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DELIVERED

June 22, 2007

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

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Dear Sirs / Mesdames,

Re: Comments on Proposed National Instrument 31-103 *Registration Requirements* ("NI 31-103"), Proposed Companion Policy 31-103CP ("31-103CP") and Consequential Amendments to other National Instruments and Legislation (collectively, the "Registration Reform Rules")

We submit the following comments in response to the Notice and Request for Comments (the "Notice") published on February 23, 2006 (2007) 30 OSCB (Supp-2) with respect to the Registration Reform Rules. Section A consists of our general comments on the Registration Reform Rules; Section B

consists of our comments on the proposed amendments to securities legislation; Section C consists of our responses to certain of the specific questions put forward by the Canadian Securities Administrators (the "**CSA**") for consideration; and Section D consists of our more technical comments relating to specific provisions of NI 31-103.

This letter represents the general comments of certain members of our securities practice group (and not those of the firm generally or any client of the firm) and are submitted without prejudice to any position taken or that may be taken by our firm on its own behalf or on behalf of any client.

We support the efforts of the CSA to harmonize, streamline and modernize the registration regime across Canada and encourage the CSA to continue with this effort to the extent that it accomplishes the objective of creating a flexible, uniform and administratively efficient regime with reduced regulatory burdens and compliance costs.

SECTION A. GENERAL COMMENTS

1. Registration Generally

(a) Overview of the Registration Regime

We would encourage the CSA to incorporate as many of the requirements as possible in NI 31–103 as opposed to provincial legislation. To the extent substantive requirements are included in provincial legislation, there is potential for differences in the wording of the statutory provisions, which would reduce harmonization. Of particular importance in this respect is the requirement to register, including the description of the activities triggering the registration requirement, the description of the trigger and the definition of investment fund manager.

(b) The Business Trigger

We note that the movement from the longstanding "trade" trigger to a "business" trigger should be carefully considered and that, given the fundamental nature of the change, industry participants should be given clear guidance. We believe it would be helpful if the CSA could provide more clarity around the business trigger for registration as a dealer, focussing on those activities which the CSA believe involve an investor protection issue. In particular:

(i) In the Notice it is stated that one factor to be considered is whether the person is "acting as intermediary, or otherwise inducing reliance by others on the person or

company, in connection with the activity". Presumably this is not meant to include intermediaries in trades which conduct purely administrative functions (such as transfer agents, data providers, custodians, etc.)

(ii) In the Notice it is stated that the CSA "would not consider a firm that provides merger and acquisition advisory services to a company but does not participate in the distribution of securities to be in the business of dealing in securities". Merger and acquisition advice may involve soliciting purchases or sales of securities. Would these activities constitute "participating in the distribution of securities"?

(iii) The CSA comments that the business trigger is not intended to capture individuals who are buying and selling securities for their own account and we submit that, similarly, the business trigger should not capture companies or other entities (such as limited partnerships), who through their directors, officers, employees or other personnel buy or sell securities for their own account.

The proposed criteria for the business trigger effectively establish a series of open-ended subjective tests that would technically capture virtually any capital market transaction or relationship that is not expressly excluded from its ambit. The test would potentially apply to a host of varied financial services activities, including M&A transactions, structured products, OTC derivative hedging activities, full- or part-time proprietary trading activities for persons trading for their own account, etc. The test is much broader than the definition of "market intermediary" under the *Securities Act* (Ontario) which currently triggers the dealer registration requirement in Ontario and which has proven to be very problematic to work with, particularly in the investment fund or structured product context.

(c) Proficiency Requirements

We would ask the CSA to give more consideration to the propriety of the proposed proficiency requirements. In the Notice, the CSA state that the proficiency requirements are intended to ensure that only qualified persons can deal in securities, advise or manage investment funds. We submit that the proposed proficiency requirements, particularly for investment fund managers, do not always relate to the activities of the registrant. We would also encourage the CSA to be flexible in considering applications for

exemptions from specific proficiency requirements, in light of the circumstances and, in particular, the business plan of the registrant.

(d) Corporate Amalgamations

We submit that the rule should specifically provide for the continuance of registration upon amalgamation, in a manner similar to that contemplated by s. 186 of the *Canada Business Corporations Act*. Such provision would be in keeping with the objective of creating flexibility and administrative efficiency, with reduced regulatory burden.

(e) Registration Process

Registration, whether with a securities regulatory authority or a self regulatory organization, is currently a very cumbersome, time-consuming and bureaucratic process, and we submit that, with the introduction of NI 31-103, the opportunity be taken to streamline the process by doing away with various trivial administrative necessities, including the need to re-initial pages, list all of one's immaterial positions in large corporate groups, etc. Further, we submit that the lengthiness of the process can be reduced significantly by introducing performance standards for the regulatory authorities and self-regulatory organizations (for example, provide a target timeframe to complete registration within six weeks).

(f) Other

In the interests of harmonization, we submit that underwriter registration should be addressed by NI 31-103.

We would also ask the CSA to reconsider the requirements for quarterly filing of financial statements. This would appear to be unduly burdensome on smaller registrants, particularly for those registrants that do not hold client securities.

