recording and storing this category of communication?

Currently, "Relationship" records such as account opening documents are maintained for a minimum of seven years from the date the account is opened. Moving the trigger date from the start date of a relationship to the end date would effectively require the firm to maintain files in perpetuity for long term clients. The volume of information required to be archived is potentially staggering as well as costly to store and retrieve. We suggest the CSA focus on the specific type of records of concern and provide a more reasonable time frame in respect of the retention period.

5. Compliance

We support the move to a more principle-based regime, as set out in the Instrument. The obligation of firms to establish, enforce and document a system of controls and supervision to ensure a firm's compliance with all applicable requirements of securities legislation is appropriate.

We are concerned, however, with the proposed removal of the currently prescribed requirement applicable to branch offices and branch managers. We believe that the responsibilities inherent

in managing branches necessitate specific registration and designated supervisory requirements. In addition to ensuring that the branch managers have the requisite skills and regulatory obligations to perform this function, we also believe that registration contributes to investor confidence in the general integrity of the market.

6. Complaint Handling

The new requirement for registered firms to implement policies and procedures to address client complaints is important from an investor protection and level playing field perspective. The definition and scope of complaints should be consistent as between firms under CSA and SRO jurisdiction.

To the extent that clients have similar recourse regardless of whether a firm is overseen by the CSA or an SRO is important to maintain market integrity.

7. Non-resident registrants

We support the provisions that level the playing field with respect to non-resident registrants, recognizing that it is appropriate to impose some additional requirements on non-residents. It is appropriate to harmonize the approaches taken by different CSA jurisdictions. However, we are concerned that the there does not appear to be a definition of non-resident. This could result in a disclosure requirement for any client whose registrant is out of the province, even if the firm has an office in that province.

Part IV - Conflict of Interest, Relationship and Referral Disclosure issues

We support the approach taken by the CSA to consolidate all the applicable regulatory requirements related to related and connected disclosure into one all encompassing regulation.

1. Conflicts Management

While we generally support the CSA's efforts to include principle based regulation in the Instrument, we have concerns that the combination of both principle based and prescriptive regulations in one section will result in it being extremely difficult for firms to comply with the Instrument.

Section 6.1(1) requires registered firms to identify "each potential and actual conflict of interest." "Conflict of interest" is defined very generally in the Companion Policy. We agree with the

principle that firms should identify all potential and actual conflicts of interest; however the requirement in section 6.1(3) mandates the disclosure of conflicts of all of these actual and potential conflicts. It is our view that this disclosure will not be meaningful to clients as it will be too long and likely irrelevant disclosure. We would submit that the definition of conflict of interest should include a materiality test and we would ask the regulators to provide guidance as to what they consider to be a "material" conflict of interest, i.e. a conflict of interest that merits disclosing, as was done with related and connected issuer disclosure.

We also request that the disclosure requirement in section 6.1(3) not include the requirement to disclose "any conflict of interest which it is reasonably likely that a client would consider important when entering into proposed transaction". This is a very subjective standard, which would be virtually impossible to implement from a management and compliance point of view. Furthermore, we are concerned that such a subjective standard would substantially increase our litigation risk, as it could be all too easy for disgruntled clients to rely on this section in order to claim that any conceivable alleged conflict would have deterred them from a transaction, if it had been disclosed.

Section 6.1(2) of the Instrument requires registered firms to deal with conflicts of interest by "exercising responsible business judgment influenced only by the best interest of the client or clients." In our submission, this sets a standard that is far too vague and general. We would be interested in guidance on, for instance, how one deals "in the best interest of clients" when the conflict is between two clients. Where there is a conflict between two clients, how would the firm identify this if clients have relationships with different advisors in separate offices? If the firm was able to identify a conflict, who would decide which client's interests would be served? Would the firm then be expected to disclose to other clients this conflict of interest? This would be contrary to our confidentiality and privacy obligations that are highly guarded by a registrant.

