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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
Nova Scotia Securities Commission
Superintendant of Securities, Newfoundland and Labrador
Registrar of Securities, Northwest Territories
Registrar of Securities, Yukon Territory
Registrar of Securities, Nunavut

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Toronto, Ontario
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E-mail: jstevenson@osc.gov.on.ca

Dear Sirs/Mesdames,

**Re: National Instrument 31-103 Registration Requirements and related forms**

BMO Nesbitt Burns Inc. ("BMO") appreciates this opportunity to provide comment, on our own behalf and on the part of certain of our related entities, on the Canadian Securities Administrators' revised draft of National Instrument 31-103 - Registration Requirements and related forms as published on February 29, 2008, (collectively the "Instrument"). We are

encouraged by many of the changes that have been made to the Instrument as a result of comments received during the previous comment period. We encourage the CSA to provide the same thoughtful consideration of comments submitted with respect to this draft of the Instrument and provide all stakeholders with the opportunity to provide additional feedback if necessary before the Instrument is finalized.

BMO strongly supports the goals of the CSA to harmonize, streamline and modernize the registration regime across Canada. Creating a harmonized and administratively efficient regime with reduced regulatory burdens and compliance costs will increase the Canadian capital markets' competitiveness in the global marketplace which will benefit all Canadian investors. In order to achieve harmonization it is our view that the CSA must be vigilant in its efforts to reduce differences among securities regimes in all the provinces and territories and SROs. These differences, regardless of whether they result in inconsistencies, create market inefficiencies which in turn increase the cost of participating in the Canadian capital markets.

The remainder of this letter will address the various parts of the Instrument in turn.

## ***Categories of Registration and Permitted Activities and Exemptions***

### 1. Implications for Schedule I Banks

In our June 2007 comment letter we asked the CSA to ensure that the Instrument did not incidentally require a bank to register to carry on its current activities. We are pleased to see that the Instrument now contains an exemption for specified debt that includes and expands upon the current exemption which will allow for a harmonized approach across the country with respect to evidence of deposits of financial institutions and government debt which are typically sold in bank branches. We note however that although the CSA has stated that it will not alter the status quo with respect to the regulation of banks we have discovered some areas where the Instrument may impact banks' ability to continue to carry on their activities as they do today. We have attempted to itemize some of these concerns below. Our concern is that all of these areas may not be identified and resolved prior to the Instrument coming into effect. In order to avoid this we strongly recommend the CSA include a parallel exemption for financial institutions as is found in section 35.1 of the draft amendments to the Ontario Securities Act. This would harmonize the securities regulations applicable to

financial institutions across Canada and would give the financial services industry assurance that the adoption of the Instrument will not have unintended consequences.

## 2. Removal of Current Registration Exemptions

In our June 2007 comment letter we asked the CSA to ensure that the elimination of existing exemptions and the introduction of the "business trigger" did not cast the regulatory net too widely by removing specific exemptions that should remain in place or by revoking exemption orders that should remain in effect. As the current draft of the Instrument can now be read in conjunction with a proposed draft of National Instrument 45-106 Prospectus and Registration Exemptions (NI 45-106) which anticipates the coming-into-effect of the business trigger we reiterate our concern that, as drafted, the elimination of certain registration exemptions will negatively impact banks and other market participants from carrying on certain activities that have been conducted by them for decades under existing registration exemptions.

### a) Short Term Debt

We are concerned that the current exemption for short term debt has not been continued in the Instrument. The removal of this exemption would preclude banks and other non-registered firms from continuing to trade in products such as commercial paper without registration, absent any provincial exemption. This would be a significant change to the status quo and a step-back from harmonization.

While we are pleased to see that the exemption for short-term debt will be continued in Ontario under Ontario Securities Commission Rule 45-501 *Ontario Prospectus and Registration Exemptions* (OSC Rule 45-501) we are disappointed to see that this exemption will not be continued across Canada. The removal of this exemption will now require participants in the short term debt/commercial paper market to examine each provincial and territorial securities act to ensure a proper exemption is in place. We note that many jurisdictions had removed this exemption from their securities acts when the national instrument came into effect and will now have to amend their acts to reinstate the exemption. We recommend that the exemption for short term debt be included in the Instrument or in NI 45-106.