We support the CSA's efforts to streamline the categories of registration.

2. **Exempt Market Dealers**

We would suggest that the CSA give consideration to whether registration and, in particular, the capital, insurance and proficiency requirements are appropriate for all entities that may be considered to be acting as "market intermediaries". For example, individuals or entities that merely provide an introduction between an investor and an issuer for a referral fee could be considered to be market intermediaries, triggering

registration requirements. In such circumstances, the "market intermediary" would not have possession of clients' assets and may not have any pre-existing or ongoing relationship with the investor or be providing any advice as to the suitability of investments. We believe that the requirement for such an individual or entity to register may be unnecessarily cumbersome, does not protect investors, and does not foster efficient public markets. We would ask the CSA to reconsider registration, and in particular, capital, proficiency and insurance requirements in the context of the services being provided.

Further, we would ask that the CSA consider whether registration should be required for individuals or entities dealing with a more narrow class of "accredited investor". In our experience, certain sophisticated investors may engage consultants or other "market intermediaries" who may not meet the specific requirements for exempt market dealers ("**EMD**s"), but who do have a skill set sought by these accredited investors. We submit that sophisticated accredited investors are typically well positioned to select their consultants or "dealers" and to assess the skills of such individuals and entities, even if such individuals and entities do not meet the specific criteria set out by the CSA.

Further, once an EMD has placed a security in its accredited investor account, it may need to be able to assist the client to resell that security, such as through the exchange. In order to assist the client in reselling, the EMD needs to be able to deal with registered dealers whether they are acting as agent or principal. This is not contemplated in the new rule, as EMDs are limited to dealing with accredited investors and the "acting solely through a registered dealer as agent" exemption has not been included. We submit that this exemption should be included.

3. **Investment Fund Managers**

(a) Definition

Greater clarity is required for the term "investment fund manager" and the activities that trigger a registration requirement for such entities. Also greater clarity is required as to the nexus between Canada and the entity that triggers registration. We would propose that there should be a requirement that the investment fund manager have an office in Canada to trigger the registration requirement.

(b) Capital and Insurance Requirements

We would ask the CSA to reconsider the capital and insurance requirements for investment fund managers, particularly for those managers

who outsource functions such as custody and portfolio management. To the extent that custodians and/or portfolio managers have insurance in place or are subject to capital requirements, imposing these obligations on investment fund managers is duplicative and will result in unnecessary costs which will likely ultimately be borne by investors.

(c) Proficiency Requirements

As noted above, we believe that the proficiency requirements for investment fund managers should be reconsidered, particularly for fund managers who outsource most functions. In such circumstances, it is difficult to determine the value added by the CSA's proposed proficiency requirements.

4. **Non-Canadian Dealers**

The primary effects of NI 31-103 on non-Canadian dealers are:

- elimination of the "international dealer" registration category in Ontario;
- repeal of the dealer registration exemptions contained in National Instrument 45-106 *Prospectus and Registration Exemptions* ("**NI 45-106**"), including the exemption for trades with an "accredited investor";
- introduction in the CSA jurisdictions, outside of Ontario and Newfoundland and Labrador, of a new "universal dealer registration" requirement;
- introduction of a national "international dealer exemption" that significantly narrows the list of clients and type of securities with which a non-Canadian dealer may trade on an exempt basis; and
- introduction of an EMD registration category that will permit Canadian and non-Canadian dealers to trade (i) in securities being distributed under a prospectus exemption or (ii) to persons or companies to whom a security may be distributed under a prospectus exemption (for example, trading with an "accredited investor").

Under NI 31-103, a non-Canadian dealer that has no establishment in Canada may rely on the international dealer exemption to trade with a narrow list of "permitted international dealer clients" when trading in "foreign securities" and certain Canadian debt securities, subject to the filing of submission to jurisdiction forms and delivering client notifications. The practical effect of the proposed international dealer registration exemption is

to very significantly narrow the list of clients with whom a non-Canadian dealer is permitted to trade on an exempt basis and to require registration as an EMD as a condition to trading with the full range of "accredited investors" with whom they are presently permitted to trade.

Non-Canadian dealers that are presently registered as international dealers in Ontario will no longer be permitted to trade with the following clients in Ontario under the proposed international dealer exemption:

- a person or entity that has net assets of $5,000,000;
- certain investment funds not advised by a person registered as a portfolio manager in Canada;
- a registered charity; or
- a person in respect of which all of the owners of interests, direct, indirect or beneficial, are persons that are accredited investors.

In the Canadian provinces and territories that presently permit non-Canadian dealers to trade in any type of securities with "accredited investors" on an unregistered basis, NI 31-103 will require such dealers to rely on the narrow international dealer exemption or, alternatively, register as an EMD.

Under the proposed international dealer exemption, non-Canadian dealers will be restricted to trading only in "foreign securities," and in certain Canadian debt securities in the secondary market. Presently, in most provinces and territories, a non-Canadian dealer may trade in both Canadian and non-Canadian securities on a dealer registration-exempt basis with an "accredited investor".