2. Managed Account Transactions

- **Responsible Person**

Section 6.2(1) of the Instrument defines responsible person as including every affiliate of the adviser with no exemption for those who do not participate, or have access prior to implementation, of investment decisions, as was previously provided in section 118 of the Ontario Securities Act. We submit that this narrowing of the definition is not warranted, and the existing definition should be retained so that only affiliates of an adviser that may influence the

investment recommendations and decisions of the adviser will be captured.

We also would ask for guidance on whether an "agent" of an advisor would include a non-affiliated sub-advisor.

- **Purchase Restrictions**

Section 6.2(2) of the Instrument sets out restrictions on investments by an adviser in a managed account or an investment portfolio that apply unless a client consents in writing prior to the purchase. This would replace section 118(2) of the Ontario Securities Act, which constrains an adviser from "knowingly" making one of the prohibited investments, but does not provide for an exception where the client consents. Section 6.2(2) would remove the knowledge requirement, and would provide for an exception where the client consents. We note that the consent provision specifically requires the registered adviser to obtain written consent for each purchase transaction. We would submit that this more onerous requirement increases standards in most provinces to meet the Quebec standard and could result in investment loss for clients if the consent is not obtained on time. Therefore, we submit that this pre-transaction disclosure requirement be replaced with the provision of a statement of related issuers on an annual basis or available for view on a website. For connected issuers we suggest that we move to a requirement where a list of connected issuers may be provided to clients upon request.

We note that the investment prohibition in section 6.2 (2) could also apply to purchases of mutual funds.

We would request that investment portfolio be defined.

3. Issuer Disclosure Statement

Section 6.4 of the Instrument requires a registered firm to maintain an "issuer disclosure statement". The statement must contain a list of connected issuers, in the course of distribution. In our view it would be almost impossible to keep such a list current as the status of whether an issuer is in or out of distribution changes on a daily basis.

The statement also would have to be delivered before the following occurs: first purchases or sells a security of an issuer listed in the disclosure statement; or before the registrant first advises the client to purchase, sell or hold a security of an issuer listed in the disclosure statement. We would submit that the requirement to deliver such a statement should be

replaced by a requirement to maintain a statement on a website that is accessible to clients.

We submit that the requirement in section 6.4(5)(a) (i.e. that the name of the registered firm and the mutual fund be sufficiently similar to disclose that they are affiliated) is not realistic since there are many funds that are affiliated with a registered firm but do not have a similar name to the firm. We believe it would be unfair to exclude such mutual funds from the exemption.

4. Fairness in allocation of investment opportunities

We agree that firms should have a means to fairly allocate investment opportunities to their clients. However, creating a model of allocation at the client level would be difficult while, at the same time taking into consideration both the suitability and risk tolerance level of the individual clients as well as documenting individual client-advisor communications. We suggest that firms be able to create models that complement the needs of their business with that of their clients. Documentation and employment of this model would provide evidence that fair allocation is executed.

In section 6.6(b) of the Instrument the CSA suggests that prior to a client investing in a security, an advisor must provide the written policies and procedures relative to fair allocation. Does this mean that internal compliance manuals would be part of relevant client disclosure? We believe that it would be prudent to provide this disclosure to clients, upon request, when investing in a new issue or other offerings where the firm employs its allocation model.

5. Referral Arrangements

The Instrument deals with the concerns related to client awareness, client confusion, referrer performing activities requiring registration and supervision and oversight in a reasonable manner. However, the types of activities that are intended to be covered should be more clearly defined. For example, it is unclear whether this section is intended to apply to the payment of finders' fees for non-brokered private placements or to soft dollar arrangements. It is also not clear whether the referrer must be registered to undertake referral activities.

In addition, as noted above, the CSA must be careful not to cast the net too widely in respect of conflict of interest requirements. This section regarding referral fees should be focused to address the specific concerns that the CSA has on this issue.

We believe the most important aspect in respect to referral arrangements is disclosure, but that the parameters of disclosure should be well defined. In particular, items (c) and (g) of section 6.13(1) are too open ended to provide certainty as to the limits of disclosure.

