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RE: COMMENTS ON PROPOSED NATIONAL INSTRUMENT 31-103 *REGISTRATION REQUIREMENTS*

Thank you for the opportunity to provide comments on the revised draft National Instrument 31-103 *Registration Requirements* ("**NI 31-103**"), which was published for comment on February 29, 2008.

I commend and support the efforts of the Canadian Securities Administrators (the "**CSA**") to harmonize, streamline and modernize the registration regime across Canada. It is unfortunate that we are already seeing the selective implementation of certain provisions of the proposed rule, such as in the case of British Columbia and Manitoba's decision not to apply the "business trigger" for dealer registration and to opt-out of the Exempt Market Dealer ("**EMD**") regime. It is important to ensure that a collective approach to registration matters across all Canadian jurisdictions results from these efforts and urge each of the CSA participants to ensure that a fractured approach, to the extent possible, is avoided. Further, while the objective of achieving harmonization through the adoption of uniform registration standards is important, in order to fully achieve that objective I believe that it

is equally important to ensure that the interpretation of the registration requirements, and all associated limitations, be consistent across the jurisdictions.

Specifically, I would like to take this opportunity to provide comments in respect of the following areas, each of which will be discussed in turn:

1. the need for clarification regarding the application of the "business trigger" test and factors in the context of venture capital and private equity investment vehicles;

2. the availability of exemptions from certain fit and proper requirements and conduct rules for EMDs that may handle client cheques in transit;

3. the need for clarification regarding the application of the "flow-through analysis" in respect of portfolio managers;

4. the application of the transition provisions to registered non-Canadian resident investment counsel/portfolio managers with imposed "permitted client" terms and conditions; and

5. the need for clarification regarding the use of credit ratings in the context of specified debt securities (Section 8.19(2)(b)).

1. "Private equity" investment vehicles and the "business trigger"

With the introduction of the "business trigger" in NI 31-103, the central question in assessing whether registration is required is whether a person is trading or advising for a business purpose. While Section 1.4.3 of the Companion Policy does provide some guidance to assist generally in the applicability of the "business trigger" in the context of venture capital, it would be helpful if the CSA were to also provide the "more specific guidance with respect to private equity" referred to in response to Question 36 of the Summary of Comments to NI 31-103 (the "**Summary of Comments**"). Understanding the views of the CSA in this regard is critical in light of the number of venture capital and private equity related firms that may potentially be captured by NI 31-103, which if implemented without this guidance will create confusion in a broad and important sector of the economy. It is also difficult to provide meaningful comment on the wide reaching implication of NI 31-103 without the more specific guidance that was referenced.

Further, in respect of the venture capital guidance that is provided in Section 1.4.3 of the Companion Policy, it is not clear whether the guidance is intended to suggest that the conceptual business trigger distinction only applies if the venture capital firm (i) is making only a few investments, (ii) is investing only in corporate entities, and/or (iii) is investing only in private companies. It is felt that further clarification is required in this area as many venture capital firms have similar roles in public entities (most typically smaller entities undergoing a restructuring or in early stages of development), which may not be corporate entities. Respectfully, it is submitted that, in principle there should be no distinction made based on the reporting issuer status or the nature of a target investment.

2. The handling of client cheques in transit by EMDs

The Companion Policy to NI 31-103 (the "**Companion Policy**") indicates that the capital and insurance requirements will apply to an exempt market dealer who handles, holds or has access to client assets, including client cheques or similar instruments. Specifically, section 4.7.1 of the Companion Policy indicates that where a dealer or adviser "handles client cheques in transit (e.g. a cheque made payable to a third party issuer)" it is considered to be handling, holding or having access to client funds.

Respectfully, the holding of cheques made payable to third parties should not be included in this list. Since the cheque is made payable to the issuer (and as a result, cannot be cashed by the dealer) it is not apparent how the investor's assets are at risk by allowing the EMD to facilitate an exempt market investment and provide this reasonable business service for its clients. Further, any level of risk that may be associated with such an activity does not appear to justify the additional procedures that an EMD and issuer would have to implement, or the costs that may be incurred in the context of an offering, simply to avoid the EMD holding onto cheque made payable to the issuer. In fact, it is respectfully submitted that the CSA consider including in the Companion Policy a statement to the effect that handling cheques payable to an issuer is not considered handling, holding or having access to client assets.