Under NI 31-103, a non-Canadian dealer will be required to register as an EMD to trade in Canadian and non-Canadian securities with the full list of "accredited investors." A non-Canadian dealer that wishes to register as an EMD will be required to:

- make informational filings for each of its directors and senior executive officers;
- register each of its individual dealing representatives that will trade in Canada, who will be subject to Canadian proficiency requirements;
- register an Ultimate Designated Person ("**UDP**") (i.e. the senior business person responsible for ensuring that the registered firm

develops and implements policies and procedures for the discharge of the registered firm's obligations under securities legislation) and a Chief Compliance Officer ("**CCO**") (i.e. the person responsible for the day-to-day monitoring of the firm's adherence to its compliance policies and procedures).

EMDs will also be subject to "fit and proper" requirements, such as annual and quarterly financial statement reporting requirements, capital adequacy calculation and reporting requirements, insurance, bonding and other notice filing requirements. In addition, EMDs will be subject to specific custody rules for client assets.

We submit that, if an EMD is subject to primary regulation by the NASD, FSA or similar body that imposes capital, insurance, CCO, UDP and other similar requirements, additional Canadian regulation is redundant. We would ask the CSA to consider a system of mutual recognition for the regulation of intermediaries and investment funds which is not duplicative of such entities' compliance with the laws of their home jurisdictions and does not subject such entities to subjective tests and a cumbersome registration process in 13 Canadian jurisdictions. As in other areas of regulation, it is increasingly accepted that mutual recognition and international regulatory cooperation by sophisticated regulators will make Canadian capital markets stronger both nationally and internationally.

5. **Non-resident Advisers**

The primary effects of NI 31-103 on non-resident advisers are:

- elimination of the "international adviser" registration category in Ontario;
- repeal of OSC Rule 35-502 *Non-Resident Advisers*;
- repeal of the exemptions from the adviser registration requirement in Quebec for advisory activities conducted solely with a subset of accredited investors in Quebec. (Section 194.2 of the Regulation Respecting Securities (Quebec) – (the "**Quebec Adviser Registration Exemption**");
- introduction of a national "international portfolio manager" exemption that is significantly narrower than the international adviser registration and also more limited than the Quebec Adviser Registration Exemption, and that contains a solicitation restriction;
- introduction of a "portfolio manager" registration category; and

- introduction of a statutory sub-adviser exemption applicable in all provinces.

Under NI 31-103, a portfolio manager that has no establishment in Canada and is registered in the jurisdiction in which its head office or principal place of business is located may rely on the international portfolio manager exemption to act as a portfolio manager for a narrow list of "permitted international portfolio manager clients". In order to rely on the exemption, a portfolio manager cannot solicit new clients in Canada, cannot advise on Canadian securities, cannot derive more than 10% of gross revenues from its portfolio management activities in Canada and must file submission to jurisdiction forms and deliver client notifications.

In particular, the condition that new clients not be solicited will eliminate the usefulness of this exemption. In our experience, this is a very difficult condition to comply with, or to establish from an evidentiary basis.

In Ontario, the practical effect of the proposed international portfolio manager exemption and the elimination of the international adviser registration category is to narrow significantly the list of clients whom a currently registered international adviser in Ontario is permitted to advise. Non-resident advisers who are registered as "international advisers" in Ontario will no longer be permitted to advise the following categories of clients if they rely on the proposed international portfolio manager exemption:

- a portfolio manager acting as principal or agent for accounts fully managed by it;
- a broker or investment dealer acting as principal for accounts fully managed by it;
- a registered charity;
- an individual who has a net worth of at least $5 million, excluding the value of his or her principal residence, or any person or company legally and beneficially owned by such individual;
- a corporation that has shareholders' equity of at least $100 million; or
- a fund that distributes securities in Ontario to persons or companies referred to above.

Similarly, non-resident advisers which are currently relying on the Quebec Adviser Registration Exemption to advise Quebec institutional

investors on an exempt basis will have to apply for registration as an adviser in Quebec or terminate their existing advisory relationships if they cannot rely on the narrower international portfolio manager exemption.

While we support the introduction of the "international portfolio manager" exemption in all Canadian provinces and territories, we submit that the exemptions for international dealers and advisers should be harmonized, as many products may involve both "dealing" and "advising" and the exemptions should be based on the sophistication and/or net worth of the clients and not the services being provided.

Under NI 31-103, a non-resident adviser could register as a "portfolio manager" to advise any category of Canadian clients with respect to any type of securities. A non-resident adviser that wishes to register as a portfolio manager will be required to:

- register each of its individual advising representatives who will be subject to Canadian proficiency requirements that require a CFA or Canadian Investment Manager designation plus specific investment management experience,

- register a UDP (i.e. the senior business person responsible for ensuring that the registered firm develops and implements policies and procedures for the discharge of the registered firm's obligations under securities legislation), and

- register a CCO (i.e. the person responsible for the day-to-day monitoring of the firm's adherence to its compliance policies and procedures) who will be required to meet Canadian specific proficiency requirements.

Portfolio managers will also be subject to "fit and proper" requirements pertaining to, among other things, annual and quarterly financial statement reporting requirements, capital adequacy calculation and reporting requirements, insurance, bonding and other notice filing requirements. In addition, portfolio managers will be subject to specific custody rules pertaining to client assets.