Part V - Suspension and Revocation of Registration

1. Automatic Reinstatement

We believe that the reference to "automatic reinstatement" in the Companion Policy may be misleading, as the Instrument indicates that a Form 33-109F4 must be submitted. Registrants might conclude that they do not need to file any paperwork prior to contacting or advising their clients, once they have been hired at the new firm.

At what point is a registrant considered to be gainfully employed following departure from one firm and during the course of being hired by another firm? Is the registrant considered to be gainfully employed again as soon as a firm offer letter has been delivered?

2. NRD and Transfers

A transfer form would be most helpful to firms with questions pertaining to: Outside Business Activities the individual is currently involved with and has previously disclosed to the regulators, details surrounding resignations and terminations as well as allegations made by clients, sponsoring firm or SRO, financial disclosures and unresolved client complaints and internal disciplinary matters concerning the individual's previous firm.

3. Termination of Employment

Will there be late filing fees? Could a firm be required to pay late filing fees at both the 5 day and 30 day filing stage?

Are the days measured by business day or calendar day?

4. Exception - hearing

In the event that a registrant appeals a suspension and requests a hearing, will there be provision to allowing the individual to continue to work subject to supervision and conditions?

How long will the appeal process take?

Part VI - Information Sharing

We believe that the proposed section 8.1 is overly broad and subjective. In particular, this section requires production of all information in a firm's possession or which it is aware of that is relevant to an assessment of the person's suitability or material to the hiring of the person. What is considered relevant to the assessment of suitability and/or the hiring of an employee is somewhat subjective and not clearly defined. Also, the relevance of certain information may only be apparent in hindsight.

In addition, there are no guidelines concerning the sharing of information, specifically:

(a) whether the registrant involved will need to provide consent;
(b) how contact will be initiated between the firms,
(c) deadlines that firms will have for communicating; and
(d) what happens if a firm does not comply with information sharing requests, and (e) how the regulators become involved.

More importantly, there may be unintended consequences of the information-sharing requirements, such as privacy law violations and/or increased exposure to defamation and related lawsuits commenced by the subject of a negative report, especially in situations where a former firm has information that may appear to be relevant but is unconfirmed, speculative and may not ultimately turn out to be correct.

We question whether this section is necessary in light of the above noted concerns and the information that is currently available to prospective employers in the Notice of Termination ("NOT"). We believe that the current NOT disclosure, combined with any information that can be obtained directly from the prospective employee should be sufficient to allow a firm to make an informed decision about the hiring of a prospective employee without imposing the additional disclosure requirements set out in this section.

If the provisions are retained, we would suggest that a legislated no action provision or safe harbour clause such as the one that is contained in section 141 of the *Ontario Securities Act* granting immunity to the Commission and its officers for actions taken in good faith, be included in the applicable legislation to protect registrants who act in good faith from legal action for complying with the disclosure requirements in section 8.1, or for failing to disclose certain

information pursuant to section 8.1 (i.e. there could be information that a registrant fails to disclosure because it does not appear relevant at the time of disclosure). We would also recommend that the no action clause include an immunity provision for statements made in good faith by a registrant in a NOT.

If this is not possible, then at the very least, we would strongly recommend that the Instrument contain a provision stating that registrants can rely on the defence of absolute or qualified privilege for complying in good faith with the information sharing requirements set out in section 8.1 or for statements made in good faith in a NOT. However, this would only be a potential defence to action and would not provide registrants with the same degree of protection as a legislated no-action clause. We would be interested in knowing whether the CSA has received a legal opinion confirming that qualified or absolute privilege would protect information that is disclosed in accordance with section 8.1, or statements made by a registrant in a NOT.

Part VII - Exemptions from Registration

1. International Dealers

One of BMO's US affiliates (BMO Capital Markets Corp) is registered with the U.S. Securities and Exchange Commission (SEC), is a member of the National Association of Securities Dealers (NASD) subject to NASD rules and oversight, and is also registered with the Ontario Securities Commission as an International Dealer. A small number of the persons who are registered by this entity with the NASD are also registered as our representatives.

