

March 5, 2014

VIA E-MAIL

British Columbia Securities Commission
 Alberta Securities Commission
 Financial and Consumer Affairs Authority of Saskatchewan
 The Manitoba Securities Commission
 Ontario Securities Commission
 Autorité des marchés financiers
 Financial and Consumer Services Commission of New Brunswick
 Nova Scotia Securities Commission
 Registrar of Securities, Prince Edward Island
 Superintendent of Securities, Newfoundland and Labrador
 Registrar of Securities, Northwest Territories
 Superintendent of Securities, Yukon Territory
 Registrar of Securities, Nunavut

<p>Ontario Securities Commission 20 Queen Street West, Suite 1903, Box 55 Toronto, ON M5H 3S8</p> <p><u>Attention:</u> John Stevenson, Secretary <u>E-mail:</u> jstevenson@osc.gov.on.ca</p>	<p>Autorité des marchés financiers 800, square Victoria, 22e etage C.P. 246, tour de la Bourse Montreal, Quebec H4Z 1G3</p> <p><u>Attention:</u> Me Anne-Marie Beaudoin, Corporate Secretary <u>E-mail:</u> consultation-en-cours@lautorite.qc.ca</p>
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Dear Sirs and Mesdames:

Re: Proposed Amendments to NI 31-103, NI 33-109, NI 52-107, OSC Rule 33-506, OSC Rule 35-502 and Related Forms (the “Proposed Amendments”)

This submission is made by the Private Capital Markets Association of Canada (formerly, the Exempt Market Dealers Association of Canada) (**PCMA Canada**) in response to the request for comments



published by the Canadian Securities Administrators (the **CSA**) on December 5, 2013 in connection with the Proposed Amendments.

WHO IS PCMA CANADA?

PCMA Canada is a not-for-profit association founded in 2002 to be the national voice of exempt market dealers (**EMDs**), issuers and industry professionals in the private capital markets across Canada.

PCMA Canada plays a critical role in the private capital markets by:

- assisting its hundreds of dealer and issuer member firms and individuals to understand and implement their regulatory responsibilities;
- providing high-quality and in-depth educational opportunities to private capital markets professionals;
- encouraging the highest standards of business conduct amongst its membership across Canada;
- increasing public and industry awareness of the private capital markets in Canada;
- being the voice of the private capital market to securities regulators, government agencies, other industry associations and the public capital markets;
- providing valuable services and cost-saving opportunities to its member firms and individual dealing representatives; and
- connecting its members across Canada for business and professional networking.

Additional information about PCMA Canada is located on our website at: www.pcmacanada.com.

WHO ARE EXEMPT MARKET DEALERS?

EMDs are fully registered dealers who engage in the business of trading in securities to qualified exempt market clients. EMDs are subject to full dealer registration and compliance requirements and are directly regulated by the provincial securities commissions. The regulatory framework for EMDs is set out in National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations (NI 31-103)* applies in every jurisdiction across Canada.

EMDs must satisfy substantially the same "Know-Your-Client" (**KYC**), "Know-Your-Product" or (**KYP**) and trade suitability obligations as other registered dealers who are registered investment dealers and members of the Investment Industry Regulatory Organization of Canada (**IIROC**) and mutual fund dealers and members of the Mutual Fund Dealers Association of Canada (the **MFDA**). NI 31-103 sets

out a comprehensive dealer regulatory framework (substantially the same for all categories of dealer) which requires EMDs to satisfy a number of regulatory obligations including:

- educational proficiency;
- capital and solvency standards;
- insurance;
- audited financial statements;
- KYC, KYP and trade suitability;
- compliance policies and procedures;
- books and records;
- trade confirmations and client statements;
- disclosure of conflicts of interest and referral arrangements;
- complaint handling;
- dispute resolution;
- maintenance of internal controls and supervision sufficient to manage risks associated with its business;
- prudent business practices requirements;
- registration obligations; and
- submission to regulatory oversight and dealer compliance reviews.

EMDs may focus on certain market sectors (*e.g.*, oil and gas, real estate, mining or minerals, technology, venture financing, etc.) or may have a broad cross-sector business model. EMD clients may be companies, institutional investors, accredited investors or investors who purchase exempt securities pursuant to an offering memorandum or another available prospectus exemption.