As noted above, we submit that recognition should be given by the CSA to the home country regulation of US and other non-resident advisers. For example, the proficiency requirements of the U.S. and the U.K. and other EU member states should satisfy the Canadian requirements. In our experience, the current process of obtaining "proficiency equivalency waivers" is very slow and unnecessarily bureaucratic. Similarly, Canadian

custody requirements should be more accommodating to international standards and practices consistent with the reality of global custody arrangements.

6. **Non-Canadian Investment Fund Securities**

We would ask that the CSA consider exempting from the dealer, adviser and investment fund manager registration requirements the offering of non-Canadian investment fund securities to institutional and other sophisticated investors. Furthermore, we would ask that the CSA consider not adopting the Ontario "look through" analysis with respect to investment fund advisers and managers. As currently drafted, NI 31-103 appears to adopt the Ontario regime by providing an adviser registration exemption for advisers of privately placed funds that are distributed in Canada ... through one or more registrants. (see ss. 9.15 (2) and 9.16 (2) of NI 31-103).

NI 31-103 contains an exemption from the requirement to register as an adviser for an "international portfolio manager" advising an investment fund. It is unclear whether the inclusion of that international portfolio manager registration exemption when advising an investment fund indicates that the CSA is adopting the "look through" analysis reflected in OSC Rule 35-502 *Non-Resident Advisers* (under which portfolio managers of an investment fund sold to investors in Ontario are treated as advisers who must be registered as such in Ontario unless an exemption is available).

This, in our view, is an overly-broad approach and is not consistent with allowing Canadian investors access to a global marketplace. We would ask the CSA to reconsider this position and to clearly stipulate whether the Ontario "look through" analysis is being adopted or abandoned.

7. **Comments Related to Futures**

We would ask the CSA to harmonize the approach to commodities and to registration under commodity futures legislation with that being adopted with respect to securities, in order to harmonize and streamline the regulation of "futures" across Canada.

8. **Comments Related to Conflicts of Interest**

With respect to conflicts, we would ask that the CSA consider whether any of the proposed requirements would be duplicative, especially for investment fund managers, in light of the requirements imposed by National Instrument 81-107 *Independent Review Committee for Investment Funds* ("**NI 81-107**"). We would also ask that, given that a principle based approach is being proposed, the CSA consider rescinding some of the more cumbersome

requirements for client consent in favour of clear disclosure. In particular, we are referring to requirements such as those imposed by section 118(2)(b) of the *Securities Act* (Ontario) and section 227 of the regulation to the *Securities Act* (Ontario) (and the equivalent provisions in other jurisdictions).

9. **Transitional Issues**

NI 31-103 does not address transitional issues. Sufficient transitional and grandfathering relief will be imperative for entities and individuals to comply with the proposed regulatory requirements. For example, market intermediaries will be required to register in provinces which previously did not require registration, investment managers will need to obtain registration, entities will need time to meet capital and insurance requirements and individuals will need time to fulfill new proficiency requirements. We would ask that the CSA consider exempting individuals from new proficiency requirements if such individuals are registered at the time the Registration Reform Rules come into force.

Also, international dealers and advisers may be faced with obtaining registration, or relying upon an exemption that restricts their activities beyond what they are currently permitted to do. If enacted in its current form, the Registration Reform Rules would require these dealers and advisers to terminate existing client relationships. We would submit that these relationships should be grandfathered.

SECTION B. PROPOSED AMENDMENTS TO SECURITIES LEGISLATION

1. In order to provide meaningful commentary we will need to examine the proposed legislative amendments.

2. In the interests of harmonization, the business trigger for registration should be included in NI 31-103 and not in the individual local legislation. Keeping the registration trigger itself in the local legislation defeats the goal of national harmony as it allows for differences among the CSA jurisdictions.

3. The CSA comments that the business trigger is not intended to capture individuals that are buying and selling securities for their own account and we submit that, similarly, the business trigger should not capture companies or other entities (such as general partners of limited partnerships), who through their directors, officers, employees or other personnel are buying or selling securities for their own account.

4. Being "in the business of dealing in securities" should require a physical presence in at least one Canadian jurisdiction. This presence

should be something beyond having an "agent" in Canada (see discussion of section 9.13 of NI 31-103 below).

5. In the interests of harmonization, all conduct rules should be included in NI 31-103, as opposed to being included in both NI 31-103 and in local legislation.

6. In the interests of harmonization, the registration requirement for investment fund managers should be included in NI 31-103 and not in the individual local legislation. In this regard, the rule needs to clearly set out the factors to be considered for determining whether and in what jurisdiction an investment fund manager is required to register.

7. It is unclear whether NI 31-103 requires that investment funds and their managers register as dealers.

8. Amendments to sections 34 and 35 may not be required, as indicated, as these sections have been largely rendered non-existent by OSC Rule 45-501.

SECTION C RESPONSES TO CERTAIN OF THE CSA'S QUESTIONS

CSA QUESTION # 1

In practice, we believe that the registration of limited market dealers has not provided any additional investor protections, and the costs may outweigh the benefits. We believe the CSA should reconsider the requirement to register in order to trade in the exempt market. Alternatively, we believe that there should be more definition to the types of activities that constitute acting as an "intermediary", or, if believed necessary for investor protection, that the scope of the exempt market be reconsidered.

