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September 30, 2010

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c/o Ontario Securities Commission 20 Queen Street West, Suite 1903, Box 55 Toronto, ON M5H 3S8		c/o Autorité des marchés financiers 800, square Victoria, 22e étage C.P. 246, tour de la Bourse Montréal (Québec) H4Z 1G3	
Attention:	John Stevenson, Secretary	*Attention*:	Me Anne-Marie Beaudoin, Corporate Secretary
E-mail:	jstevenson@osc.gov.on.ca	*E-mail*:	consultation-en-cours@lautorite.qc.ca

Dear Sirs and Mesdames:

Re: Notice of and Request for Comment on Proposed Amendments to National Instrument 31-103 Registration Requirements and Exemptions ("NI 31-103"), National Instrument 33-109 Registration Information and to Related Policies and Forms (the "Proposed Amendments")

This submission is made by the Exempt Market Dealers Association of Canada (the "**EMDA**") in response to the request for comments published by the Canadian Securities Administrators ("**CSA**") on June 25, 2010 in connection with the Proposed Amendments.

The EMDA (formerly the Limited Market Dealers Association of Canada) is a not-for-profit association founded in 2002 by a group of Canadian business people whose firms were active in the exempt securities market. The purpose of the EMDA is to:

- assist its members with understanding and implementing their regulatory responsibilities;
- ensure the highest standards of business conduct amongst its membership across Canada;

- increase public and industry awareness of the exempt market and its role;
- be the voice of the exempt market dealers locally and nationally to securities regulators, government agencies, other industry associations and the capital markets;
- provide valuable services and cost saving opportunities to its members; and
- connect its members across Canada for business opportunity networking.

Additional information about the EMDA is located on our web site at: http://www.emdacanada.com.

Below are our comments on certain matters discussed in the Proposed Amendments that impact exempt market dealers (collectively, "**EMDs**" or individually, an "**EMD**") under the heading "*Specific Comments*". We have also provided other comments involving the EMD registration category that were not specifically solicited by the Canadian Securities Administrators (the "**CSA**"), but we believe are important to discuss and these are set out below under "*Other Comments*".

SPECIFIC COMMENTS

Proficiency (initial and ongoing) and Suitability

The CSA proposes to add a requirement to existing section 3.4 of NI 31-103 that a registered representative "*understand the structure, features and risks of each security the individual recommends*". The CSA states that the proposed change reflects the view that in-depth knowledge of all securities a registrant recommends is a fundamental component of the proficiency requirement.

We agree with the intention of the change but believe it should not be added to section 3.4, rather this is better addressed by locating it elsewhere in NI 31-103.

1. Create a new separately enumerated "Know Your Product" Section

The EMDA agrees that each registrant should have in-depth knowledge of the securities he or she recommends. Although we agree that product knowledge could be viewed as a fundamental component of the proficiency requirement, it could also be viewed as a fundamental component of the suitability obligation. The CSA has already explicitly stated in section 13.3 of the Companion Policy to NI 31-103 (the "**Companion Policy**") in discussing suitability, that "*registrants should have in-depth knowledge of all securities they buy or sell for, or recommend to, their clients*" (the "**KYP Obligation**"). The proposed change would result in the KYP Obligation being discussed in two different sections in NI 31-103 and the Companion Policy which may lead to confusion.

The EMDA recommends that the CSA create a separately enumerated KYP Obligation section in NI 31-103 so that it is a specific obligation unto itself, and not a derivative of the proficiency or suitability requirement in NI 3-103. Specifically, the EMDA recommends that the CSA create a new section 13.3.2 (Know Your Product) and renumber the existing section 13.3 (Suitability) as section 13.3.1 (Suitability), which would be minimally disruptive to the existing numbering system.

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The EMDA believes the KYP Obligation should immediately follow the suitability requirement in existing section 13.3 of NI 31-103 and that the Companion Policy discussion of the KYP Obligation in section 13.3 (Suitability) be incorporated into the new Know Your Product section in 13.3.2. This would give the KYP Obligation the force of a legal requirement which is then supported by the discussion in the Companion Policy.

