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

John Stevenson, Secretary
Ontario Securities Commission
20 Queen Street West
19th Floor, Box 55
Toronto, Ontario
M5H 3S8

Anne-Marie Beaudoin
Directrice du secretariat
Autorité du marchés financiers
Tour de la Bourse
800, square Victoria
C.P. 246, 22eme étage
Montréal, Québec
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Dear Mr. Stevenson and Ms. Beaudoin:

RE: Response to Request for Comments on Proposed National Instrument 31-103 and Companion Policy 31-103 – Registration Requirements

Scotia Cassels Investment Counsel Limited (Scotia Cassels) is pleased to respond to the Canadian Securities Administrators' Request for Comment on proposed National Instrument 31-103 – Registration Requirements and Proposed Companion Policy 31-103CP.

Scotia Cassels is a subsidiary of the Bank of Nova Scotia. If and when Proposed NI 31-103 is implemented, Scotia Cassels expects that it will be required to register in the category of adviser.

Scotia Cassels applauds the CSA on its efforts to consolidate and harmonize the complex web of Canadian securities laws and regulations. To the extent that the Proposed NI 31-103 harmonizes and simplifies existing registration laws and regulations, Scotia Cassels supports them.

Scotia Cassels participated in various industry initiatives to formulate responses to the CSA's Request for Comment on Proposed NI 31-103 and generally supports the comments being made by the Investment Counselling Association of Canada and the Canadian Bankers Association. In addition to the comments made in those submissions, Scotia Cassels wishes to draw the following issues to the attention of the CSA:

<u>The Role of the Ultimate Designated Person and the Chief Compliance Officer</u>:

Under sections 2.8 and 2.9, an ultimate designated person is responsible for ensuring that a registered firm develops and implements policies and procedures for the discharge of the firm's obligations under securities laws, while the chief compliance officer is responsible for discharging the firm's obligations under securities laws. While Scotia Cassels agrees that these are the responsibilities of the UDP and CCO, respectively, under current Ontario and other provincial securities laws, Scotia Cassels believes that since the UDP must be an executive officer of the registered firm, the UDP is better situated than the CCO to be responsible for the discharge of the registered firm's obligations under securities laws. The CCO would be more suited to ensuring that the firm develops policies and procedures reasonably designed to ensure that the firm discharges its obligations under securities laws. Since these are the roles currently ascribed to the UDP and CCO of registered advisers under Ontario securities laws, Scotia

Cassels recommends that this adviser standard be applied universally to all registered firms.

Record-Keeping Requirements:

Section 5.20(4) requires a registered firm to keep client activity records for seven years from the date of the activity and relationship records for seven years from the date the person or company ceases to be a client of the registered firm. The Companion Policy 31-103CP defines relationship records very broadly to include, among other things "all e-mail, fax and other written communications to clients."

The requirement to preserve all e-mail communications will be especially onerous for registered advisors, since there is no current requirement to preserve all e-mails. Almost universally, e-mail retention systems are designed to preserve records by user name rather than by client. To comply with the requirement to preserve all e-mail communications with clients for seven years after a client's relationship with the firm has ended, registered firms will have to build e-mail retention systems at exorbitant expense or store all of their representatives' e-mail communications in perpetuity (also at exorbitant cost). Ultimately, those costs will be passed on to clients.

Scotia Cassels therefore asks the CSA to reconsider the requirement to treat all e-mail communications as relationship records that must be preserved for such a lengthy period of time. The Investment Dealers Association's (IDA) By-law 29.7 requires securities dealers to retain e-mails that are either sales literature or correspondence (as those terms are defined in By-law 29.7) for a period of either two years or five years from the date of their creation. As well, several Canadian provinces have recently decreased their statutory limitation periods to two years. Given this trend, Scotia Cassels submits that a retention period of between two years and five years from the date of creation is appropriate for relationship records.

Account Activity Reporting:

Section 5.25 sets the frequency in which account statements must be sent to clients to once each quarter, unless the client requests more frequent account statements. Section 5.25 stipulates that registered advisers must send their clients monthly account statements if the client has consented to having trade confirmations directed to the adviser.

The effect of the proposed rules are that registered advisers will have to:
(a) change their account opening documentation and systems to track with what frequency clients require account statements; and
(b) significantly upgrade systems and human resources to generate monthly account statements or deliver confirmations to clients.

Enabling clients to request more frequent account statements than the current quarterly frequency would require that registered advisers build systems to track the frequency with which each client requests account statements and to generate account statements on that basis. The costs of such systems will ultimately be passed on to clients.

With respect to the requirement to deliver either monthly account statements or trade confirmations to clients, Scotia Cassels believes that there may not be sufficient client demand for such reporting to justify the increased costs. In Scotia Cassels experience, most of its clients would more account statements or trade confirmations as an inconvenience.

In addition, most registered advisers are able to lower their trade execution costs because trade confirmations are not sent to clients. Many registered advisers obtain the preferred trade execution rates generally available only to institutional investors, by bulking their clients' trade orders. Once the bulked trade is executed, the securities or cash is delivered to a custodian who deposits the

securities or cash to clients' accounts according to the registered adviser's instructions. The registered adviser receives a single confirmation for the bulk trade. The requirement to either generate trade confirmations for each account or monthly statements would mean a significant investment of technological and human capital resources by registered advisers, when there has not been any corresponding client demand. Scotia Cassels estimates that its costs of generating and sending account statements would triple from $200,000 to $600,000, if it were required to send monthly rather than quarterly account statements. In its opinion, the increased costs are not justified when there has not been sufficient client demand for increased account monitoring.