As noted above, we would ask that the CSA reconsider whether the proposed proficiency requirements are really appropriate in light of the proposed activities.

CSA QUESTION # 2

We are supportive of any efforts toward harmonization.

CSA QUESTION #3

There are several situations where we believe that registration of an investment fund manager is unnecessary. One situation is where all the substantive functions are outsourced to other regulated entities. Another

situation is where the relationship between the fund manager and the client is primarily a portfolio management arrangement with the account held through an intermediary vehicle for tax or other reasons.

We would ask that the CSA consider the following situation, which is not uncommon. A sophisticated, institutional investor is seeking to obtain the portfolio expertise of a foreign adviser, which the investor has researched and sought out. After detailed due diligence, the investor agrees to enter into a relationship with the foreign adviser. For tax, regulatory, or other reasons the investor prefers that its investment be held through a special purpose Canadian vehicle. As a result, the foreign adviser, under NI 31-103, may arguably be required to register in Canada as an adviser, a dealer and an investment fund manager. We do not believe that this result would be appropriate if a cost- benefit analysis were applied to the scenario.

We would also be interested in how the proposed Registration Reform Rules interact with NI 81-107. Given that there are detailed conflict of interest rules now enacted for certain investment fund managers, is another layer of regulation really necessary? We believe that to the extent an investment fund manager is subject to NI 81-107, it should be exempt from the conflict of interest provisions of NI 31-103.

CSA QUESTION # 4

For the purposes of determining any issues or concerns which may arise in connection with the registration of the UDP and the CCO, we would request that the CSA more clearly set out its rationale for registration of these individuals. It should be noted that if registration will allow for enforcement against these individuals in the event of a failure to comply by the registered firm, then these positions will be very undesirable from a risk-reward standpoint.

We are also concerned that the requirement to register the UDP and CCO focuses responsibility for compliance upon two individuals rather than the firm. The CSA state that its goal is to promote a firm-wide culture of compliance. We submit that having two individuals being ultimately responsible for compliance is not consistent with this goal and that the CSA look to industry best practices for the purposes of establishing a better means of incorporating a firm-wide culture of compliance.

CSA QUESTION #5

We do not see why there should be a restriction on having an associate advising representative category for restricted portfolio managers. Given that

this category of registration is largely discretionary in any event, we would prefer to see the flexibility for the associate category.

We would also ask the CSA to consider introducing a practice that, when an "associate" registration is granted, the regulators give an indication as to what steps would be required to upgrade the registration from "associate" to full adviser.

CSA QUESTION #6

While we do not have an objection in principle to the registration of senior executives and directors, we do have a concern that the CSA is focussing too much on individuals, rather than the firm itself, in respect of compliance.

CSA QUESTION #7

We believe that portfolio managers should be exempt from the investment fund manager registration for all funds that are only offered to "accredited investors". In such circumstances, the relationship between the advisor and the client is primarily an advisory one. That the client retains the right to select the fund or investment strategy to be used, does not seem to be an adequate justification to require that the manager have an additional registration.

CSA QUESTION #9

We agree that the "know your client" and suitability requirements should not apply to accredited investors who sign an acknowledgement that they are not looking to the market intermediary for this kind of service. As long as there is an informed consent about the roles and responsibilities of the parties to the transaction, we do not believe that there is any merit in imposing this obligation on the intermediary.

CSA QUESTION #10

We do have concerns that the proposed relationship disclosure document either (i) will contain such detailed disclosure that it will be unduly cumbersome; or (ii) will address the proposed requirements in such a generic way as to be of limited, if any, value.

We are concerned about the increasing burden on registrants to "produce paper" and prohibitions on registrants dealing with clients if the disclosure previously provided is out of date. (Similar requirements are

imposed in connection with related and connected issuers, related registrants, etc.)

We would ask the CSA to consider whether certain of the disclosure (i.e. s. 5.12(1)(a) and (b)) could be included in account opening documentation, and whether other disclosure (i.e. s. 5.12(1)(c) and (d)) could be available upon request. Does item 5.12(g) address requirements with respect to related and connected issuers and related registrants? If so, section 6.4 should be modified accordingly.

CSA QUESTION # 12

A materiality concept would be appropriate within the requirement in the rule.

CSA QUESTION #14

We believe it would be preferable to have all the registration exemptions within NI 31-103. As stated in our comments in Section A, item 1(a) above, to the extent possible, we believe that requirements and exemptions should be contained in NI 31-103 and not local legislation.

CSA QUESTION #16

We would suggest that the CSA consider tying the annual fee payment date to the registrant's financial year end. This would allow registrants to pay participation fees based on audited financial results rather than estimated amounts with an adjustment to follow.

SECTION D. SPECIFIC COMMENTS ON PROPOSED NI 31-103

The following comments are presented in reference to the section numbers of NI 31-103 to which they relate.