The Instrument will replace the current "International Dealer" category provided under section 208 of the *Ontario Securities Act* (Regulation) with a new registration exemption which will require that an International Dealer have no establishment, officers, employees or agents resident in Canada. BMO Capital Markets Corp. will then be forced to register as an investment dealer, as due to a handful of employees in Canada it will no longer meet the requirements of an International Dealer. In order to be registered as an investment dealer, it will be required under Section 3.1 of the Instrument to become an IDA member. This is currently not possible under IDA's By-law No. 2 which does not permit non-resident firms to become members. If the IDA were to amend its by-law, and non-residents were required to join the IDA as the Instrument contemplates, BMO Capital Markets Corp., in addition to complying with NASD rules, would also have to comply with IDA rules. There is no obvious regulatory benefit to the additional IDA oversight and it will result in a significant regulatory burden as BMO Capital Markets Corp. would

then have to comply with similar but not identical reporting rules as well as incur duplicative fees and charges.

We would propose that the requirement in the definition in section 9.13(1) that an International Dealer "has no establishment in Canada or officers, employees or agents resident in Canada" be deleted. It can be argued that the foreign registration requirement in paragraph (b) of the definition of International Dealer in section 9.13(1) combined with the restrictions in subsection 9.13(2) sufficiently address any regulatory concerns.

2. Mobility Exemptions

Section 9.23 (e) of the Instrument provides, as one of the conditions of the mobility exemption for an individual, that the individual in a local non-principal jurisdiction have not more than five eligible clients. Additional clarity is required as to whether this is limited to 5 clients per individual registrant or 5 clients per registrant firm.

We would also request the CSA provide further guidance concerning their expectations concerning the tracking and surveillance that firms should have in place to monitor compliance with client mobility limits.

We would also ask the CSA to comment on how the mobility exemption will be affected by the implementation of NI 11-102 (Passport) both in the participating jurisdictions and in Ontario?

Part VII Related Forms

Attached as an appendix to this letter we have included drafting comments on the associated forms.

We have appreciated the opportunity to express our views regarding the proposed Instrument. We would be pleased to answer any questions that you may have about our comments.

Yours truly,

c/s *Bill Haldane*

Bill Haldane
Managing Director
CCO Retail Compliance

Form 33-109F1 Notice of Termination

References to "Officers" throughout Form 33-109F1 should be reviewed given that under the Instrument only the UDP and CCO will be registered as Officers of the firm.

Section D - Information about the termination

The term for "cause" is a defined law concept and, therefore, confusion can arise in situations where an employee is terminated for misconduct but that misconduct does not meet the legal standard for "cause". Given the level of information and disclosure that a firm will be required to provide upon a registrant's departure under the new instrument, we question the need for the distinction at all. Alternatively, we suggest replacing the term for "cause" with "Termination for Misconduct".

Section E - Further details

We reiterate our comment above in reference to using the term for "cause". With respect to question E, 1, we suggest adding a "not applicable" box that can be selected as an alternative in completing this section.

With respect to question E, 1, we suggest the addition of the phrase "to the best of the firm's knowledge".

With respect to question E, 3, we are concerned with the term "significant" internal disciplinary measures, as it leaves room for misinterpretation. We submit that word "significant" should be deleted. Further, we are also concerned with the requirement to disclose whether the individual was subject to any significant internal disciplinary measures at the firm or any "affiliate" of the firm. Given the size of our organization, it is possible that an individual could have been subject to internal discipline, within the past twelve months, by an affiliate of the firm but that the firm would not necessarily be privy to. We suggest deleting reference to an "affiliate" of the firm.

With respect to question E, 4, the use of the word "include" in the second sentence suggests that the list is not inclusive. We would like clarification as to what else is contemplated here (e.g. verbal allegations?).

With respect to question E, 5, we believe that this question is confusing, as individuals are not permitted to have un-discharged financial obligations to "clients" of the firm. The obligation, in the circumstances contemplated, is to the firm. We recommend amending the language here to make this concept clearer.

With respect to question E, 6, we again have the same concerns with the reference to an "affiliate" of the firm and suggest that it be deleted.

