June 29, 2007

VIA E-MAIL

British Columbia Securities Commission
Alberta Securities Commission
Saskatchewan Securities Commission
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marches 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 o Securities, Yukon Territory
Registrar of Securities, Nunavut

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

c/o Anne-Marie Beaudoin
Directrice du secrétariat
Autorité des marches financiers
Tour de la Bourse, 800, square Victoria
C.P. 246, 22 étage
Montreal, Quebec H4Z 1G3

Dear Sirs/Mesdames:

Re: Comments on Proposed National Instrument 31-103 – Registration Requirements

The following are comments on proposed National Instrument 31-103 prepared by Jo-Anne Bund, Bryce Kraeker and Paul Dempsey, all lawyers with Gowling Lafleur Henderson LLP.

We act for issuers and registrants who participate in both the exempt market and the prospectus-qualified market, including but not limited to private equity funds and limited market dealers. The comments in this letter represent a consolidation of comments and concerns raised with us by clients since the proposed instrument was published in February 2007. The comments herein do not necessarily reflect the views of Gowling Lafleur Henderson LLP

General Comments on Registration of Exempt Market Dealers

We act on behalf of a number of issuers that raise capital in reliance on the exemptions from the prospectus and registration requirements set out in NI 45-106, many using the accredited investor exemption, the offering memorandum exemption that is available to issuers in all jurisdictions except for Ontario and Newfoundland and the family, friends and business associates exemption.

There is significant concern about the impact of the proposed instrument on the exempt markets. One of our clients, a sophisticated and knowledgeable industry participant with extensive experience in this market, has asked us to forward to the CSA for its consideration the following comments in respect of the proposal to introduce an exempt market dealer registration category:

The exempt market has been, for as long as we have had securities legislation, an efficient and vital means of capital formation. Billions of dollars have been raised and deployed in many industries, where going the full prospectus route would not have been feasible, or dealers were simply not interested. For all this activity, the problems have been remarkably few. The exempt market has also served as an incubator of business, particularly in the western provinces, where access to institutional funds and conventional loans was historically weak. We believe that the proposal to extend registration requirements and effectively take the "exempt" out of the selling of exempt securities in the rest of Canada, as Ontario and Newfoundland have already done, would significantly impair capital formation in Canada.

We believe the regime for capital raising set out in NI 45-106 is effective and that investor protection and enforcement mechanisms that exist under current securities legislation with respect to the exempt market are sufficient. We agree with the BCSC that the CSA has not sufficiently described the market problem related to the use of these exemptions and, like the BCSC, we are concerned that the registration requirement that treats "exempt market dealers" the same as other registered dealers will have a detrimental effect on capital raising. We suggest the CSA provide a more rigorous analysis of the market problem and explain how it will be addressed by the proposed registration requirements for exempt market dealers before implementing these requirements.

We note that the exempt market dealers would be those that today act as agents, sellers, finders or other type of intermediary between an issuer distributing an exempt security and an investor buying an exempt security. We believe that the nature of the relationship between such intermediaries and an investor is very different than between a normal registered dealer or advisor and their clients and it is not an ongoing client-type relationship, in the ordinary sense. Rather the exempt market transaction is usually based on a "one-off" transaction in an exempt security that must be held for a long period due to resale restrictions. An intermediary would not normally open an "account" for the investor, nor would the investor expect an intermediary to do so, for such a one-off transaction. It does not seem necessary for the law to require them to do so. In our experience, investors will be reluctant to disclose their personal financial information to the intermediary just for the purpose of completing the transaction. Further, the investor will also be reluctant to continue updating the intermediary about the investor's personal financial circumstances and, even if the investor's circumstances were to change, it may largely be irrelevant because investor may still have to hold the exempt market security due to the resale restrictions. In any case, investors buying under an offering memorandum receive conflict and risk disclosure for that security and, before they are permitted to buy that security, investors must meet certain financial or relationship thresholds.