PART 1: DEFINITIONS

In respect of the definitions contained in NI 31-103, we suggest the following amendments and/or clarifications:

1. s. 1.1(1) - The definitions of "IDA" and "MFD SRO" should reference a "recognized self-regulatory organization" as opposed to the "Investment Dealers Association of Canada" and the "Mutual Fund Dealers Association of Canada", respectively, as the names of these organizations may change over time, or they may merge with other self-regulatory organizations, or be replaced.

2. s. 1.1(1) - The definition of "marketplace" should be amended to remove subsection (d) (of the definition of "marketplace" under s. 1.1 of National Instrument 21-101 *Marketplace Operation*). Technically, subsection (d) would include dealers carrying out initial public offerings, private placements and off-market trades (with RS consent), leading to marketplace requirements that were not intended and are inappropriate in the circumstances.

3. We submit that a definition for "investment fund" should be included in NI 31-103.

4. s. 1.1 (3) – We submit that the requirement that the UDP be "responsible for ensuring that a registered firm develops and implements policies and procedures" is too broad. The role of the UDP should be more clearly defined in NI 31-103 and, in particular, should be limited to obligations under securities legislation. We also believe that the requirement that the CCO be "responsible for discharging a registered firm's obligations" is too onerous a demand and creates excessive liability. Such obligation is not consistent with CSA's comments that compliance is to be a firm-wide obligation. We suggest that the language be amended to provide instead for a "responsibility to administer the registered firm's policies and procedures adopted to discharge its obligations under applicable securities law."

PART 2: CATEGORIES OF REGISTRATION AND PERMITTED ACTIVITIES

1. We commend the CSA for streamlining the number of registration categories.

2. ss. 2.1 (a) to (c) and (e) – We suggest that the wording "with any persons or companies" be added to the end of each of these subsections.

3. s. 2.1(d) – As noted in the CSA's comments, British Columbia is considering not adopting the EMD category. We submit that it may be beneficial to conform to the approach taken by British Columbia, firstly, for the purposes of harmonization and secondly, in practice, the registration of limited market dealers in Ontario and Newfoundland and Labrador has not shown to provide any additional investor protection. Interestingly, the "universal registration" model was introduced in 1987 in Ontario, where it is not generally considered to

have been effective[1] and there had been some discussion of phasing it out. The Province of Newfoundland and Labrador is the only other Canadian jurisdiction to have adopted the system. The model is not one that was endorsed by Concept Proposal 11-102 for Uniform Securities Legislation and was one which was successfully resisted by the CSA in the rest of Canada in connection with the introduction of NI 45-106. If the CSA requires further analysis in this regard, we suggest that a cost-benefit analysis be undertaken.

4. ss. 2.1(e) and 2.3(b) – Are there circumstances when an entity might seek registration as a restricted dealer or restricted portfolio manager for servicing a restricted class of clients (rather than a specified class of securities)?

5. s. 2.2(1) – Subsection 2.3 of NI 45-106 (refer, in particular, to subsection (q) of the definition of accredited investor in s. 1.1 of NI 45-106) provides a broader exemption than provided in s. 2.2(1) of NI 31-103. What is the rationale for detracting from the current exemption?

   As noted above, we believe that NI 31-103 should include exemptions from the dealer registration requirement and investment fund manager registration requirement in respect of the sale and administration of pooled funds that are offered solely to accredited investors. We believe in these circumstances the nature of the relationship is substantively advisory.

6. s. 2.4 – The term "registered dealer" should be defined or further clarification provided. With respect to any exemptions that are available for the benefit of registered dealers, it should be clarified as to whether these exemptions also apply for the benefit of market participants operating under a registration exemption (i.e. a dealer delivering research reports to its clients). If so, the term "registered" should be removed.

7. ss. 2.6 (a) to (c) – The role(s) of these individual registrants should be clarified so as to ensure proper registration.

8. ss. 2.8(1) and 2.9 (1) – See our comments in Section D, Part 1, item 4.

9. ss. 2.8(3) and 2.9(3) – The language "must be registered" is too definitive, as there may be circumstances in which the CSA may not

[1] We note that the *Five Year Review Committee Final Report – Reviewing the Securities Act (Ontario)*, March 21, 2003 (chapter 9.5) recommended eliminating the universal registration requirement in Ontario.

want to register an individual and this provision may otherwise compel the CSA to do so.

PART 3: SRO MEMBERSHIP

1. s. 3.2 – We would suggest that the CSA consider incorporating an exemption from the requirements to be a member of an MFD SRO consistent with discretionary relief that has been routinely granted in the past.

PART 4: FIT AND PROPER REQUIREMENTS

Division 1: Proficiency requirements (Please also see our comments under Section A, items 1(c) and 3(c) above).

1. Generally, foreign proficiency credentials should be built into NI 31-103, to avoid the impractical result of requiring those that are more than proficient in their home jurisdiction from having to undertake Canadian proficiency (i.e. seasoned U.S. registrants in the portfolio management side). In general, we reiterate our comments about the recognition of firms regulated in other jurisdictions (see our comments under Section A, item 4 above).

2. s. 4.1 – All references to organizations in s. 4.1 should include their respective successors, replacements and assigns. We would also suggest that the CSA consider building in the flexibility to designate equivalent courses.