We respect to question E, 7, in addition to our concern in respect of the reference to an "affiliate" of the firm, we are also concerned with the use of "material violations", and of "fiduciary duties". Although the examples provided in the question are supposed to provide an indication of what a "material violation is", we require further clarification as to what constitutes a "material violation" as opposed to a simple "violation". We note for example, the absence of reference to unauthorized and discretionary trading; yet the provision is arguably over-inclusive by capturing "unsuitable investments". In respect of the use of the term "fiduciary duties", we require further clarification as to in what context such a duty is contemplated. Many individual registrants will not be in a fiduciary relationship with clients. We recommend that the language mirror the triggers for an internal investigation set out in IDA Policy 8 Part III section 1 "The Member shall conduct an internal investigation where it appears that the Member, or any current or former registrant, while in the employ of the Member, has violated any provision of any legislation or law, or has violated any by-laws, rules, regulations, rulings or policies of any regulatory or self-regulatory organization relating to theft, fraud, misappropriation of funds or securities, forgery, money laundering, market manipulation, insider trading, misrepresentation or unauthorized trading, in any jurisdiction, inside or outside of Canada.

With respect to question E, 9, we question the utility of addressing discretionary and/or unauthorized trading in a separate question, as distinct from question E, 7. We recommend having one question dealing with all types of violations or alleged violations.

With respect to question E, 10, we have concerns about having to identify "any other matter" that we believe is relevant to an individual's suitability for registration. We believe that the regulatory bodies are more equipped to assess a candidate's suitability for registration. Further, being required to answer this question subjectively, potentially puts the firm at risk of a defamation or other action being brought by the former employee.

Are the 5 & 30 days from the effective date of termination business days or calendar days?
Do the regulators have any expectations for firms to disclose further information after 30 days?

Form 33-109F4 – Application for Registration of Individuals and Permitted Individuals

NRD Mapping
We believe that it is important that testing be done prior to implementing any changes on NRD, if the types of errors that were experienced during the initial NRD conversion process are to be avoided.

We would be interested to know what the regulators expectations are, with regard to who will be responsible for verifying and correcting errors on NRD that result from changes that flow from these proposals. Do the regulators anticipate that there will be a registration freeze period?

Current registrants and the new Form
How will the new wording of the questions on Form 33-109F4 ("Form F4") apply to current registrants and their existing NRD records?

Relationships & Conflicts Of Interest
Form F4 does not request disclosure of spousal information. In some jurisdictions, disclosure is required of any relationships the individual's spouse may have with other securities firms and/or any associations with individuals or companies who are registrants, directors, officers or principal shareholders of a securities firm. This information is currently reported outside of the NRD system via an email. Will this to continue to be the case?

Notice of collection and use of personal information
Currently, the NRD screen that the authorized firm representative (AFR) sees immediately prior to submitting the current Form F4 on behalf of an individual provides notice of collection and use of personal information, addresses submission to the jurisdiction of certain regulatory bodies, and includes several paragraphs under the heading Self-Regulatory Organizations. We note that it is the AFR, and not the applicant, who currently signs off on the NRD filing. We recommend that the form be changed to permit the applicant to make the appropriate attestations after reviewing their application and prior to choosing the "submit to firm button" for processing.

References to Officers
Form F4 should be reviewed to ensure that references to Officers are appropriate, given that once the Instrument is implemented, the CCO and the UDP will be the only individuals registered as Officers.

Item 1: Name/Other personal names
It would be helpful if this section specifically referred to nicknames in the bold sub-heading. Firms currently enter nicknames under this section, but as nicknames are not referred to in the sub-heading, we have to train our applicants to do this. We believe that this section also should clearly set out instructions concerning disclosure of Team and Marketing names, given that the regulators have indicated they want this information on record.

Item 6: Individual Categories
What are the regulators expectations surrounding activity triggers?

It is not clear whether the reference to Securities in the checklist of types of products the applicant may deal in includes Options and Futures; we presume that these are not included. We suggest that Options and Futures be added as separate approval categories.