**b) Trades through a registered dealer**

Currently section 3.1 of NI 45-106 provides an exemption from the dealer registration requirement for a trade by a person acting solely through an agent who is a registered dealer (the "registered dealer exemption"). As the exemption in NI 45-106 will be removed once the Instrument comes into effect we believe that this exemption should now be included in the Instrument. The CSA has indicated that this dealer registration exemption will no longer be necessary under the business trigger model because a person or company trading through a registered dealer will not normally be considered to be "in the business of trading securities" and therefore will not need to rely on an exemption from the registration requirement to conduct that activity. We note that certain market participants, including Bank of Montreal, engage in a variety of activities that might be considered to be in the business of trading in securities that currently are exempt from registration because they deal through a registered dealer. As an example, currently Bank of Montreal conducts it equity derivative business through BMO Nesbitt Burns as registered dealer. Absent the current exemption, Bank of Montreal itself would have to be registered as a dealer to conduct these activities. It is not clear to BMO why market participants such as banks, hedge funds and pension funds who are in the business of trading in securities should be required to register as dealers when they conduct that business through a registered dealer. We would ask the CSA to include an exemption from dealer registration in the Instrument for activities conducted through a registered dealer.

**3. Permitted Supranational Agency**

While we are pleased that the definition of "permitted supranational agency" has been broadened from the original definition found in the current version of NI 45-106 to include the African Development Bank, Caribbean Development Bank and the European Bank for Reconstruction and Development we would request that the CSA consider adopting a generic definition of permitted supranational agency instead of relying on a list of defined entities as is currently the case in both the Instrument and NI 45-106. Adopting a generic definition is a more flexible approach and will result in the list not getting "stale" because of the creation of new entities that are not contemplated.

Further, as currently drafted in both instruments the exemption for sovereign entities does not use a specific definition but rather a generic description ("guaranteed by a government of a foreign jurisdiction if the debt security has an approved credit rating from an approved credit

rating organization"). It would be consistent to adopt a similar generic definition for permitted supranational entities as well. This more flexible approach is in line with other jurisdictions' approach and will facilitate high quality foreign entities to be active in our capital markets fostering their development. For example the following entities are not included in the current definition of permitted supranational agencies found in both the Instrument and the draft amendments to NI 45-106: the European Investment Bank, Council of Europe Development Bank, Eurofima and Nordic Investment Bank. All of these entities are very active participants in the global capital markets and are considered high quality due to their significant sovereign ownership.

**4. Investment Fund Managers**

Section 2.8.1 of the Companion Policy states that investment fund managers will have to register as a dealer if they carry on marketing and wholesaling activities unless these activities are incidental to their activities as a fund manager. Investment fund managers will always engage to a greater or lesser extent in the promotion of their funds. Because this is such a prevalent practice in the industry and is a pro-competitive business activity we would request that the CSA provide more direction on what specific activities the CSA will consider to be a "tipping point" that will require investment fund managers to also become registered as dealers.

## ***Conduct Rules***

**1. Know- your -Client (KYC) - Direct Brokerages**

Section 5.3(1)(c) of the Instrument as drafted requires that all registrants take reasonable steps to ensure that they have sufficient information about their clients to meet their regulatory obligations in recommending a trade, acting on trade instructions or making a discretionary trade for a client. Currently pursuant to IDA Policy 9(A)(3)(a) direct-brokerages (which offer execution-only services), while required to fulfill IDA KYC obligations, are exempt from suitability requirements. Direct brokerages must inform their customers, in writing, at the time an account is opened that they "will not consider the customer's financial situation, investment knowledge, investment objectives and risk tolerance when accepting orders from the customer". We would ask the CSA to confirm that in respect of direct-brokerage the "regulatory obligations" that are applicable are limited to the IDA imposed KYC obligations. Our concern is that if clients are asked to provide any additional personal information they may falsely believe they are being provided something they are not because

IDA Policy requires direct-brokerages to clearly advise their clients that their particular financial situation will not be used by the direct brokerage in executing trades.