EMDs provide many valuable services to small and medium size enterprises (**SMEs**), large businesses, investment funds, merchant banks, financiers, entrepreneurs, and individual investors, through their ability to participate in the promotion, distribution and trading of securities, as either a principal or agent.

IMPORTANCE OF CAPITAL RAISING IN THE PRIVATE CAPITAL MARKET

The private capital markets plays an important role in the capital markets

As OSC Chair, Howard Wetston announced when the OSC released its Progress Report on the OSC's exempt market review in August 2013:

“The exempt market plays an important role in Ontario’s capital markets, especially for start-ups and SMEs. It is important as a securities regulator that our continued work in this area promotes an exempt market that is innovative and globally competitive and that facilitates capital raising while protecting investors.”

The private capital market forms a large part of Canada’s capital markets

According to a recent report published by the CSA, in 2011 a total of \$149.5 billion was invested by Canadian investors in investment funds and non-investment funds under the five main prospectus exemptions used for capital raising.¹ The private capital market forms the largest part of Canada’s capital markets.

SMEs play an important role in our economy and need money to grow.

A lot of money raised for SMEs is in the exempt market. As OSC Chair, Howard Wetston, stated at PCMA Canada’s annual conference in May 2013:

“There is no question that small and medium-sized companies play a significant role in driving economic growth. We recognize that small and medium-sized companies account for more than half of Canada’s GDP. In 2011, about \$28 billion was raised through the exempt market in Ontario by non-investment funds, out of a reported total distribution of about \$87 billion. Yet small and medium-sized companies are struggling to raise capital and they need to grow.”

¹ The five main prospectus exemptions used for capital raising are: the accredited investor exemption in section 2.3 of NI 45-106, the family, friends and business associates exemption in section 2.5 of NI 45-106, the offering memorandum exemption in section 2.9 of NI 45-106, the minimum amount exemption and the additional investment in investment funds in section 2.19 of NI 45-106). See footnote 1 in CSA Proposed Amendments to the Accredited Investor and Minimum Amount Investment Prospectus Exemptions.

EMDs play an important role in capital raising for SMEs

EMDs play a fundamental role in the capital raising process for issuers, particularly SMEs, who may find it difficult to attract the attention of full service investment dealers. It is important that the CSA continue to support the capital raising efforts by EMDs for both public companies and private companies, especially during these challenging economic times and we commend the CSA for its continued efforts in this regard.

PCMA CANADA'S COMMENTS ON THE PROPOSED AMENDMENTS

I EMDs and PROSPECTUS OFFERINGS

PCMA Canada submits that EMDs provide a valuable capital raising function in the private capital markets and should continue to be allowed to participate in a prospectus offering. Under the Proposed Amendments, the CSA seeks to amend Section 7.1(2)(d)(i) of NI 31-103 and prohibit EMDs from participating in prospectus offerings by deleting language that had commonly been interpreted as permitting EMDs to participate in a prospectus offering (e.g., initial and subsequent public offerings or continuously offered investment funds). The deleted language is set out below.

7.1(2)(d)

(i) an exempt market dealer may act as a dealer by trading a security that is distributed under an exemption from the prospectus requirement, ~~whether or not a prospectus was filed in respect of the distribution.~~

We respectfully request that the CSA reconsider its proposed amendment to Section 7.1(2)(d)(i) of NI 31-103 for the reasons set out below.

EMDs are not statutory “underwriters” if they participate in a prospectus offering as selling group members of an underwriting syndicate

When invited to participate in an underwriting syndicate, EMDs typically assume the role of a “selling group member”. As a selling group member, an EMD is discharging a critical function in the offering process, but is not acting as an underwriter and does not sign the prospectus. A “selling group member” is specifically carved-out of the definition of “underwriter” under, for example, the Ontario *Securities Act* which explicitly states that an “underwriter”, excludes:

*“a person or company whose interest in the transaction is limited to receiving the usual and customary distributor’s or seller’s commission payable by an underwriter or issuer” (the **Selling Group Member Carve-Out**).*

Evidence of EMDs acting as underwriters and selling group members in prospectus offerings

Prior to September 29, 2009 and the implementation of Registration Reform, we understand that some limited market dealers (**LMDs**) acted as underwriters and/or were selling group members in connection with prospectus offerings, such as special warrant financings. In contrast to EMDs today, LMDs were not subject to any proficiency, insurance, capital or other requirements, and yet were allowed to act as underwriters or were selling group members in connection with special warrant prospectus offerings. EMDs today are a highly regulated category of dealer and subject to the direct and active oversight by the CSA and its members, as we have described earlier in this comment letter.

