Scotia Capital Inc.
Scotia Plaza
40 King Street West
Box 4085, Station "A"
Toronto, Ontario
Canada M5W 2X6

Scotia Capital

June 29, 2007

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
H4Z 1G3

Dear Mr. Stevenson and Ms. Beaudoin:

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

Scotia Capital Inc. (SCI) 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.

SCI is a subsidiary of The Bank of Nova Scotia and is a member of the Investment Dealers Association (IDA). If and when Proposed NI 31-103 is implemented, SCI expects that it will be required to register in the categories of Investment Dealer and as an Investment Fund Manager. It is less clear whether The Bank of Nova Scotia would be required to register under Proposed NI 31-103 in order to carry on some its current activities. SCI does not support the imposition of such a requirement on Canadian banks regulated by the Office of the Superintendent of Financial Institutions.

SCI applauds the CSA on its continuing 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, SCI supports them.

SCI 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 Funds Institute of Canada, Canadian Bankers Association and Investment Industry Association of Canada. In addition to the comments made in those submissions, SCI wishes to draw the following issues to the attention of the CSA:

<u>The Registration Trigger</u>:

The Request for Comment contained a sentence that the "business trigger is not intended to capture individuals who are buying and selling securities for their own account and who do not have direct access to a marketplace (excluding those who have dealer-sponsored access)." Will investors who buy and sell securities for their own account and have dealer-sponsored access be required to register? As well, will employees of investment dealers who advise issuers on mergers and acquisitions, capital raising, underwriting syndications or the money market be required to register?

Repeal of Exemptions for Capital-Raising and Safe Securities :

The Request for Comment contains some indication that the CSA proposes to eliminate registration exemptions for capital-raising and safe securities, but does not identify which exemptions are proposed to be eliminated. Consequently, there has been much confusion as to whether financial institutions, such as banks, who sell bonds, principal-protected notes, t-bills, commercial paper, money market and other instruments will become subject to registration under NI 31-103. Since there is not currently sufficient information about what registration exemptions will be eliminated, SCI is unable to offer insightful comment on the issue. With the expectation that the CSA will publish for comment any proposal to eliminate existing registration exemptions, SCI looks forward to the opportunity to offer its comments at that time.

The Role of the Ultimate Designated Person and the Chief Compliance Officer:

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 SCI agrees that these are the responsibilities of the UDP and CCO, respectively, under current Ontario and other provincial securities laws, SCI 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. These are the responsibilities currently ascribed to the UDP and CCO of registered advisers under Ontario securities laws.

In addition, the 2006 "Joint Regulatory Notice on the Role of Compliance and Supervision" issued by the Mutual Fund Dealers Association ("MFDA") and the Investment Dealers Association ("IDA") amongst others, states:

> Senior management has responsibility to establish and maintain a Member's overall compliance system. All management has the responsibility to supervise and to direct the activities of the Member and the individuals within the Member firm to achieve compliance with applicable laws and regulation with respect to areas of their management responsibility.

The role of the Compliance Department was described as: "to identify, assess, advise on, communicated, monitor and report on the Member's compliance with regulatory requirements."

SCI therefore recommends that the responsibilities assigned to the UDP and CCO under sections 2.8 and 2.9 be reversed, so that the UDP is responsible to ensure that the registered firm discharges its obligations under securities laws and the CCO is responsible for ensuring that the registered firm develops and implements policies and procedures designed to discharge the firm's obligations under securities laws.

SCI is also concerned that each registered firm may only appoint a single UDP and a single CCO. Currently, SCI has a UDP and CCO for each of its retail division (ScotiaMcLeod) and its institutional division (Scotia Capital). Since the securities industry continues to evolve at a rapid pace and each business line draws on a different knowledge base and skill set, SCI believes that it is appropriate that it be able to appoint a UDP and CCO for each distinct business line. From the CSA's point of view, there will always be an individual who is accountable should a business line fail to satisfy its responsibilities under securities legislation.

Record-Keeping Requirements:

Section 5.20(4) requires a registered firm to keep client activity records for seven years from the date of an 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 e-mail communications will be especially onerous, since there is no current requirement to preserve such records for that length of time. 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 for seven years after a client's relationship with the firm has ended, registered firms will have to build new e-mail retention systems at exorbitant expense or store all of their representatives' e-mail communications in perpetuity (also at exorbitant cost).

SCI 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, SCI 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 reduces the frequency in which account statements must be sent to clients to once each quarter, unless the client requests more frequent account statements. Enabling clients to request more frequent account statements than a standard monthly or quarterly frequency would require registered firms to change account opening documentation and build systems to track with what frequency clients require account statements. The costs of building such a system could outweigh the cost savings to registered firms of having to deliver statements on a quarterly rather than monthly basis.

Section 123 of the Ontario Regulation and IDA Regulation 200 require securities dealers to deliver account statements to clients each month there is activity or an unexpired option in the account or quarterly and at the end of the dealer's fiscal year end. Clients who wish to monitor account activity more frequently have the option of monitoring their accounts through electronic Internet account access. Given that securities dealers are already required to provide account statements more frequently than quarterly, SCI recommends that the CSA revise section 5.25 to exempt securities dealers who deliver account statements in accordance with IDA Regulation 200.

