

# IBK Capital Corp.

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**VIA email: [jstevenson@osc.gov.on.ca](mailto:jstevenson@osc.gov.on.ca)**

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

c/o Ontario Securities Commission  
20 Queen Street West, 19<sup>th</sup> Floor, Box 55  
Toronto, ON, M5H 3S8

**Attention: John Stevenson, Secretary**

Dear Sirs and Mesdames:

**Re: Proposed National Instrument 31-103 Registration Requirements**

This submission is made by IBK Capital Corp. (“IBK Capital”) in response to the request for comments published February 23, 2007 on the proposed National Instrument 31-103 *Registration Requirements* (“Proposed NI 31-103”). IBK Capital is an independent, privately owned investment banking firm operating in Ontario under the Limited Market Dealer registration and is a member of the Limited Market Dealers Association (the “LMDA”). IBK Capital offers a full range of services including, among others, merger, acquisition and divestiture advisory services, business valuations, fairness opinions, takeover defence planning, project financing and private placements of equity and debt instruments.

IBK Capital was founded by a group of experienced professionals who had previously worked for many years as investment bankers with Merrill Lynch Canada Inc. The team is proud of its expertise and has a solid track record in the Canadian investment banking community. Our core competencies lie in raising capital for emerging companies and assisting them in achieving their capital markets and corporate development objectives.

Since its inception in February 1989, IBK Capital has established an enviable track record as an independent Canadian financial advisory firm, having played a role in transactions with a combined value of \$4.3 billion. IBK Capital successfully completed many financial advisory engagements including capital raising assignments for a large number of senior and junior companies, internationally. Companies serviced by IBK Capital are active in the Natural Resources Sector (gold, precious gems, base metals, industrial minerals, coal, uranium, alternative fuels such as peat), the Technology Sector (animation, semi-conductors, telecommunications and environmental sciences) and the Renewable Energy Sector (biomass, solar and wind). IBK Capital provides financial advisory services to public companies, and to private emerging companies which includes assisting them in raising first and second round financings and the most effective way to become listed on a recognized stock exchange in North America. Since January 1994, IBK Capital has raised over \$575 million in equity financings.

Our comments generally track very closely those issued by the LMDA but they also are specific to reflect the nature of our investment banking activities. We thank you for the opportunity to comment.

### **General Comments**

We support the Canadian Securities Administrator's (the "CSA") Registration Reform Project to "harmonize, streamline and modernize the registration regimes across Canada". We also support the CSA's efforts to improve "client protection" measures.

However we are concerned that certain requirements in the proposed NI 31-103 would lead to unnecessary regulatory burden and unjustified costs to the Limited Market Dealers ("LMDs") in general and IBK Capital in particular. The proposed requirements with respect to Working Capital, Financial Institution Bond, Financial Audit and Account Reporting would substantially increase the LMDs' operating costs.

We do not disagree with the CSA that the ultimate purpose of such additional financial burden is to provide additional protection to the investor; however we believe that there should be an exemption from those requirements provided to those Exempt Market Dealers ("EMD") who do not hold client assets. We believe this is a significant oversight in Proposed NI 31-103.

We are further concerned that the additional burden and costs will flow beyond the realm of registrants and regulators and will negatively affect the venture capital market costing issuers and investors both time and money.

We respectfully request that the CSA engage IBK Capital and other LMDs in a consultation process and suggest the CSA provide specific industry concerns from issuers and investors as a measure for further discussion about registration reform.

## Specific Comments

### **Fit and proper and conduct requirements**

*Question #1: What issues or concerns, if any, would your firm have with the proposed fit and proper and conduct requirements for exempt market dealers? Please explain and provide examples where appropriate.*

a) Proficiency Requirements for LMD/EMDs

<b>Requirement</b>	<b>Current Requirement</b>	<b>Comment</b>
Proficiency Requirements for an Exempt Market Dealer include:  (i) the Canadian Securities Exam and either the Conduct and Practices Handbook Exam or the Partners, Directors and Senior Officers Exam;  (ii) the Series 7 Exam and the New Entrants Exam; or  (iii) meet the requirement of a Portfolio Manager - Advising Representative	None	The “relevant experience” guidance contained in s. 4.4 of the Companion Policy <sup>1</sup> states that the regulator may grant an exemption based on qualifications or relevant experience equivalent to, or more appropriate in the circumstances than, the prescribed proficiency requirements. This guidance should be codified in Proposed NI 31-103 to ensure that current registrants (LMDs) and current exempt market participants that will be registered as exempt market dealers (“EMDs”) pursuant to Proposed NI 31-103 (collectively “LMD/EMD”) are granted an exemption (“grandfathered”) based on their experience in the LMD/EMD industry. The exemptions should include an exemption for professionals possessing qualifications and/or experience relevant to the LMD/EMD industry.