2. Retain Existing Process-Driven Standard for Determining the KYP Obligation

The EMDA supports the existing "process-driven" standard for determining a registrant's KYP Obligation as set out in section 13.3 of the Companion Policy and as stated believes it should be brought into NI 31-103 more explicitly. The specific section states: *"[r]egistrants should know each [product/security] well enough to understand and explain to their clients the [product's/security's] risk, key features, and initial and ongoing costs and fee."* It further states: *"[i]n all cases, we expect registrants to be able to demonstrate a process for making suitability determinations that are appropriate in the circumstances."*

This is contrasted with section 3.4 of the proposed Companion Policy, where the CSA seeks to impose a "reasonable person standard" to determine whether a registrant has satisfied his or her KYP Obligation. The proposed amendment states that: *"[u]nder section 3.4 of NI 31-103, registered individuals must not perform an activity that requires registration unless they have the education, training and experience that a reasonable person would consider necessary to perform the activity competently and to understand the structure, features and risks of each security they recommend to a client. CCOs must also not perform an activity that requires registration unless they have the education, training and experience that a reasonable person would consider necessary to perform the activity competently."* [emphasis added]

The EMDA respectfully submits that a registrant's KYP Obligation should be determined at the time any investment is made by an investor, and not after-the-fact. The EMDA is concerned that if this new reasonable person standard is used to determine whether a registrant has satisfied his or her KYP Obligation, then it may invite a retrospective analysis by CSA members. This may result in a CSA member substituting its own views of what is "reasonable" for those of the EMD at the time of the trade or what is commonly accepted practice within the industry. There may also be differences in interpretation of this reasonableness standard by the different compliance and enforcement staff across the various CSA jurisdictions.

Furthermore, the EMDA respectfully submits that the reasonable person standard is different than the existing process-driven standard that was published in CSA Staff Notice 33-315 – *Suitability Obligation and Know Your Product* ("**CSA Staff Notice 33-315**"). The EMDA supports the CSA's current approach involving a "process-driven standard" for determining whether a registrant has satisfied his or her KYP Obligation as set out in NI 31-103 and CSA Staff Notice 33-315. The EMDA does not support the change from a "process-driven standard" and we do not believe the CSA has sufficiently explained its rationale for this change in policy.

Account Activity Reporting

3. Fair Value Accounting in Client Account Statements

The CSA proposes to amend section 14.14 in NI 31-103 by adding subsection (5.1) in order to require registered firms, except in limited circumstances, to use fair value under IFRS for valuing securities in client statements.

The EMDA does not believe that EMDs should be involved in assessing the fair value of securities in client statements since many securities sold by EMDs are securities of unlisted issuers. Moreover, as discussed below, many securities are Client Name Securities (defined below) and not held or controlled by EMDs.

If the CSA determines that EMDs are required to assess the fair value of securities in client statements, then the EMDA respectfully submits that any calculation of fair value should only involve listed securities where there is a fully transparent marketplace to ensure a consistent application of value assessment. If EMDs are required to calculate fair value of unlisted securities, we believe there would be a strong probability that different EMDs will arrive at different fair value calculations for securities of same issuer which would likely confuse investors as to the realizable value of their holdings. Moreover, the EMDA is concerned that any incorrect calculation of the fair value of securities of an unlisted issuer may impose liability on an EMD despite its best efforts in making such calculation with the resources it has available.

4. Reporting on Client Name Securities

The EMDA respectfully submits that client statements of an EMD should only include those securities that an EMD holds or controls on behalf of a client, and not securities that are held in certificate form by the client, or are registered in a client's name on an issuer's books and records ("**Client Name Securities**").

Below are the EMDA's answers to the questions you have specifically asked in the Proposed Amendments in connection with account statements.

