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May 29, 2008

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

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

Anne-Marie Beaudoin, Directrice du secrétariat
Autorité des marchés financiers
Tour de la Bourse, 800, square Victoria
C.P. 246, 22 étage
Montréal, QC H4Z 1G3

Dear Sirs and Mesdames:

Re: **Proposed National Instrument 31-103 *Registration Requirements* – Request for Comment**

This submission is made by the Business Law Section of the Ontario Bar Association (OBA) in response to the request for comment published February 29, 2008 by the Canadian Securities Administrators (CSA) regarding proposed National Instrument 31-103 *Registration Requirements* and Companion Policy 31-103CP (NI 31-103). This letter was prepared by members of the Securities Law Subcommittee of the OBA Business Law Section.

We congratulate the CSA on their responsiveness to the comments submitted with respect to the previous version of NI 31-103. However, as explained further below, we still have concerns with respect to some of the amended provisions. We focus our comments on

the issue of harmonization generally, as well as on four aspects of the proposal regarding exempt market dealers that cause concern.

Harmonization

As noted in the letter dated June 29, 2007 from the OBA Securities Law Subcommittee in response to your previous request for comment, we in general support the CSA's initiative in proposing NI 31-303, including the proposed "business trigger" for the requirement to become registered. As well, we agree with the stated purpose of NI 31-103, that is, "to harmonize, streamline and modernize the registration regime across Canada" and to "create a flexible and administratively effective regime with reduced regulatory burden." We are therefore concerned that British Columbia and Manitoba are not implementing the proposed instrument with respect to the registration of exempt market dealers and that Manitoba is not adopting the "business trigger" definition. The result will be a fragmented registration regime with respect to the exempt market dealer registration category, which is counter-productive to the goals of harmonizing and streamlining the dealer registration regime in Canada.

Exempt Market Dealers

NI 31-103 would add a new category of registration for dealers who restrict their activities to the exempt private placement market. While modeled on the existing category of "limited market dealer" in Ontario and Newfoundland and Labrador, it would not contain the exemptions from most of the dealer requirements contained in those regimes.

<u>Handling or Holding Client Assets</u>

We support the CSA's decision to implement a risk based approach with respect to client assets for the solvency requirements and we believe that is the proper approach to apply to the exempt market dealer registration category. We note however, that under the proposed instrument, exempt market dealers that "handle, hold or have access to client assets, including cheques and other similar instruments" will not be exempt from certain requirements with respect to capital, insurance and audited financial statements. Pursuant to the companion policy to NI 31-103, exempt market dealers that handle or hold client cheques which are payable to third parties are deemed to be "handling or holding" client assets.

For example, an exempt market dealer that provides a transportation function by delivering a client cheque made out to the issuer or the issuer's lawyer in trust or delivering a security post closing of a transaction to a client will be deemed to be "handling or holding" the cheque or security and will therefore lose the exemption from the requirements described above. We believe that including the activity of handling or holding a client's cheque made payable to a third party, or a security to be delivered to a

client post closing, is too broad an application of the risk principle and will result in small exempt market dealers having to satisfy registration requirements that will be too onerous for them.

We believe that it is appropriate for the exemption from the capital, insurance and audited financial statement requirements to be based on the risk that clients are subject to when the exempt market dealer has access to client funds deposited in the dealer's trust account. In our view, including the risk associated where the dealer merely provides a courier function for an issuer or client will cause many small exempt market dealers to unnecessarily lose the exemption from the capital, insurance and audited financial statement requirements for no appreciable benefit from a public policy perspective. The ultimate result is that the small exempt market dealer will incur significant additional business costs that may ultimately cause many exempt market participants to exit the industry or significantly increase the cost of capital formation.

Requirement for Limited Market Dealers to apply for Exempt Market Dealer registration

We have concerns with respect to the requirement for limited market dealers registered under the current regime to apply for registration as exempt market dealers within six months of the effective date of NI 31-103 or risk having to cease conducting registerable activity until exempt market dealer registration is granted. Registered limited market dealers have already incurred costs in time and money by registering under the current regime. Imposing a second level of registration costs upon companies and individuals will impose an additional regulatory burden on all participants and should be avoided wherever possible. We also have concerns about the additional resources and the duplication of effort that will be required by the CSA to process applications for companies and individuals that have already completed a prior registration process under the limited market dealer registration category.

Proficiency Requirements

While we agree in principle with the proposed proficiency requirements, we have concerns about the grandfathering provisions of Part 4 with respect to proficiency requirements. The exempt market dealer category is a new category of registration and pursuant to the transition rules, individuals or companies registered as limited market dealers in Ontario and Newfoundland and Labrador will be deemed to be registered as exempt market dealers. However, the grandfathering provisions in section 4.16 do not appear to include those individuals that are "deemed to be registered" as being exempt from the proficiency requirements pursuant to section 10.1(2) of Part 4. We also note that section 10.4(5) limits the proficiency exemption in section 4.16 to a period of 12 months from the date NI 31-103 comes into force. We are concerned that the resources of the CSA will not be adequate to process the influx of proficiency exemption applications that will be received from limited market dealers seeking an exemption based on the experience or education they have gained in their operations under the

current regime. We are also concerned that there is a lack of guidance from the CSA with respect to other proficiency requirements that will be acceptable to the CSA, other than the Canadian Securities Exam, and suggest that the CSA provide guidance with respect to such proficiency exemptions in the companion policy to NI 31-103.

Margin

We also have concerns that the restrictions on "margin" in the proposed rule may have an impact on some of the settlement processes currently utilized in the industry as a whole. For example, transactions that are settled by payment of a pre-arranged subscription price against delivery of a security (referred to as a "DAP" or "delivery against payment") could be caught by this rule. For example, under the proposed rule, from the time of closing of an offering until the time of delivery of the security for payment, any dealer that settles the transaction through a DAP may be seen as providing a loan or an extension of credit to the subscriber. We believe that this provision should be clarified such that normal settlement practices of this description will not be impeded through the application of this provision of the rule.

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We congratulate the CSA on the work they have done to date and how they have amended NI 31-103 to address the comments raised during the first comment period on NI 31-103. We encourage all CSA members to adopt the rule when finalized and create, to the greatest possible extent, a harmonized registration regime in Canada. We continue to recommend that the CSA develop an appropriate regulatory regime that focuses on the actual risks to clients, issuers and other market participants that are created by the specific activities undertaken by limited market dealers and other participants in the exempt market.

We appreciate this opportunity to comment on the revised verion of NI 31-103. If you have any questions, please direct them to Brian Prill (bprill@mcleankerr.com, 416-369-6610), Timothy Baikie (tbaikie@abanet.org, 416-572-2000 extension 2282) or Janne Duncan (janne.duncan@macleoddixon.com, 416-202-6715).

Yours truly,

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Chair, Business Law Section
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