After September 29, 2009, we understand that EMDs have entered into selling group arrangements as selling group members with IIROC dealers in connection with prospectus offerings.

No evidence of investor harm

EMDs provide an important distribution channel, as well as a source of information, support and guidance, for issuers in the private capital markets, including SMEs, and accordingly, we submit that EMDs should be able to sell any type of security as a selling group member, whether or not it is offered under a prospectus, provided they restrict their sales to accredited investors. The CSA has not provided any evidence of investor harm where EMDs participate as selling group members in a prospectus offering, and we submit that, in the absence of such evidence, the CSA’s restrictive proposal runs contrary to the principle of evidenced-based regulation and the CSA’s broadly stated public policy goal of supporting capital raising. PCMA Canada recommends that the CSA continue to allow EMDs to participate as selling group members in a prospectus offering.

EMDs participate as selling group members to provide continuity to early stage issuers and their investors

EMDs and their investors are a critical source of early-stage growth capital for SMEs, including those in the mining, oil and gas and technology sectors, through private placements and other alternative financing stages. This type of capital formation is crucial to our economic development and it should continue to be supported and encouraged by the CSA through its regulatory framework.

When a nascent issuer reaches the stage in its lifecycle when it is able to access the public capital markets and undertakes a prospectus offering, investors and issuers alike may place considerable value on the continued participation by the EMD who supported the issuer's early growth as a private company. Companies with small market capitalizations in particular are heavily reliant on continued access to capital markets through the services provided by EMDs. These issuers, and other stakeholders, also benefit from having more dealers participating in the underwriting syndicate, particularly at the co-manager and selling group level.

PCMA Canada respectfully submits that it would be counterproductive to the capital raising process that, after nurturing the issuer's growth, sometimes over a period of years, an issuer should be denied the ability to appoint its EMD to participate in this milestone financing event; especially when that EMD and its investors played a critical role in an issuer's past financings and success. Not all issuers succeed, but when they do, it is customary and appropriate for the EMD that helped such an issuer raise early-stage capital to be formally recognized for those efforts, and to be financially compensated. An important component of that compensation is afforded by way of being granted a position, albeit a junior position, in the underwriting syndicate as a selling group member.

Three ways EMDs can participate in a prospectus offering

PCMA Canada submits that EMDs should be able to participate in a prospectus offering by: (a) selling prospectus-offered securities directly to accredited investors; (b) entering into a referral arrangement with an IIROC dealer in compliance with NI 31-103 (a **Referral Arrangement**); and (c) earning a fee for providing prior and/or ongoing advisory and support services to the issuer or IIROC dealers (an **Advisory Fee**), as part of a selling group. For the reasons stated below, PCMA Canada strongly believes that the CSA should allow EMDs to participate in prospectus offerings as selling group members, as previously allowed and consistent with past practices, before and after Registration Reform.

1) EMDs selling to accredited investors

PCMA Canada submits that EMDs should be able to continue to sell prospectus qualified securities to accredited investors and be part of the selling group. We submit that it is not clear, on a policy basis or practical basis, why an EMD can sell a security to an accredited investor under a prospectus exemption but not under a prospectus as a selling group member; especially when accredited investors are assumed to have a certain level of sophistication and the ability to withstand financial loss and the presence of the prospectus enhances the investor protection.

EMDs effectively can participate as a selling group member today by “wrapping” the prospectus in an offering memorandum and distributing the securities under an exemption, such as the accredited investor or offering memorandum exemption under sections 2.3 and 2.9 respectively of National Instrument 45-106 – *Prospectus and Registration Exemptions (NI 45-106)*.

PCMA Canada submits that the requirements that are typically involved in a private placement offering, such as resale restrictions and form filing and fee payment requirements should not apply when a prospectus has been filed for that security. PCMA Canada believes that satisfaction of private placement requirements when selling securities to accredited investors despite a prospectus being available imposes an unnecessary administrative burden on issuers and EMDs, and arguably investors are worse off in such circumstances for several reasons:

- First, a report of exempt trade should not be required since a prospectus distribution report and activity fee is already paid in connection with a prospectus offering. To require another filing and payment of fees would be an unnecessary duplication of information and fees with no public benefit.
- Second, a prospectus should not be required to be filed as an “offering memorandum” as required in a private placement since the prospectus is already filed on SEDAR and publicly available and provided to the investor.
- Third, a prospectus provided to investors as an “offering memorandum” should not be required to provide different statutory rights of action applicable pursuant to those required for an offering memorandum since these rights ultimately provide investors with less protection than the statutory rights of action an investor receives in connection with a prospectus offering.
- Fourth, investors should receive free-trading shares similar to those received by other investors who purchased securities through an IIROC dealer. Investors should not be subject to a four-month resale restriction, as would typically be required when they purchase securities of a reporting issuer sold on a private placements basis.