The requirement for these types of intermediaries between the issuer and the investor to open and update client accounts, maintain working capital and bonding requirements, deliver quarterly account statements, and submit financial records, will increase capital raising costs, as intermediaries will have to charge higher fees to support their businesses, with seemingly

little additional benefit to the investors than what exists today. Working capital requirements make sense in the context of investment dealers with continuing financial connections to clients and to markets, with margin commitments, settlement requirements, underwriting obligations and the handling of client assets and funds. But the wholesale application of these dealer rules to a very different type of relationship seems unnecessary, expensive, confusing and perhaps insufficiently thought out.

We estimate that it cost approximately $200,000 to become set up as a limited market dealer in Ontario, which costs included incorporating and registration costs, legal fees, accounting fees, compliance personnel, staffing and training fees and costs to develop policies, procedures and systems. We ask that the securities regulators consider these very high costs and provide a serious analysis of the effects of these proposed changes.

We further suggest that the requirement that the intermediary establish a "Know Your Client" type of relationship with the investor actually increases confusion regarding the role and obligations of the intermediary vis a vis the investor. The suitability requirements work to set up a much closer relationship between the buyer and seller. An unintended potential consequence of this is that an exempt market seller, having attained perhaps the basic knowledge gained from the Canadian Securities Course and the Conduct and Practices Handbook (almost all of which pertains to stock market and mutual fund investments), is now in the position of trusted financial advisor, with access to knowledge about the investors full financial circumstances, but without the full range of investment solutions and investment experience to offer. This is a far different relationship than the current model, where a seller simply offers an investment product to a potential buyer. We should not forget that current securities laws already prohibit the making of misrepresentations and other forms of misconduct and permit the securities commissions to intervene and take enforcement action where such misconduct is contrary to the public interest.

We suggest that Form 45-106F4 The Risk Acknowledgment Form is clear and sufficient as its very plain and blunt warning states that the person selling the security has no duty to tell the investor whether the investment is suitable and it states what the issuer is paying the seller. This disclosure, combined with the requirements prescribed by NI 45-106 as to who is eligible to invest in such securities based on the investor's income or relationship with the issuer, in our view, ought to be sufficient.

Further Comments and Concerns

1. Part 4 of National Instrument 81-104 – Commodity Pools addresses proficiency and supervisory requirements for the sale of such products. Why are those requirements not incorporated into NI 31-103?

2. It is not clear how sections 4.3 and 4.4 apply in light of section 3.2. Do not all mutual fund dealers have to be SRO members?

3. The Ontario Securities Commission has granted exemptions from section 213 of the Regulation (Canadian incorporation requirement) for non-resident limited market dealers. Will such relief still be available to exempt market dealers in the future?

4. For non-resident exempt market dealers, section 4.7 should be amended to address equivalent non-North American standards.

5. Will existing limited market dealers be "grandfathered" with respect to proficiency requirements?

6. In response to Question #9 in the notice, pension funds and foreign financial institutions should be included in the exemption from suitability obligations set out in section 5.5. Paragraphs 1.1(i) and (s) of NI 45-106 should be referenced in this regard.

7. The prohibition on lending or extending credit in section 5.17 appears to be inconsistent with the obligation in paragraph 5.3(1)(d) to establish the creditworthiness of a client.

8. With respect to section 6.4 issuer disclosure statement, OSC staff has required disclosure of related issuers even if a registrant does not intend to deal or advise in respect of securities of a related issuer. Will this provision be interpreted by the CSA to be limited to only those related issuers whose securities might be the subject of a trade or advice?

9. Since referral arrangement requirements are not included in section 3.3, is it correct to conclude that the referral arrangement requirements in Division 2 of Part 6 will override any SRO policies concerning referral arrangements?

10. In October 2005 the CSA published a proposal to incorporate a registration exemption in respect of capital accumulation plans in NI 45-106. Why is that proposed exemption not included in this instrument?