On that basis, Scotia Cassels requests the CSA to reconsider the proposed provisions and retain the current requirement for registered advisers to send quarterly account statements.

Complaint Handling:

With respect to the requirement in section 5.32 to report complaints annually, Scotia Cassels looks forward to the opportunity to comment on the implementation mechanisms. It requests that the CSA consider permitting registered advisers to make the complaint report to their principal regulator rather than having to make reports to each jurisdiction in which the adviser is registered.

Conflicts Management:

Section 6.2 requires a registered firm to identify each potential and actual conflict of interest and resolve the conflict in a fair, equitable and transparent manner while "exercising responsible business judgment influenced only by the best interest of the client or clients." The provision is so broadly worded that it applies to all actual and potential conflicts of interests, whether such conflicts are

material to clients or not. Furthermore, since many conflicts will be resolved by disclosure to clients, there is a risk that the conflicts disclosure to clients will be so voluminous that it becomes meaningless. Scotia Cassels therefore recommends that the CSA consider importing a materiality test into the provisions dealing with conflicts of interest management. Alternatively, perhaps the CSA could identify what conflicts of interests it believes are not being appropriately resolved. That would assist registered firms to improve their conflicts management policies and procedures to address those conflicts.

As well, the conflicts of interest provisions raise an additional question: How does a firm show that it exercises responsible business judgment influenced only by the best interest of the client or clients?

The requirement in section 6.1(3) for registered firms to provide prior written disclosure of a conflict of interest to a client when there is a reasonable likelihood that the client would consider the conflict important when entering into a proposed transaction is problematic. In Scotia Cassel's view, this provision effectively creates a litigation minefield because it requires registered firms to assess conflicts of interest and their potential impact on each individual client before a client makes a proposed investment, while clients will have the opportunity to assess the importance of the conflict after having made the investment and with the benefit of knowing how the investment performed.

Issuer Disclosure Statement:

Section 6.4 requires firms that act as an advisor or dealer in respect of securities of related issuers or, in the course of a distribution, connected issuers, to deliver a current issuer disclosure statement before the registered firm first trades a security for or advises a client to trade in a security whose issuer is listed in the issuer disclosure statement.

Scotia Cassels believes that the costs of building systems to ensure that current issuer disclosure statements are delivered to clients before they actually trade or are advised with respect to related issuers will be exorbitant. For that reason, Scotia Cassels recommends that the CSA consider an alternate model whereby registered firms are: (a) required to deliver a statement of their policies respecting their activities dealing or advising in securities of related or, in the course of distribution, connected issuers at account opening and thereafter, at least annually. Such a statement would contain the address of an accessible website on which current issuer disclosure statements are posted; and (b) permitted to deliver current issuer disclosure statements by posting the statements on an accessible website. Such a regime would enable registered firms to effectively and on a timely basis advise clients of related or connected issuers, while avoiding the costly mechanisms necessary to supervise and track delivery of the statements, in the manner currently contemplated by section 6.4.

Information Sharing:

As currently drafted, section 8.1 would require registered firms to disclose to another registered firm information about "a person" that is relevant to that "person's" conduct or suitability as a registered person. Scotia Cassels understands that the CSA intended that the information sharing provisions only apply to a registered dealer's employees and therefore recommends that all references to "person" in the provision be replaced by the term "employee".

Furthermore, the requirement for a registered firm to disclose all the information in its possession or of which it is aware is overly broad; it significantly raises the spectre of defamation litigation since a firm could be required to disclose information in response to a query when it has not yet had sufficient time to ascertain its accuracy.

There are other concerns that the CSA should consider before implementing information sharing: How does a registered firm substantiate that another registered firm is considering employing or retaining an individual as an employee, agent or partner? When is it appropriate for a registered firm considering a candidate to make the inquiry, given that such an inquiry could put the candidate in a tenuous position with the registered firm to which the inquiry is being made? How soon must the firm receiving the inquiry respond? Is it appropriate that registered firms be automatically obliged to disclose information to any foreign financial services regulator pursuant to section 8.1(3)(d), when a foreign regulator requiring information from a Canadian registered firm has the option of making their request through a Canadian regulator or by obtaining a Canadian court order? Has the CSA obtained an opinion from the federal Privacy Commissioner confirming that registered firms who comply with the proposed information sharing provisions in NI 31-103 will not be in breach of *The Personal Information Protection and Electronic Documents Act*?

Scotia Cassels strongly believes that if these provisions are implemented, the implementing statute must grant registered firms absolute or qualified privilege as a protection against defamation lawsuits and urges the CSA to explicitly cause such a privilege to be granted.

In closing, Scotia Cassels thanks the CSA for its consideration of its comments on Proposed NI 31-103 and the Companion Policy. Please do not hesitate to contact Susan Eapen at (416) 862-5840 or Cathy Tuckwell at (416) 814-4096, if you have any questions or wish to discuss these comments further.

Yours truly,
Scotia Cassels Investment Counsel Limited

M. Catherine Tuckwell, CFA
Chief Compliance Officer