**2. Know- Your-Client- Reputation**

Section 5.3(1)(a) of the Instrument, as drafted, requires a registrant to take reasonable steps to "establish. . . the reputation of the client" in circumstances "where there may be cause for concern.". While we appreciate the CSA's concern, we are concerned that the proposed section is overbroad and will require a registrant to make a subjective assessment of a client's reputation without guidance or criteria to look to. In the absence of proper guidance or specified criteria on the parameters of the concept of "reputation", compliance with this section will be difficult for the firm. Furthermore, we believe that the implication of such a broad and undefined assessment of a client's reputation may put the firm at risk vis-à-vis its' clients and potential clients. Accordingly, we suggest that this requirement be eliminated from the section. In the alternative, however, and at the very least we suggest that the section be more specifically tailored to meet the CSA's objectives. In this regard, we suggest that the CSA amend this section to provide that a registrant be required to establish the reputation of a client only in circumstances where information known to the registrant causes doubt as to whether the client is of good reputation. We believe that the "information known and causes doubt" test provides greater clarity and certainty than the "may be cause for concern" test, as the former will only trigger a registrant to establish the reputation of a client where information is known to it causes doubt as to the client's good reputation. This language is reflected in the Ontario Securities Commission Rule 31-505 Part I 1.5(a), and we believe provides more guidance and clarity to the registrant ultimately charged with this responsibility, as well as consistency with current industry requirements.

**3. Record Retention**

Though we support the CSA's desire to implement effective and consistent record-keeping requirements, by identifying two new types of records - activity records and relationship records - we believe that the CSA may inadvertently create a substantial financial and administrative burden for the firm, particularly with respect to email retention and retention of all client communication.

Section 5.16(4) of the Instrument will require the firm to maintain "activity records" for a period of seven years from the "date of the act", and "relationship records" for seven years from the "date the person or company ceases to be a client of the registered firm." Unfortunately, this

requirement may ultimately result in the firm having to archive emails longer than intended, as currently email is not archived according to its content, and so in order to meet the new requirement, emails might have to be kept indefinitely. This solution will prove costly and mean that the firm might end up retaining client correspondence for longer than appropriate given our obligations under privacy legislation. Given these concerns, we believe that the CSA should eliminate the concepts of activity and relationship records, and instead follow the prescriptive approach as found in MFDA Rule 5 and IDA Regulation 200, which would also provide additional consistency with current industry record-keeping requirements. To that end, we suggest that the CSA mandate that firms maintain records of client communications for a single, fixed period of time.

As with emails, requirements regarding records of oral communications are equally troublesome. The practical implications of this requirement concern us as our business is built on direct client contact primarily through oral communications. It is unreasonable to expect registrants to document every conversation with both clients and prospective clients. Accordingly, we suggest that at the very least there be a materiality provision included in the record-keeping requirements so as to avoid the necessity of capturing all telephone calls or other oral communications (or otherwise documenting all telephone calls and other oral communications), since, as it is currently worded, the record-keeping provision would require a record be kept of any and all client communications.

**4. Statements of Accounts and Portfolio**

BMO supports the idea of issuing client account statements on a quarterly basis. However, we are concerned about the proposal to issue monthly statements where a client so requests. While BMO is committed to providing timely, current and accurate reporting to our clients, we firmly believe that off-cycle mailings are neither necessary nor practical. We recognize that some investors desire the convenience of more immediate access to up-to-date information about their holdings but we believe that there may be more practical and environmentally responsible methods to achieve this end. For example BMO Investments Inc. (BMOII), our mutual fund dealer affiliate, as well as many other industry participants, provide convenient and secure 24-hour on-line access to account information, with fund holdings, prices and transactional history on a daily basis. BMOII also maintains two call centres where clients can speak to an investment representative to obtain up-to-date account and transactional information, in addition to being able speak with an investment professional

at any BMO Bank of Montreal branch. Clients can also access BMOII's secure automated touch-tone service that allows them to request account information by fax. We would recommend that the CSA give firms the option to provide non-paper-based means of up-to-date account access.

Adding an additional layer of cost without evidence of a corresponding need does not serve investors and results in additional costs being passed on to them for disclosure that can be provided by more cost-effective and environmentally-friendly means. Moreover, depending on their service providers, certain registrants with a large volume of retail clients could face significant and costly systems upgrades in order to be able to store the massive amounts of data generated by more frequent reporting.

**5. Complaint Handling**

Section 5.12.3 of the Companion Policy provides that registrants have an obligation to disclose to all clients all dispute resolution mechanisms available for pursuing different types of complaints.

Registrants should only be required to inform clients that they may consult with ombudsman services, securities regulators or their own legal counsel if they do not believe that their complaint has been dealt with appropriately. A broad blanket requirement to enumerate all possible steps to challenge and defeat the firm's rejection of a complaint is an inappropriate responsibility to place on the firm. It borders on providing legal advice and may be taken to be a representation that may in itself be actionable.

We suggest that the Companion Policy directive be replaced with the following:

> "Registrants should disclose to all clients any internal dispute resolution mechanism available for pursuing different types of complaints together and the client's ability to consult with OBSI, securities regulators, and their own legal counsel with respect to unresolved complaints."