3. Application of the "flow-through analysis" to portfolio managers

In its response to Question 94, 550 and 551 of the Summary of Comments, the CSA acknowledged that the flow-through analysis should not be applied to investment fund managers and portfolio managers (i.e. that advisers and investment fund managers are not required to register in a Canadian jurisdiction merely because units of an investment fund managed or advised by them are purchased by investors in such Canadian jurisdiction). The CSA also clarified in Section NI 31-103 and the Companion Policy that investment fund managers are required to be registered only in the jurisdiction where the person or company that directs or manages the fund is located (which in most cases will be where the investment fund managers' head office is located). However, no similar clarification or guidance have been provided in respect of portfolio managers that provide advisory services only in respect of Canadian resident investment funds, and not directly to individual investors in such funds.

Respectfully, it is submitted that the CSA should consider clarifying in either NI 31-103 or the Companion Policy that a portfolio manager is only considered to be advising an investment fund in the respective jurisdictions of organization of the portfolio manager and investment fund and/or where their directing minds are resident. Further, it is suggested that the CSA consider providing additional guidance to the effect that a portfolio manager's participation in the preparation of offering documents, or other ancillary wholesale and marketing activities, relating to an investment fund that it advises does not otherwise trigger a requirement to register as an adviser in those Canadian jurisdictions where investors in that investment fund are resident.

4. Transition provisions for currently registered non-resident portfolio managers/investment counsel

The transition provisions outlined in Part 10 of NI 31-103 provide that a firm registered in a category set forth in Appendix C will transition and be deemed to be registered in the appropriate continuing category on the date that NI 31-103 comes into force. It is requested that the CSA clarify in either NI 31-103 of the Companion Policy how the transition provisions will apply in respect of current registrants in continuing categories that are subject to specified registration terms and conditions.

By way of example, I understand that an Alberta registered non-Canadian portfolio manager/investment counsel that is currently subject to the mandatory "permitted client" restrictions imposed by the Alberta Securities Commission (the "**ASC**") will not automatically be transitioned into the category of portfolio manager. During a discussion forum at a recent registration reform conference, it was indicated by a speaker associated with the ASC that, notwithstanding that such a firm had already completed a full registration application in connection with its initial registration, the registered firm would be required to submit a new registration application to become a "fully registered" portfolio manager under NI 31-103. It is submitted that requiring such a firm to again apply for registration as a portfolio manager will impose upon that firm an unfair and unwarranted burden and create a significant expense to the registrant in terms of time and money, all to provide the respective commission with information that it has already received in connection with that firm's initial application. Respectfully, I would ask that the CSA further consider and clarify the manner in which this type of registrant, and other registrants currently subject to terms and conditions, be transitioned in connection with the implementation of NI 31-103.

5. Specified Debt

Section 8.19 of NI 31-103 provides that the dealer registration requirement does not apply a specified debt. The CSA is to be commended for recognizing that specified debt should be exempt from the dealer registration requirement. In connection with the issuance of Draft National Instrument 45-106 – Prospectus and Registration Exemptions, there is the statement that: "We are currently reviewing the use of credit ratings in New NI 45-106. Once we have completed our review, we will assess whether any amendments are required to the exemptions in New NI 45-106 that currently contain a credit rating requirement." Please note that there is also a credit rating requirement in Section 8.19(2)(b) of NI 31-103. In considering the use of a credit rating requirement in NI 45-106, corresponding consideration should be given to its use in NI 31-103. Specifically, it is submitted that the CSA, should indicate that an approved credit rating from one of the specified credit rating organizations qualifying as having an "approved credit rating from an approved credit rating organization", notwithstanding that any one of the other approved credit rating organizations may have rated the security or instrument in a rating category that is not an approved credit rating (as is the case in National Instrument 81-102 – *Mutual Funds*). It is submitted that an approved credit rating should be sufficient for purposes of no exemptions in NI 31-103 and NI 45-106 given the stature of the approved credit rating organizations.

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I thank you for the opportunity to comment on the proposed NI 31-103. Should you have any questions regarding this submission, please do not hesitate to contact the undersigned.

Yours very truly,

GOODMANS LLP

Per: Krista Coburn

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