1. ***Investors may not be aware that securities are held in different ways or understand the implications for account reporting of holding securities in one way or another. To what extent would investors benefit from including Client Name Securities on their account statements? For example, would including Client Name Securities ensure that account statements provide investors with a more complete picture of their portfolio?***

The EMDA does not believe that including Client Name Securities on client account statements is beneficial to clients of an EMD where the Client Name Securities are not held by an EMD nor do they exist on an EMD's books and records. In many instances, the Client Name Securities were a product of a private placement transaction and may have been deposited in a client account with another registrant or are held in bearer form by the client or its agent. Including Client Name Securities on EMD client account statements would be highly impractical, and more concerning, it would be misleading and confusing to

clients who may mistakenly believe that the EMD retains custody and/or control of these Client Name Securities.

2.	***If Client Name Securities were required in account statements we would require registered firms to use IFRS to determine the fair value of Client Name Securities. Some securities held in client name are illiquid and do not have a value that can be determined by reference to an active market. Would including the fair value of illiquid securities on account statements be useful to investors?***

The EMDA does not believe that including the fair value of illiquid securities on account statements is useful to clients and is potentially misleading.

3.	***We understand that many registered firms that currently include Client Name Securities in their account statements have arrangements with the issuer to regularly update them on the securities owned by a client. In what circumstances does this practice work? In what circumstances might this practice be impractical or unduly burdensome? How common are those circumstances?***

The EMDA respectfully submits that it is not common practice among EMDs to have arrangements with issuers to regularly update them on Client Name Securities. Many EMDs do not hold or control Client Name Securities therefore it is not reasonable for such EMDs to provide information to clients on Client Name Securities or to provide them with updates on Client Name Securities.

To our knowledge, this practice works only where there is a statutory or contractual obligation between the issuer and/or its agent (*e.g.*, registrar and transfer agent) and the registrant to provide such information with the client's consent. Even if a legal obligation existed in the context of an EMD, there is always a concern that an issuer and/or its agent may not be able to provide a registrant with the appropriate information in a timely manner. If not, it is unclear what disclosure a registrant would be required to include in an account statement in the absence of such information.

4.	***Other than entering into an arrangement with the issuer, how else could registered firms collect information on what Client Name Securities a client owns? How would these alternatives work and what costs would be involved?***

A registrant could obtain information about the number and types of Client Name Securities from an issuer's registrar and transfer agent provided there was a legal obligation to provide a registrant with this information, which is generally not the case.

5.	***What changes would registered firms need to make to their account statement procedures to include Client Name Securities? How difficult or costly would these be?***

A significant number of EMDs do not hold or control client assets (including Client Name Securities). Requiring EMDs to purchase computer software for purposes of providing client account statements imposes an unnecessary and costly financial burden on EMDs. Other than sending required information in

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relation to a confirmation of a trade, EMDs typically do not have the technology capable of generating client account statements for any client assets. The EMDA is not aware of any current industry software capable of generating client statements for Client Name Securities, and are concerned that the cost of developing such software would be prohibitive for EMDs relative to the benefit to a client. Moreover, this information will arguably only provide a historical trading record of past trades by a client rather than providing any real information about the client's assets that are held by the EMD.

6. ***Under section 14.14, registered firms are only required to provide account statements to "clients". When do you consider a client relationship to start and end? What factors should be considered in determining whether a client relationship has ended?***

The EMDA is of the view that a client's relationship starts when he, she or it has completed an EMD's account application or Know Your Client ("**KYC**") form and the client has actually acquired a security through a transaction with the EMD. It is unclear when a client relationship ends, especially, if there are no securities or cash on account held by an EMD for such client. For example, once a KYC account form has been completed by a client, the client may receive ongoing marketing materials from the EMD regarding a variety of offerings the EMD is currently acting on, or may act on in subsequent engagements. The EMDA is of the view that an EMD should have no reporting obligations to the client where there are no securities or cash on account held by an EMD for such client. Simply put, despite any ongoing client relationship with the EMD for the purposes of marketing future offerings, there is no utility in providing a client with a *nil* client statement.