2) EMDs and Referral Arrangements

PCMA Canada submits that EMDs should be able to enter into a Referral Arrangement with an IIROC dealer in connection with a prospectus offering. The IIROC dealer would be responsible for all of its KYP, KYC and suitability obligations in connection with the sale of such prospectus-qualified securities

to qualified investors and not the EMD. The referral fee would be an amount negotiated between the EMD and IIROC dealer.

3) EMDs and Advisory Fees

PCMA Canada submits that EMDs who have provided prior support of an issuer in early stage financings or for other commercial reasons as negotiated between the IIROC dealer and EMD, should be able to receive part of the aggregate selling commission in connection with a prospectus offering, even if no securities are sold by an EMD to any investors. This Advisory Fee would be an amount negotiated between the EMD and the issuer and/or IIROC dealer.

II EMDs SHOULD BE ABLE TO SELL PROSPECTUS-QUALIFIED MUTUAL FUNDS

Section 7.1 of the Companion Policy to NI 31-103 currently states that *“EMDs can sell investment funds (whether or not they are prospectus-offered) under prospectus exemptions without registering as a mutual fund dealer or being a member of the MFDA.”*

Proposed Section 7.1(2)(d)(i) of NI 31-103 would appear to prohibit EMDs from selling prospectus-offered mutual funds since the Proposed Companion Policy related to this section adds language that states that *“exempt market dealers are not permitted to participate in a distribution of securities offered under a prospectus”*. On its face, this language is overly broad and potentially impacts the interpretation of Proposed Section 7.1(2)(d)(i) of NI 31-103, which expressly acknowledges that EMDs may sell prospectus-offered mutual funds.

Unexplained removal of language about EMDs selling investment funds without registering as a mutual fund dealer or being a member of the MFDA

It is unclear why the CSA struck the language in Section 7.1 of the Companion Policy to NI 31-103 that states that EMDs can sell investment funds without registering as a mutual fund dealer or being a member of the MFDA. Is this drafting change to the Companion Policy intended to restrict EMDs and give effect to a new registration requirement? If the CSA is intending a policy change we believe this matter should be more specifically addressed.

We strongly believe that EMDs selling prospectus-qualified mutual funds should not be required to be registered as a mutual fund dealer or be a member of the MFDA as has been the policy of the CSA for some time. Accordingly, PCMA Canada respectfully requests the CSA reintroduce this language back to the Companion Policy to remove any doubt about CSA policy. We note the lack of corresponding

commentary in the Proposed Amendments to explain such a change and therefore, we must conclude that no such fundamental policy change was in fact intended.

III EMDs AND THE RESALE OF FREE-TRADING SHARES OF SECURITIES LISTED, QUOTED OR TRADED ON A MARKETPLACE

PCMA Canada does not object to the CSA's proposal under the Proposed Amendments to further clarify "brokerage activities" and restrict EMDs from trading securities listed on an exchange in a foreign market (*i.e.*, through US broker-dealers on a U.S. exchange). However, we submit that the CSA has moved too far in prohibiting EMDs from participating in secondary market trading in securities listed on a domestic marketplace (*i.e.*, through a registered portfolio manager or an IIROC dealer).

Unclear policy rationale

We are unclear why EMDs would be permitted to resell securities of a reporting issuer subject to a four-month hold period under a prospectus exemption, but not permitted to sell the same securities once they become free trading (*i.e.*, four months plus a day). If this is the CSA's intended policy, we believe further discussion and explanation of this policy is needed to ensure EMDs and the industry can appreciate the important distinction the CSA would now be making.

We recognize that EMDs generally are not able to directly participate in secondary trading in listed securities since they are not participating members of an exchange or a CDS participant; however, EMDs should still have the right to do so, *indirectly* through an IIROC dealer, at the request of their investor/clients.