11. It would be useful if the CSA explained the intended scope of section 9.15. What is meant by the phrase "the securities of the fund are primarily offered outside of Canada"? Based on the fact that the Canadian market is only about 2% of global markets, almost any foreign fund would satisfy the test. Prior versions of this exemption in Ontario suggest that it had a much narrower intent i.e. to not require the portfolio manager of an offshore fund to register merely because a registered dealer in Ontario had acquired securities for one of its clients.

12. Further to comment #11 above, it would be useful for the CSA to express its views with respect to "feeder" funds (or "parallel" funds) which are established for Canadian institutional investors for tax purposes to facilitate investment in offshore "master" investment funds which manage assets for investors from all over the world. These "feeder" funds may have only one Canadian institutional investor but that institutional investors is only one of many investors in the "master" fund.

13. Is it contemplated that registered advisers also register as investment fund managers of their own pooled funds? If so, what is the purpose of such registration and the anticipated benefit? In response to Question #3 in the notice, this is a situation where adviser registration is sufficient. The pooled fund is an administrative tool for managing client assets and should not be treated the same as retail investment funds.

14. A current issue of concern is whether representatives of a foreign private equity fund - including representatives of a general partner or some other manager of the fund - constitute market intermediaries who require registration as a dealer in Ontario in connection with the sale of fund interests to institutional investors. The minimum subscription amount for these securities is usually $5 million and subscriptions are routinely in excess of $25 million. In the proposed rule, it would appear that registration may be required in certain circumstances (if the fund representative is "in the business" of trading securities"). Our suggestion is that so long as a foreign private equity fund and its management are dealing with an institutional accredited investor, there should be a complete exemption from the registration requirements for such trades. There is no benefit to imposing Canadian registration requirements on such transactions and there is no necessity to do so since Canadian institutional investors can, and do, protect their own interests in such transactions.

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15. There is a significant amount of uncertainty and concern about the impact of the proposed instrument on the private equity market. It would be useful if the CSA clarified its position with respect to registration requirements for private equity funds. For example, is the CSA of the view that a general partner of a private equity limited partnership (and its staff/representatives) must register as a dealer, adviser and fund manager?

    We suggest that private equity is an appropriate area to grant a clarifying exemption from the requirement to be registered as

    (a) an adviser – because private equity involves the acquisition and management of assets, not the buying and selling of securities (and buying and selling of securities is only incidental to the acquisition and disposition or assets);

    (b) a dealer – because private equity funds are not “in the business” of trading securities but, rather, in the business of managing assets

    (c) a fund manager – because the benefits of such a requirement are not apparent particularly for institutional investors.

    With respect to adviser registration, we note that the comments in section 1.4 of the Companion Policy indicate that most private equity funds would probably not need to satisfy adviser registration requirements. We agree that is a proper and appropriate position for the regulator to take. However, a clear statement of the CSA’s position would be most helpful.

16. In section 6.10 of the Companion Policy we note that the CSA has discussed situations where “non-registrants are actively promoting and marketing specific securities through

third party registrants who then merely execute the trade." We believe that while the discussion in this section demonstrates the failure of some registrants to uphold the registrant's duties in dealing with the client, it is confusing with respect to the referrer. The referrer, who is a non-registrant, is considered to be breaching securities laws if in making their referral they advise their client regarding the security because then they are considered to be advising on and/or trading in a specific security. This type of discussion is confusing because it focuses on a breach occurring, which breach is based on a "trade trigger," even though the intent of the rule is to require registration based on a "business trigger."

17. We note that, with respect to referral arrangements, neither the Rule nor the Companion Policy discusses who may be an acceptable entity for referrals, which was discussed in previous CSA publications on referral arrangements. We wonder if this was intentionally dropped as a regulatory concern of the CSA, and we feel that without additional commentary and some specific proposals concerning referral arrangements, securities market participants are left in the dark with regard to the intentions of the CSA.

Yours very truly,

Jo-Anne Bund Bryce Kraeker Paul A. Dempsey