## ***Conflict of Interest, Relationship and Referral Disclosure issues***

### 1. Conflicts Management

BMO is supportive of the attempts to narrow the current definition of conflicts of interest (section 6.1) and is appreciative of the efforts of the CSA to date in endeavouring to do so. From our perspective, certain limitations remain with the current definition, such that the current definition could benefit from further review. We believe that the CSA should revisit the idea of adding a materiality threshold in light of the approach taken by the Financial Services Authority ("FSA") in implementing the MiFID provisions for the effective management of conflicts of interest. The FSA in fact modified an earlier version of its rule requiring firms to "identify the types of conflict of interest whose existence may entail a material risk of damage to the interests of the client". (See Financial Services Authority Organization systems and controls, common platform for firms, Feedback on CP06/9.)

We are concerned that basing disclosure on what firms believe may be the client's reasonable expectations, rather than on materiality, puts firms in the difficult position of trying to guess what clients may find important, or risk litigation. Implementation of the current subjective definition could quite easily lead firms to inundate clients with a laundry list of potential conflicts in an attempt to comply with the current definition. In our view, this does not serve the interests of the client. It also fails to adequately recognize that disclosure is but one aspect of a firm's efforts to manage conflicts of interest, thereby risking over-reliance on disclosure.

Similarly, BMO is concerned with the costs associated with undertaking an assessment of existing conflicts given the current reasonability standard. Without a materiality standard, the assessment of existing conflicts could become a massive exercise involving significant firm resources and staff. BMO also believes that firms could benefit from guidance from the CSA regarding the types or categories of conflicts on which it would like firms to place particular attention. Ultimately, it is not clear to BMO that the resulting assessment under the current wording would be of overall benefit to clients.

### 2. Managed Account Related and Connected Transactions

Current securities law regimes (for example, Ontario Regulation 1015 , Subsection 227(b)) permit registered firms to make trades in respect of securities of related and connected

issuers for clients in managed accounts where client consent has been obtained. The current draft of the Instrument provides an exemption to the prohibition on related and connected trades found in section 6.6 where a registered firm is acting as an advisor in respect of a fully managed account only if the transaction is made in accordance with Section 4.1(4) of NI 81-102 (approval by the independent review committee (the "IRC Process")). The introduction of the IRC Process for registered dealers and advisors in respect of fully managed accounts is a significant change in policy. The previous draft of the Instrument provided for these trades with client consent (section 6.2(2)(a)(iv)) and the CSA has recently provided exemptions to several dealers to allow these trades with one-time client consent. We can only suppose that this change was unintentional and would request that the CSA amend the Instrument in accordance with recent exemptive relief to allow registered firms to purchase securities of related and connected issuers for clients in managed accounts once the client has provided consent to such trades.

**3. Referral Arrangements**

We reiterate our view set out in our June 2007 comment letter that the types of activities which are intended to be covered by Section 6.11 to Section 6.15 of the Instrument should be more clearly defined. We also reiterate our comment that the parameters of disclosure that registrants are required to make to their clients be well defined. In particular, the disclosure requirements in Subsections 6.13(c) and 6.13(g) of the Instrument remain open-ended and subject to interpretation with the benefit of hindsight.

We note that, in its summary of comments received on the initial draft of the Instrument, the CSA noted that it had seen "continuing problems… in the industry relating to referral agreements." In light of the CSA's observation, the CSA should give registrants some guidance as to the nature of the continuing problems they have seen with respect to referral arrangements so that registrants have a better understanding of what the CSA's concerns are and can address these in written referral agreements and client disclosures. While we appreciate that it is not possible for the CSA to provide an exhaustive list of all the types of "conflict of interest" that may arise, some guidance in the Companion Policy would be useful to registrants.

Section 6.14 of the Instrument requires a registrant to take reasonable steps "to satisfy itself that the person or company has the appropriate qualifications to provide the services". In

our view, the CSA should provide detailed guidance in the Companion Policy as to what constitutes “reasonable steps”, what would constitute appropriate due diligence and what steps a registrant should take to evidence that the registrant has taken “reasonable steps to satisfy itself that… [a referral] has the appropriate qualifications to provide the services.”

Subsection 6.15(2) of the Instrument would require existing referral arrangements to be documented in writing and disclosed to clients within 180 days of the Instrument coming into force. Given the number of potential stakeholders involved and the need to communicate with clients, we believe that a longer transition period of 485 days is in order.