EMDs should be permitted to receive referral fees for trades of listed securities in the secondary market in Canada

Although we understand that securities of a reporting issuer sold by an EMD under a prospectus exemption are often registered and held by an IIROC dealer as custodian (or by a third party custodian), PCMA Canada submits that EMDs should have the right to indirectly participate and be compensated for the resale of listed securities in the secondary market in Canada through a referral arrangement, made in accordance with the referral arrangement rules under NI 31-103.

PCMA Canada believes EMDs should be encouraged to work with other registrants, including portfolio managers and IIROC dealers, consistent with CSA statements emphasizing the need for registrants to ensure that investments are suitable for their investor/clients, particularly in the private capital markets. It is important for investors to have a diversified portfolio of investments that include public

and private market securities and, in order to achieve diversification, EMDs are increasingly entering into referral arrangements with portfolio managers and IIROC dealers. Such referral arrangements provide an EMD's investor/clients access to prospectus-offered securities in the secondary market in exchange for the payment of a referral fee in compliance with the referral arrangement rules under NI 31-103. This would include the resale of securities traded on a domestic marketplace such as a stock exchange.

PCMA Canada is concerned that the Proposed Amendments involving new Section 7.1(5) of NI 31-103 and its related Companion Policy would prohibit EMDs from entering into such referral arrangements since EMDs would indirectly (through a portfolio manager or IIROC dealer) be participating in the resale of securities that are publicly listed on a marketplace. PCMA Canada believes investor interests are better served by allowing EMDs to enter into referral arrangements with any registrant, including a portfolio manager or IIROC dealer, and earn a referral fee for trades made by that other registrant in any securities that are publicly listed on a domestic marketplace.

IV CLARIFICATION OF THE DEFINITION OF "MARKETPLACE" IN SECTION 7.1(5) OF NI 31-103

We request the CSA to clarify its use of the term "**marketplace**" in Proposed Section 7.1(5) of NI 31-103 to ensure there is no uncertainty. For example, we note that FundSERV Inc. is recognized not as a "marketplace" but as a "clearing agency" under subsection 21.2 of the *Securities Act* (Ontario) and under comparable legislation in all other CSA jurisdictions, as evidenced by the OSC exemptive relief order provided to FundSERV in April 2012.² However, we are unclear whether the broad language in the definition of "marketplace" in the *Securities Act* (Ontario) in fact excludes FundServ Inc. and generally, the CSA's intended definition of this term in connection with Proposed Section 7.1(5). Whether FundServ is expressly included or excluded from the application of this proposed section may have a material impact on its interpretation and our views on this matter.

V PROPOSED EXPERIENCE REQUIREMENT FOR EMD CCOs

The Proposed Amendments seek to add a new experience component to the proficiency requirement to be a chief compliance officer (**CCO**) of an EMD. The CSA proposal would require a CCO applicant to have "*gained 12 months of relevant securities industry experience in the 36-month period before applying for registration*" (the **Proposed Experience Requirement**).

² See http://www.osc.gov.on.ca/en/SecuritiesLaw_ord_20120413_226_fundserv.htm.

Proposed Experience Requirement is too subjective

The Proposed Experience Requirement, although generally helpful in encouraging high standards in the industry, is not related or tailored to the functions and responsibilities of an EMD CCO. We are concerned that what is relevant and, equally important, sufficient ‘securities industry experience’ is not well articulated by the CSA, other than as set out in the Companion Policy to NI 31-103.³

Imposing the Proposed Experience Requirement is a possible barrier to entry

We are concerned that imposing the Proposed Experience Requirement could act as a barrier to entry for new EMDs if there is an insufficient number of available CCO candidates who satisfy the Proposed Experience Requirement. We are also not aware of any cost benefit analysis involving the introduction of the Proposed Experience Requirement and understand this is required by Section 143.2 of the *Securities Act* (Ontario). Such information would be helpful to all capital market participants.

Moreover, the implementation of NI 31-103 and its new business trigger test, has resulted in the need for more issuers to become registered (when an exemption is not available or they do not seek to engage a registered dealer) and these firms may not have personnel with such “relevant securities industry experience”.

Better alternative is to introduce a mandatory EMD CCO Course

The CSA states in the Proposed Amendments that “*CCOs must have a good understanding of the regulatory requirements applicable to the firm and individuals acting on its behalf. CCOs must also have the knowledge and ability to design and implement an effective compliance system.*” (the **CCO Requirements**). We agree.