3. ss. 4.11 to 4.13 – We submit that the proposed proficiency requirements are too narrow, as they exclude individuals who would otherwise be able to fulfill the role of chief compliance officer (i.e. a securities lawyer in private practice who regularly advises dealers/advisers; or personnel with experience working at a securities regulatory authority or self-regulatory organization who regularly deal with compliance matters).

Division 2: Solvency Requirements

4. s. 4.14(2)(c) – We submit that the working capital requirement for investment fund managers is too high and should be reduced. We also request that the CSA provide a rationale for choosing this amount.

   If a capital requirement is imposed on investment fund managers, we submit that to the extent the fund manager outsources custody and/or

portfolio management services, the capital requirements should be reduced.

Similarly, we would request that the CSA provide a rationale for the capital requirements for EMDs, and consider whether a reduced capital requirement should be imposed on EMDs without possession of, access to or control over, client securities.

5. s. 4.18(1) – The referenced clauses of the financial institution bond are not necessarily relevant for investment fund managers that outsource custody and/or portfolio management. In such circumstance, such insurance may be duplicative and an unnecessary cost which would likely be passed on to investors.

Similar consideration should be given to insurance requirements for EMDs without possession of, access to or control over, client securities.

Division 3: Financial Records

6. Generally, the financial reporting requirements should be harmonized with those of the IDA and should take into consideration significant differences in foreign jurisdictions. Imposing a significantly different standard of reporting requirements will only result in foreign registrants filing for exemptive relief, as in most cases the new Canadian requirements will be impractical.

Also, consideration should be given to whether the audit and financial statement requirement should apply to all EMDs (see discussion with respect to capital and insurance requirements above).

7. s. 4.22(1) – Ninety days may not provide international parties with sufficient time, as filing deadlines in many foreign jurisdictions are longer.

8. ss. 4.22(2) – The U.S. does not have a requirement to deliver financial statements after the first, second and third quarter, so additional costs will be imposed on U.S. parties. What is the rationale for having to provide quarterly statements? What risks are the CSA trying to address?

9. s.4.24 (1)(c) – "net asset value adjustment" should be defined. This is a significant requirement and the CSA should provide its rationale for imposing it. Further, we submit that the CSA consider a materiality standard (i.e. similar to that in the IFIC guidelines).

10. s. 4.26 – We ask that the CSA confirm that Part 8 of National Instrument 52-107 *Acceptable Accounting Principles, Auditing Standards and Reporting Currency* will apply to this subsection and that there will be no amendments to Part 8 in connection with the implementation of NI 31-103.

11. s. 4.27(b) – The requirement to have the balance sheet "signed by at least one director" should be removed. Firstly, in the U.S., directors are not required to sign financial statements (certifications are done by the chief financial officer). Secondly, Canadian corporate statutes already require that a director sign the balance sheet; there is no need to repeat this requirement in a securities rule.

PART 5: CONDUCT RULES

Division 1: Account opening and Know Your Client

1. It should be clarified whether the term "registrant" applies to both a "registered firm" and a "registered individual".

2. As noted under our response to CSA Question #9 above, we would ask that the CSA exempt dealers from suitability and know your client obligations in respect of trades by accredited investors, where the accredited investor has acknowledged that the dealer will not be performing this function.

3. s. 5.5 – Sections 5.3 and 5.4 should also not apply to a registrant that executes a purchase or sale of a security from a non-Canadian dealer.

Division 2: Relationship disclosure

4. s. 5.10(2) – Keeping the relationship disclosure document current will require constant updating, which is impracticable, time-consuming and costly. It may not always be possible to notify clients as to changes prior to the next trade being made or advice being communicated.

Division 3: Client Assets

5. s. 5.13(1) – It should be clarified that only one separate securities trust account is required, not one separate securities trust account for each client.

6. s. 5.13(2) – We submit that s. 5.13(2) should also allow for the holding of cash on behalf of a client in a designated trust account with trust

companies and other recognized financial institutions legally operating in Canada.

7. s. 5.17 – This restriction will seriously impact foreign exchange trading and other businesses. EMDs and other registrants subject to regulatory requirements in other jurisdictions should be exempted from this restriction. Further, non-SRO registrants should be permitted to provide margin to accredited investors and to non-Canadian clients where permitted under applicable local legislation as it may be necessary for them to do so (for example, in the context of a sale to certain accredited investors and offshore investors who will only pay against delivery of the security certificates, they may need to advance funds).

Division 5: Account activity reporting

8. ss. 5.21 and 5.25 – Electronic delivery should be specifically permitted under ss. 5.21 and 5.25. Further clarification as to whether there is a limit on how often a client can request statements under s. 5.25 should be provided.

9. s. 5.26(1) – We believe this language is too broad and should be restricted to controls and supervision to address the firm's obligations under applicable securities laws.

Division 7: Complaint handling

10. s. 5.30 – Further details and clarification needs to be provided. For example, can any dispute resolution service be used? Does it need to be available for all complaints? Does the dispute need to be resolved? The subsection uses the term "mediate", can arbitration or other dispute resolution mechanisms be used? Has any analysis been conducted on the costs versus benefits of the dispute resolution service?