Complaint Handling:

With respect to the requirement in section 5.32 to report complaints annually, SCI notes that it is already required to report complaints that it has received to the IDA using the IDA's Comset system. Registered mutual fund dealers will be required to report complaints to the Mutual Funds Dealers Association using METS starting this July. To avoid registered firms having duplicate reporting obligations and having to build separate policies, systems and procedures to report the same complaint to different regulators, SCI urges the CSA to exempt registered firms who are obliged to report complaints to a Canadian securities

self-regulatory organization (SRO) from the complaint reporting obligations of section 5.32. Alternatively, the CSA should permit registered firms who are required to report complaints to a Canadian securities SRO to report complaints to the CSA in the same form those complaints are reported to the SRO.

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 will be so voluminous that it becomes meaningless. SCI therefore recommends that the CSA consider importing a materiality clause 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 focus their efforts 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 its 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 SCI'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 has 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. It is expected that a registered firm's list of related issuers will remain relatively stable while its list of connected issuers will change from day-to day if not hour-to-hour.

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 connected issuers will be exorbitant. For that reason, SCI 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 timely advise clients which issuers are related or connected to them, while avoiding the costly mechanisms necessary to supervise and track delivery of the statements, in the manner currently contemplated by section 6.4.

Referral Arrangements:

The provisions respecting referral arrangements are intended to ensure that such arrangements and the compensation payable under them are disclosed to clients in writing. The definitions of "referral arrangement" and "referral fee" in section 6.11 are very broad and would result in disclosure of a vast array of arrangements to which registered firms could be a party. For instance, the arrangement under which a registered firm sends its clients funds to an affiliate for conversion into the foreign currency necessary to complete a transaction on a foreign securities marketplace could be considered a referral. The requirement to disclose in writing such arrangements has two immediate consequences: (1) firms such as SCI may not be able to satisfy the referral arrangement disclosure obligations within the 120 day implementation period proposed by the CSA; and (2) any written disclosure provided to clients about referral arrangements would be so voluminous that there is a significant risk it would not be meaningful to clients.

SCI recommends that the CSA develop a materiality definition that would make a referral arrangement subject to disclosure. For instance, an exemption from disclosure of those referral arrangements that account for less than 1% of a registered firm's or its representative's annual revenues may be appropriate.

Lastly, the requirements in section 6.13 to disclose "any conflicts of interest" resulting from a referral arrangement and any other information that a reasonable client would consider important in evaluating the referral arrangement are seemingly impossible standards for registered firms to meet. SCI believes that the protection that such disclosures are intended to afford clients is already achieved through conflict of interest resolution mechanisms.

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. SCI understands that the CSA intended that the information sharing provisions only apply to a registered firm'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*?

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

Investment Fund Manager Category:

SCI looks forward to the opportunity to review and comment on any proposed implementation mechanisms concerning the registration of investment fund managers.

With respect to the proficiency requirements for investment fund managers' Chief Compliance Officers stipulated in section 4.13, SCI asks the CSA to reconsider whether it is necessary for a lawyer or Chartered Accountant with the requisite employment or professional experience to have passed the Canadian Securities Exam.

Forms:

We are attaching Schedule "A" which contains specific comments on Proposed Forms 33-109F4 and 31-109F1.

In closing, SCI 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, if you have any questions or wish to discuss these comments further.

Yours truly,
Scotia Capital Inc.

Susan Eapen
Associate Director, Legal Counsel, Compliance

SCHEDULE "A"

Comments on Proposed Form 33-109F4 – Application for Registration of Individual and Permitted Individuals:

What is the difference between and individual and a permitted individual?

Item 2 – should contain a warning note that alternate names includes nicknames. Such a warning is included in Schedule "A" of the form but may be missed by individuals who are completing the form.

Item 8 – take out "and all"

Item 9 – transit should be 5 digits and alpha-numeric

Item 12 – the current form refers to "industry standard of conduct" while the proposed form refers to "standard of conduct." What is the difference?

Item 13 – "approved person" definition needs to capture all approved persons of SROs.

Item 15 – what is an "allegation"? Does it capture situations when an individually is named in a lawsuit in which allegations of deceit or misrepresentations are made or is it confined to allegations that a specific individual committed deceit or misrepresentation?

Item 16 – "debt obligation" is defined to broadly since almost anyone has failed to pay an invoice or other financial obligation on time.

Schedule 6 – does not seem to correspond with new registration categories.

Schedule E – should state "completed or passed"

Schedule G – should provide option to note when an individual is on leave, the reason for the leave, and the dates the leave commenced and is expected to end. More direction on what constitutes a conflict of interest is required.

Schedule H – may be redundant because the information should be found in response to Item 12 and Schedule I.

Form 31-109F1 Notice of Termination

Part E:

-correct termination to resignation

Question 3 – what is "significant"?

Question 8 – what is a "pattern"? More direction regarding the frequency and time-frame is requested.

Question 10 – add a comment box