PCMA Canada believes a better way to satisfy the CCO Requirements is to mandate that all CCO candidates for EMDs take a mandatory CCO course and successfully pass an examination. We believe a mandatory EMD CCO Course specifically designed for CCOs of EMDs would ensure a more

³ The Companion Policy to NI 31-103 which states that ‘**relevant securities industry experience**’ includes experience acquired: (a) during employment at a registered dealer, a registered adviser or an investment fund manager in related investment fields, such as investment banking, securities trading on behalf of a financial institution; (b) securities research, portfolio management, investment advisory services or supervision of those activities; (c) in legal, accounting or consulting practices related to the securities industry; (d) in other professional service fields that relate to the securities industry; or (e) in a securities-related business in a foreign jurisdiction.

consistent level of knowledge and experience across the industry and increase the likelihood of satisfying the CCO Requirements.

Although a permanent EMD CCO Course does not presently exist, PCMA Canada has already identified a need for a CCO course and opportunities for ongoing education for CCO's. For example, last year, we presented a full-day EMD CCO Course in Toronto, Calgary and Vancouver and we have plans to expand the program in 2014. PCMA Canada is also near completion of the redesigned Exempt Market Products Course with our partners, the IFSE Institute, which will form a new baseline proficiency standard for the exempt market. PCMA Canada would be pleased to work with the CSA to develop an EMD CCO Course to satisfy industry needs and CSA expectations.

Consider allowing one CCO to act for more than one EMD

While considering matters involving EMD CCOs, PCMA Canada recommends that the CSA permit a qualified individual to be the CCO of more than one unrelated EMD, which is currently not permitted.

We are advised by our members that: (a) it is difficult for EMDs to find individuals interested, yet alone qualified, to be an EMD CCO; and (b) many small EMDs are unable to afford to pay for a full-time CCO unless their business model and activity are of a certain minimum size. We submit one advantage of having a part-time EMD CCO is that their compensation and the costs of developing, implementing and updating an effective compliance system could be shared among EMDs. Any conflicts could be adequately addressed by the CSA as part of the registration process.

There is precedent for having a senior officer working part-time at more than one registrant since IIROC currently allows individuals to act as a CFO for more than one IIROC dealer firm. Arguably, there is merit in extending this to CCOs provided that there is an adequate plan of supervision which addresses, and properly manages, any conflicts of interest. There are also numerous examples of individuals having multiple CCO roles in related registrants which also provides some precedent for our recommendation.

Need for conflicts guidance for lawyers as CCOs

We understand that some lawyers are, or seek to be, the CCO of an EMD or other registrants in Canada while also maintaining a legal practice. We are aware of the potential conflicts of interest and solicitor-client privilege issues that such circumstances may present, especially when clients of the lawyer are also clients of the EMD, but would appreciate CSA guidance on how such matters are to be managed. CSA guidance on such matters would ensure it is undertaken fairly and consistently among all CSA jurisdictions and among all categories of registration where a lawyer is, or seeks to be,

registered as a CCO while also operating a legal practice. We believe this is important especially when registration rule and regulations continue to evolve in number and complexity and often are of a legal nature, while registrants desire to engage and retain qualified and competent candidates, that may include lawyers.

VI PROPOSED CHANGES TO SECTION 8.5 OF NI 31-103 AND TRADES THROUGH OR TO A REGISTERED DEALER

The Proposed Amendments also seek, among other things, to clarify the use of the “trade through or to a registered dealer” exemption in section 8.5(a) of NI 31-103 (**section 8.5(a)**). Currently, section 8.5(a) reads as follows:

“The dealer registration requirement does not apply to a person or company in respect of a trade by the person or company if one of the following applies:

(a) the trade is made solely through an agent who is a registered dealer, if the dealer is registered in a category that permits the trade;” [emphasis added]

The CSA proposes to amend existing section 8.5(a) by removing the “solely” qualifier for trades through a registered dealer, and explicitly stating that *“the registration exemption cannot be relied upon if the person or company seeking to rely on the exemption directly solicits or contacts any purchaser or prospective purchaser in relation to the trade.”* [emphasis added] (**Proposed section 8.5(a)**)

The CSA has proposed corresponding changes to section 8.5 in the Companion Policy to NI 31-103, which would provide, among other things, that such persons may work with issuers and appropriately registered dealers provided that they do not contact or solicit purchasers.