## ***Part VII Related Forms***

Attached as an appendix to this letter we have included drafting comments on the associated forms.

We have appreciated the opportunity to express our views regarding the Instrument. We would be pleased to answer any questions that you may have about our comments.

Yours truly,
c/s *Rena Shadowitz*

Rena Shadowitz
Senior Legal Counsel

## APPENDIX

**NI 31-103**

Part 10 - Transition

We suggest deregistration of Officers take place prior to December 31, 2008 to allow firms to avoid paying renewal fees for 2009 given the March, 2009 implementation of NI 31-103.

**NI 33-109 - Forms**

Overall Comments

Please define "authorized (signing) partner or officer," given the changes in officer registration under NI 31-103. Does this authorization require an officer appointed by the firm? In addition, these terms should be consistent on all forms.

We would appreciate further clarification on timelines of the hearing process of a registrant who is suspended due to the answers contained in their NOT filing.

**Form 33-109F1 – Notice of Termination of Registration**

Is it possible to obtain guidance as to which answers might cause a registration to be suspended?

The CSA's responses to comments on the previous draft of the instrument (see page 160) indicate that Section E must be filed within 30 calendar days of the effective date of termination. However, both the form and the 33-109, Part 4.3(2)) indicate 30 business days. In order to be consistent with all other filing deadlines, we recommend that business days be used.

Item D

Please provide clarification on why there has been a change in the definition of *effective date of termination*. We would appreciate further clarification of the definition of '*cease to have authority'.*

We suggest that the form have a free text box to specify the reason for termination rather than having pre-populated definitions.

We note that “dismissed for **just** cause” replaces “dismissed for cause” on the current form. We would appreciate clarification from the CSA of the rationale for the addition of the word just. Further as noted above we believe that a full description of the reason for the termination should be disclosed in any event.

We note that there is no option for “dismissed/ resigned in good standing” – would this be considered an “Other” reason? As most of our registrants resign or are dismissed in good standing (i.e. to pursue other interest or opportunities), could section E be carved out for those individuals?

Item E

The references to *‘affiliate’* throughout the series of questions may prove to be very difficult for larger firms to answer. We ask the CSA to remove this reference.

We recommend removing "engaging in undisclosed outside business activity" from the list of examples in Question 7. Matters such as these would only be disclosed on the 33-109F1 if it led to the individual's termination.

Further to line 612 of the CSA response to comments, guidance regarding the meaning of the terms “significant,” “pattern,” and “relevant” in Questions 3, 8 and 10 is necessary. We are concerned that these terms are subjective and are likely to lead to inconsistency in reporting.

We ask that the CSA provide comment regarding the difference between questions 7 & 8 as the questions appear duplicative.

Item G

We believe that reference should be made to the specific law that “makes it an offence to submit information that…”

We don’t believe that the statement found at the end of this section:*” If there is any doubt about the relevance of information, it should be included”* should be included in the warning. If the CSA wishes to make this statement, we believe it would be better included under section E.

**Form 33-109F4 – Application for Registration of Individuals**

Item 1.2 (Other personal names)

We suggest, similar to it Item 1.3, that examples be provided of other personal names such as nick name, names due to marriage

Collection and use of personal information

The section refers to collection and use of personal information however, paragraph 3 states that 'by submitting this form you consent to the collection and disclosure of your personal information…' We request that how and when disclosure is going to be made by the regulatory authority be specified.

Self-Regulatory organizations

We believe requiring an individual to be conversant with the rules of jurisdictions for which he/she isn't registered (i.e. where the firm is registered in such jurisdictions) is too onerous requirement and we request that the CSA consider rewording this section.

We ask that the CSA provide clarity as to what kind of information sharing is contemplated by this section (e.g. is it for a purpose other than for application for registration?)

**Form 33-109F7 – Notice of Reinstatement ("Transfer Form")**

Instructions (bolded in box)

Please clarify that a change to item #13 will not exclude a registrant from using the F7.

Item 9

For Type of Location Details on the paper version of the form, please clarify the meaning of "effective date".

In order to be clearer, we would suggest re-wording this as the "effective date of registration transfer", with a full definition contained in the rule or CP.

Acknowledgements, etc.:

Third paragraph - will firms be given the option to either accept Terms & Conditions or withdraw the application, or will the Terms &Conditions be imposed automatically? If a transferring registrant fails to disclose un-discharged Terms & Conditions, we request that

firms be given the option to accept or withdraw the application, upon notification from the regulator.