It could be onerous on firms and their registrations departments to be obliged to track changes in the types of products that individuals are authorized to deal in, outside of the NRD. The NRD should capture this information, and firms should not be required to upgrade their systems and procedures to meet audit trail requirements because NRD does not capture the information.

It would be helpful for the regulators make it clear in the forms what products registrants are and are not permitted to deal in, and which categories will require regulatory approval and which ones will simply be acknowledged.

Item 8: Proficiency
It is not clear what the word 'relevant' in Item 8.1 is meant to encompass? We suggest the sentence be changed to read "relevant to the requirements or proficiencies of the registration that you are applying for."

We believe that the reference under Item 8.2 to, 'CAIFA' should be changed to ADVOCIS.
We also believe that a standard course list should be included in the final form.

Item 9: Location of employment
We request a field regarding transit numbers and cost centre information have an automatic approval built in, as these fields are for administrative purposes for the firms and would not require a review/ acknowledgment by the regulators.

Item 10: Current employment and other business activities
We suggest that other business activities should be addressed separately from the question

about current employment. Registrants often do not consider their outside business activities as matters to be disclosed when they are asked in the context of a question about their current employment. Asking about other business activities in a stand-alone question is more likely to elicit accurate information.

We suggest that questions about outside business activities be posed similarly to the way they were asked in the old 1 U 2000 - 20 b form - *i.e. Are you engaged in any other business or have any other employment for gain except your occupation with the firm with which you are now applying?'*

Alternatively, if information about outside business activities continues to be addressed by with this question, we would suggest that types of such activities should be expressly referred to - i.e. "dual registration with affiliate firms, officer/ director positions with affiliate or non-affiliated firms, employment outside of the firm for gain."

Consideration should be given to whether the question should refer to outside business activities or to "other business activities."

It would be helpful to include a section with check boxes for leaves of absence (i.e. personal, parental or medical.)

Item 12: Resignations and terminations

We believe that reference to "cause" should be deleted from this section. By including the reference, the regulator may not obtain the fullest possible disclosure, as an individual may have been terminated for one of the enumerated reasons however, was not terminated for "cause" and, therefore, would not be caught by this section.

Item 13: Regulatory Disclosure

We would suggest that a standard format or template be developed for this question. We note that NRD Item 13 is not clear, and each firm inputs information differently. The NASD Web CDR system might be a suitable model.

We note that the section for recording Partner/Director/Officer (P/D/O) registrations has been omitted. Are these details intended to be captured elsewhere, or will disclosure of prior P/D/O (non-trading) registration no longer be required?

Item 14: Criminal Disclosure

With respect to questions under subsection c and d, we are concerned that there could be circumstances in which an individual may have been an officer, for example, of a firm against which there are outstanding charges or of a firm that was convicted, without having knowledge of the same. For example, there are outstanding charges against a firm that were brought after the individual left that firm's employ but nonetheless relate to a time period at which the individual was an officer of that firm. Similarly, an individual may also not be privy to this information if he/she was an officer of a large firm, where his/her title may have been an officer, but he or she did not have any management responsibility. This issue could be addressed perhaps by adding the phrase "to the best of my knowledge".

14 (b)

This question asks for disclosure about offences in respect of which the applicant received an absolute or conditional discharge. Are the regulators satisfied that it is permissible to request information about charges that have been disposed by way of absolute discharge?

Item 16: Financial disclosure - debt obligations

We question whether it is appropriate to ask an applicant whether they have "ever failed to meet a financial obligation of $5,000 or more." Even if such a question is necessary, we recommend identifying a timeframe (e.g. within the previous twelve months).

We also have concerns with the question that asks whether "any firm, while you were a partner, director, officer or major shareholder of, failed to meet a financial obligation as it came due?", as there are clearly circumstances where an individual may not have knowledge of such facts. We suggest adding the phrase, "to the best of your knowledge" to address this issue.

With respect to questions 3 or 4, we suggest identifying a time frame (e.g. within the previous twelve months or some other defined period)