7. ***If Client Name Securities were required in account statements, are there any circumstances where a registered firm should be exempt from the requirement to provide reporting on Client Name Securities? For example, should certain types of clients, investment products or transactions be exempt? Why? (We would expect to exempt Client Name Securities held in certificate form by the client, in Delivery against Payment (DAP) accounts and in Receipt against Payment (RAP) accounts.)***

Please see our comments above.

8. ***If Client Name Securities were required in account statements, should there be a transition period to give registered firms time to change their account statement procedures? How long should the transition period be?***

If Client Name Securities were required in account statements, there should be a one-year transition period to give registrants sufficient time to update their policies and procedures and alter any automated activities involving the preparation and delivery of account statements.

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OTHER COMMENTS

Referral Arrangements

The EMDA has no comments in connection with the CSA's proposed amendments to sections 13.8, 13.9 and 13.10 of NI 31-103. However, the EMDA requests that the CSA provide further guidance on certain issues involving referral arrangements.

5. Request for Guidance on "What is Not a Referral Arrangement?"

Section 13.7 of NI 31-103 defines a "**referral arrangement**" as "*any arrangement in which a registrant agrees to pay or receive a referral fee*". The CSA has purposely defined this term broadly as stated in section 13.7 of the Companion Policy. However, this broadly-defined term is being interpreted differently by different members of the CSA, and by registrants and non-registrants within the marketplace which has lead to confusion and uncertainty.

The EMDA respectfully requests that the CSA provide additional guidance on what is not a referral arrangement to provide greater clarity and transparency to all stakeholders. For example, the EMDA understands that members of the CSA would not regard a syndication of an offering by dealers or certain types of marketing or advertising arrangements involving lead generation as a referral arrangement.

The EMDA respectfully suggests that the CSA canvass other stakeholders on this question and gather their opinions before the CSA makes a final determination on what would not constitute a referral arrangement.

6. Request for Guidance on Permitted Activities by Non-Registrants in Referral Arrangements

The EMDA acknowledges that the CSA has provided related guidance in section 1.3 of the Companion Policy in connection with the business trigger for trading and advising but believe additional guidance is required in connection with referral arrangements.

For example, the EMDA understands that a number of non-registrants are undertaking registrable activities which would ordinarily require the non-registrant to be registered as an EMD. However, the non-registrants believe they do not have to be registered since they have entered into a permitted referral arrangement. We understand that some non-registrants including life insurance agents, accountants, financial planners, and those market participants who are relying on the Northwestern Exemption Orders[1] (the "**Financial Services Providers**") believe that entering into a permitted referral arrangement allows the non-registrant to undertake registrable activities. These non-registrant Financial Services Providers

[1] The securities regulators in Alberta, British Columbia, Manitoba, the Northwest Territories, Nunavut and the Yukon Territory (*i.e.*, the Northwestern jurisdictions) have issued local orders exempting individuals and firms from the dealer registration requirement when they trade in securities in certain circumstances (the "**Northwestern Exemption Orders**").

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believe that their registrable activities are effectively "cleansed" by entering into a permitted referral arrangement with an EMD in accordance with NI 31-103 requirements.

The EMDA respectfully requests that the CSA provide additional guidance on what activities non-registrant Financial Services Providers can perform in connection with a referral arrangement with a registrant. Specifically, the EMDA respectfully requests that the CSA provide additional guidance to registrants as to what types of referral arrangements are permitted so that registrants can ensure that they are not a party to any scheme or strategy on the part of the non-registrant to circumvent registration obligations. This guidance could be added to the Companion Policy, however a separate notice specifically tailored for non-registered Financial Service Providers entering into permitted referral arrangements with registrants would be preferred.