11. s. 5.32 – We submit that s. 5.32 require only material complaints to be reported and guidance should be provided as to what should be considered material (i.e. based on dollar value and/or the nature of the complaint). Further clarification should be provided regarding what the CSA intends "nature of complaint" to include, i.e. how general or specific of a description of the complaint must be provided?

Division 8: Non-resident registrants

12. The term "non-resident" should be defined. Does non-resident refer to a non-resident of Canada, i.e. an employee of a Canadian registrant who lives in New York, but is a registrant with the OSC?

13. s. 5.35 – CIPF has changed its name and structure.

14. 5.35(c) – what does the underlying language mean? It does not seem to make sense for U.S. if there is compliance with U.S. rules in respect of U.S. assets. "Other comparable" Canadian or foreign compensation funds will have to go out and get an exemption.

15. s. 5.37(b) – The use of definitive language, such as "must", may technically compel the carrying on of uneconomic business, which seems inappropriate.

16. With respect to exceptions for SRO registrants (i.e. IDA members), NI 31-103 should be reviewed to ensure that non-IDA registrants are not subjected to more onerous requirements.

PART 6: CONFLICTS

1. As noted above in our response to CSA Question #12, we believe that there should be a materiality threshold for conflicts of interest. Further, to the extent investment fund managers are subject to NI 81-107, they should be exempt from the requirements of this section.

2. s. 6.1(1)(b) The requirement to deal "in their clients' best interests" needs to be consistent with making a profit from activities with the client (i.e. principal trading, front-end load commissions, trailer fees, etc.).

3. We would ask the CSA to consider section 6.2 and, in particular, 6.2(2) in light of various products and investment strategies. For example, certain investment funds may pursue an activist strategy which could involve a representative of management obtaining a board position in investee companies. If this strategy is clearly disclosed to investors (and, if required, the independent review committee reviews the transaction), we do not believe that it should be necessary to obtain investor consent.

4. s. 6.3 should allow one firm to place representatives on the board of a partly-owned entity that is also a registrant.

5. ss. 6.4(2) and (3) would seem to need constant sending of updated documents. These requirements seem unduly cumbersome.

6. We would like to understand what concerns the CSA is attempting to address by requiring pre-approval of all acquisitions of securities of registrants. We would ask the CSA to consider exempting from these requirements acquisitions of publicly listed securities.

7. s. 6.7(1)(b) is unclear. What is substantial, and is it the regulated business rather than assets (i.e. furniture or a portfolio of publicly traded securities)?

8. s. 6.7 should only apply to assets of a firm, not one representative buying book of another representative (i.e. on retirement).

PART 7: SUSPENSION AND REVOCATION OF REGISTRATION

1. Is s. 7.2 or 7.5, given s. 7.6, fair to a transferring individual moving to a different category of registration (i.e. officer to representative) or to a different type of dealer (investment dealer to EMD)?

2. s. 7.4(b) should require payment within 5 business days following notification.

3. We would ask that the CSA give some consideration to the current system for surrender of registration which is very cumbersome and involves an intermediate step of suspension (which for international registrants often triggers regulatory filing requirements and has a negative connotation in other jurisdictions).

PART 8: INFORMATION SHARING

1. s. 8.1(3) should allow disclosure of information to counsel or with the consent of the individual and where litigation is involved.

PART 9: EXEMPTIONS FROM REGISTRATION

1. NI 45-106 registration exemptions should continue for lenders taking pledges of securities, trades through registered dealers and occasional trading by unregistered employees of registered dealers and advisors

2. Should s. 9.3 be extended to non-investment fund distribution reinvestment programs? Should s. 9.2 be extended to other funds or issuers?

3. Please see our comments above under Section A, items 4 and 5, with respect to the international dealer and adviser exemptions.

4. s. 9.13 – The "foreign security" definition should delete (c) due to inter-listed securities or ATS-traded foreign company securities.

5. The international dealer/adviser exemptions do not permit having a Canadian agent, but ss. 9.13(3) and 9.14(2) require a Canadian agent. The term "agent" is very broad and could capture a myriad of service providers, which we would assume is not the intention. S. 9.13(2)(e) should not require principal status, as a Canadian client may want to buy a foreign security. S. 9.13(3) is impractical for dealer to dealer relationships (i.e. to buy a share on behalf of a Canadian client in Germany).

6. s. 9.13 International dealers and advisers should also be allowed officers and employees resident in Canada who are dually engaged by their Canadian affiliates.

7. International dealers, advisers and investment fund managers may have officers and employees visiting Canada from time to time, and this should be allowed.

8. The mobility exemptions seem to be unduly cumbersome and restrictive.

9. s. 9.17(f) – Consider eliminating the exception for Manitoba, again in the interests of harmonization.

PART 10: EXEMPTION

1. We believe consideration should be given to extending existing relief which may have been granted in respect of equivalent provisions (i.e. relief from the statutory/regulatory provisions equivalent to certain of the requirements in Part 7).

Thank you for your consideration of this submission. We hope that our comments are helpful and would be happy to discuss any of these submissions with you in greater detail.

Submitted on behalf of members of the Securities Practice Group at Stikeman Elliott LLP by,

Jennifer Northcote