We support the CSA objective of harmonizing the proficiency requirements across Canada; however, we requested that exemptions from the proposed proficiency requirements be given to individuals with relevant industry experience equivalent to the prescribed proficiency requirements.

With respect to IBK Capital, our firm was founded in 1989 and we believe that to day, we are one of the largest LMDs providing financial services (private placement financing activities) to junior and mid size mineral resource, alternative energy and technology companies. Over the past 18 years, all our senior bankers have had extensive hands-on experience in advising corporate clients on how to access the capital markets successfully. In that regard, we believe that such individuals be exempted from the proposed proficiency requirements.

b) Capital Requirements

<b>Requirement</b>	<b>Current Requirement</b>	<b>Comment</b>
LMD/EMD Firms will be required to maintain excess working capital of at least \$50,000 plus certain other capital requirements including, the deductible on their Financial Institution Bond (“FIB”) insurance policy.	None	We note that the levels of FIBs required appear to be activity or risk based calculations whereas the “excess working capital” requirement does not appear to be related to an EMD’s business model or the risk associated to the investor. The “excess working capital” requirement should take similar factors into consideration when determining whether an EMD actually hold clients’ assets that may be at risk and an exemption provided if no significant risk exists.

<sup>1</sup> *Ibid*, Companion Policy, s. 4.4, p 77.

We note that the CSA has not identified any significant risks to issuers, investors or other market participants in capital markets serviced by the LMD/EMD industry. Therefore, this requirement from the Proposed NI 31-103 imposes an unjustified financial burden on our financial position. This appears to conflict with the overall objective of reducing regulatory burden and increasing regulatory efficiency. An exemption from this provision should be provided for LMD/EMD registrants.

### Ultimate Designated Person (“UDP”) and Chief Compliance Officer (“CCO”)

*Question #4: Registration of the UDP and CCO is proposed. As well, we propose that the UDP be the senior officer in charge of the activity carried on by a firm that requires the firm to register. What issues or concerns, if any, would your firm have with these registration requirements? Do you think the registration of the UDP and CCO contributes to or detracts from a firm wide culture of compliance? Please explain.*

Requirement	Current Requirement	Comment
Proficiency Requirements for an Exempt Market Dealer – Chief Compliance Officer  (i) The Canadian Securities Exam, and the Partners, Directors and Senior Officers Exam; or  (ii) The Series 7 Exam and the New Entrants Exam.	None	The “relevant experience” guidance contained in s. 4.4 of the Companion Policy <sup>2</sup> states that the regulator may grant an exemption based on qualifications or relevant experience equivalent to, or more appropriate in the circumstances than, the prescribed proficiency requirements. This guidance should be codified in Proposed NI 31-103 to ensure that LMD/EMDs are granted an exemption from the CCO proficiency requirements based on their relevant experience in the LMD/EMD industry. The exemptions should include an exemption for professionals and other LMD/EMD industry participants possessing qualifications and/or experience relevant to the position of CCO

### Insurance

*Question #8: The Rule requires dealers, advisors and fund managers to have Financial Institution Bonds. In cases where the owners of the firm also carry out the operations and registerable activity of the firm, usually in small firms, are these bonds prohibitively costly to obtain and will the bonds provide coverage if they are obtained in these situations?*

Requirement	Current Requirement	Comment
LMD/EMDs will be required to maintain a Financial Institutional Bond with clauses A to E in the greater of:  (i) \$50,000 per employee or \$200,000, whichever is less;  (ii) 1% of the client assets the dealer handles, holds or has access to, or \$25,000,000 whichever is less; or  (iii) 1% of the dealers total assets or \$25,000,000, whichever is less.	None	The levels of FIBs required appear to be activity or risk based calculations but do not appear to be related to an LMD/EMD’s business model or the risk associated to the investor where an LMD/EMD does not hold client assets in client accounts. The FIB requirement should take into consideration whether an LMD/EMD actually holds client assets that may be at risk and an exemption should be provided from the FIB requirement where client assets are deemed to be at no significant risk.