7. Verifying that Non-Registered Persons are not Undertaking Registrable Activities in connection with a Referral Arrangement

Section 13.9 of NI 31-103 requires the registrant *making a referral* (the "**Referer**") to satisfy itself that the party *receiving the referral* (the "**Referee**") is appropriately qualified to perform the services, and if applicable, be registered. We note that it does not require a registrant Referee to inquire, investigate, monitor or ensure that a non-registered Referer is not undertaking activities that would trigger registration under NI 31-103.

The EMDA believes that under NI 31-103, registrants may enter into referral arrangements with Financial Service Providers with increased frequency. The EMDA respectfully requests that the CSA clarify the responsibility and/or liability of a registrant if a non-registered Referer, such as a Financial Services Provider, is engaging in registrable activities and respectfully recommends that the Companion Policy be amended accordingly to reflect such views. Particular guidance from the CSA would be appreciated by registrants that are engaged in referral arrangements with Financial Service Providers that are relying on the Northwestern Exemption Orders.

8. Amendment to Section 3.14(b)(i)

There are a number of registered firms that will be registered in the category of EMD and investment fund manager ("**IFM**"). While the CSA accommodated mutual fund dealers ("**MFD**") by including the course proficiencies of the chief compliance officer ("**CCO**") of an MFD in the requirements of the CCO of an IFM, the same was not done for an EMD. We believe section 3.14 (b)(i) of NI 31-103 should include the Exempt Market Products Exam as one of the alternate proficiency requirements which would then allow the CCO of an EMD to qualify as the CCO of an IFM without gaining additional industry-specific proficiency.

9. Consequential Amendment to Paragraph (A) of the definition of "Eligibility Adviser" in National Instrument 45-106

The "Eligibility Advisor" definition in NI 45-106 relates to who can provide suitability advice to an "Eligible Investor." Pursuant to section 13.3 of NI 31-103, all registrants must take reasonable steps to ensure that before a registrant accepts a client's instruction to purchase or sell a security, the registrant

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must make a suitability determination of the investment for the client. Since this is a requirement for all market participants registered in the EMD category, it follows that an EMD is performing the functions of an "Eligibility Advisor" when the EMD is marketing a security under the "offering memorandum" exemption and should therefore be included in the definition.

Accordingly, the EMDA respectfully requests that paragraph (a) of the "Eligibility Advisor" definition in National Instrument 45-106 be amended as follows:

This phrase should be deleted:
"*a person that is registered as an investment dealer or in an equivalent category of registration under the securities legislation of the jurisdiction*"

And should be replaced with:
"*a person that is registered under the securities legislation of the jurisdiction.*"

Alternatively, this phrase could be revised to read:
"*a person that is registered as an investment dealer, an exempt market dealer, or in an equivalent category of registration*"

* * *

The above comments are respectfully submitted by the Board of Directors of the Exempt Market Dealers Association of Canada on behalf of its membership.

We thank you for the opportunity to provide you with our comments on the Proposed Amendments. If you have any questions or concerns, we ask that you direct them to Brian Koscak, Chair of the EMDA's NI 31-103 Comment Committee, at bkoscak@emdacanada.com or 416-860-2955.

Yours very truly,

Board of Directors
Exempt Market Dealers Association of Canada

cc: Members of the EMDA NI 31-103 Comment Committee*:

Brian Koscak, Chair of the EMDA's NI 31-103 Comment Committee, EMDA Director and Partner, Cassels Brock & Blackwell LLP
Marsha Gerhart, EMDA Director
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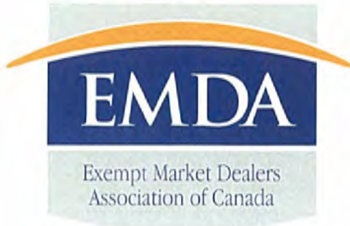

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* *This letter represents the comments of the individual in his or her capacity as a director and/or officer of the EMDA and not those of the firm where the individual is employed and is submitted without prejudice to any position taken or that may be taken by that individual's firm on its own behalf or on behalf of any client.*