PCMA Canada understands that Proposed section 8.5(a) would not change the application of the business trigger. We believe it is still necessary to determine, as a first step, whether an individual requires registration. This involves a principles-based analysis that depends on the facts. However, if an unregistered person does (or may) require registration, then Proposed section 8.5(a) provides an important *limited* exemption. If an unregistered person does engage in registerable activities, they may do so provided that the sale is made through a registered dealer and they do not contact or solicit investors directly.

We understand that Proposed section 8.5(a) clearly prohibits unregistered persons from engaging in ‘client-facing’ activities. However, we do not believe, as presently drafted, that it necessarily

precludes an unregistered person from engaging in 'dealer-facing' activities. Accordingly, PCMA Canada requests the CSA to clearly state in the Companion Policy to NI 31-103 that unregistered persons who trigger registration can still engage in 'dealer-facing' activities and receive a finders' or referral fee and provide examples of such acceptable activities.

In addition, PCMA Canada believes the CSA should provide additional guidance in the Companion Policy to NI 31-103 of what unregistered persons who trigger registration can do when relying on Proposed section 8.5(a). Although we are not suggesting that this is common practice for unregistered persons who trigger registration to engage in registerable activities, we believe additional CSA guidance should be provided for unregistered persons who may be in such circumstances.

For example, although an officer or director who regularly participates in selling activities has triggered registration, in our view, such individuals should still be able to engage in *incidental* "acts in furtherance of a trade" in the normal course of their duties to promote capital raising while relying on Proposed section 8.5(a). Please consider the following examples:

- *Family and friend and close business associates* - A brokered private placement that involves contacting and soliciting family members and close personal friends and business associates can be important sources of capital for an issuer. Officers and directors of issuers would typically be closely involved in communicating with these individuals. If the relevant individuals are caught by the business trigger and not within an available exemption, issuers would now need to coordinate all such communications through a registered dealer which would be unreasonable and would most likely cause a reduction in the amount of capital that is raised through these channels. The same could be said when it comes to soliciting individual's from a 'President's List' (or equivalent) of potential investors.
- *Soliciting strategic investors* - Many issuers have strategic investors who have been granted some form of participation rights on future financings. If the relevant individuals at the issuer are caught by the business trigger and no exemption is available, communications with such investors in a brokered private placement, could be required to be made exclusively through a registered dealer. Therefore, issuers would have to turn over part of their relationship with the strategic investor to a registered dealer and must accept that compliance with the issuer's contractual obligations to the strategic investor is in the hands of the registered dealer and out of the control of the issuer.
- *Distributions to existing securityholders* - The proposed restricted rights offering prospectus exemption for distributions to current securityholders (*i.e.*, Multilateral CSA Notice 45-312 – *Proposed Prospectus Exemption for Distributions to Existing Security Holders*) may have to be

run in its entirety through a registered dealer if the relevant individual officers or directors are caught by the business trigger and no registration exemption is available.

- *Road shows* - It is not unusual for officers and other representatives of an issuer from participating in road shows along with its registered dealer to raise capital from investors. A “road show” under Canadian securities law, in the context of a public offering of securities, means “a presentation to potential investors regarding a distribution under prospectus conducted by one or more investment dealers on behalf of an issuer in which one more executive officers or other representatives of the issuer participate.” [emphasis added] Although road shows for public offerings, by definition, permit and involve officers and other representatives of the issuer participating in an investor presentation, Proposed section 8.5(a), on its face, prohibits such participation for private placements for persons caught by the business trigger by removing the exemption.

PCMA Canada believes the CSA should permit such incidental activities by directors and officers even if their activities have triggered registration if they are done in a *bona fide* manner in the course of a capital raise with, and under the direction and presence of, a registered dealer. We would hope the CSA provides such additional guidance when it finalizes these amendments.

* * *

We thank you for the opportunity to provide you with our comments on the Proposed Amendments and welcome any opportunity for further dialogue with you on these proposed changes.

Yours very truly,

Private Capital Markets Association of Canada

***“Brian Koscak”
Chair***

***“David Gilkes”
Vice Chair***

***“Geoffrey Ritchie”
Executive Director***

***“Marsha Gerhart”
Director***

***“Conan McIntyre”
Director***

cc: PCMA Canada, Board of Directors