<sup>2</sup> *Supra.*

## Additional Comments

### Financial Reporting Requirements

Requirement	Current Requirement	Comment
<p>(i) LMD/EMDs will be required to deliver to their respective Commission annual audited statements and a calculation of excess working capital, within 90 days after their fiscal year-end.</p> <p>(ii) LMD/EMDs will also be required to file with the regulator 30 days after the end of each of the first, second and third quarter of its fiscal year, its financial statements for the quarter, and also a calculation of working capital for each of these quarters.</p>	None	<p>(i) Preparation of quarterly financial statements and annual audited financial statements is prohibitively burdensome and expensive. IBK Capital holds client funds in trust for very short periods of time until the private placement financing closes. This period is usually no longer than five business days. Imposing quarterly statements and annual audited financial statements will provide little or no additional regulatory protection for the institutions and high net worth individuals we service.</p> <p>(ii) Section 3.1 of the OSC Rule 31.503 <i>Limited Market Dealers</i> provides an exemption for LMDs with respect to providing audited financial statements to the regulator with the filing of an application or renewal of application to register as a LMD. A similar exemption from the requirement to supply audited financial statements to the regulator should be included in S. 4.22 of Proposed NI 31-103 for LMD/EMDs.</p> <p>(iii) We draw the CSA's attention to the relevant provisions of the <i>Income Tax Act</i> (Canada) pursuant to which a declaration that the financial information contained in the filer's return is true and accurate provides adequate comfort for Canada Revenue. If the Government of Canada, which derives its entire income from these filings, finds sufficient comfort in such a declaration, we submit that such a declaration should provide sufficient comfort to the regulator, pending a reason to request an audit of an LMD/EMD's financial statements. We also note that pursuant to s. 4.21 the Proposed NI 31-103,<sup>3</sup> each LMD/EMD grants the regulator the right to request the LMD/EMD's appointed auditor<sup>4</sup> to provide the regulator with an audit or review should one be required.</p> <p>(iv) We also note that pursuant to s. 4.23 of Proposed NI 31-103, an "advisor" only has to file financial statements and Form 31-103 F1 <i>Calculation of Excess Working Capital</i> at the end of the year. Since a significant number of LMD/EMDs also do not hold client cash or assets, these LMD/EMDs should be provided with an exemption to the statement filings requirement such that these statements are unaudited and that they are only required to be filed on a yearly basis, rather than quarterly.</p>

Imposing this audit requirement on LMD/EMDs will only serve to increase the cost of capital as these additional transaction costs will ultimately be transferred on to the issuers. This audit requirement derives its genesis from the working capital requirement referred to above. LMD/EMDs that do not hold client assets do not have counterparty obligations and are not in possession of property that has to be distributed back to clients should an LMD/EMD elect to wind up its operations. Moreover, the removal of the working capital requirement for LMD/EMDs would make the requirement for this provision redundant. We would also like to draw the CSA's attention to s. 4.20 and s. 4.21 of Proposed NI 31-103,<sup>5</sup> which gives the regulator the authority to cause an audit to be conducted on a registrant should the regulators so require. We believe that this provision provides the regulatory authorities with sufficient power to

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<sup>3</sup> *Ibid*, s. 4.23, p 38.

<sup>4</sup> *Ibid*, s. 4.20, p. 37.

<sup>5</sup> *Supra*.

address situations of concern to the regulators as they occur, without imposing excessive audit requirements on LMD/EMD's universally, which requirements will cause LMD/EMDs to incur significant cost increases and drastically increase their regulatory burden. Moreover, the auditing of LMD/EMDs operating statements, especially where LMD/EMDs do not hold client assets, will provide limited additional security to capital market participants.

### Statements of Accounts

Requirement	Current Requirement	Comment
<p>(i) An LMD/EMD must send a statement of account to each client not less than once every three months.</p> <p>(ii) The statement must show any debit or credit money balances and, the details of securities held for or owned by the client, unless otherwise requested by the client.</p>	None	<p>(i) IBK Capital's investor client transactions are one-off exempt market financings (private placements). It serves no useful purpose to require IBK Capital to provide investor clients with account balance statements of \$0.00 on a regular basis as contemplated in the Proposed NI 31-103. Therefore the CSA should provide an exemption to this provision of Proposed NI 31-103 for those LMD/EMDs that do not hold client assets. To do otherwise is to regulate a situation that does not exist.</p> <p>(ii) Other industry participants such as SRO participants are only able to provide these statements through the acquisition of expensive accounting software programs. We should not be compelled to incur unnecessary transaction costs where there is no rational connection to our business model.</p>

### Complaints – Dispute Resolution Services

Requirement	Current Requirement	Comment
<p>A registered firm must allow clients the option of resolving their complaint through a dispute resolution service.</p> <p>Upon receipt of a client complaint, the registered firm must</p> <p>(i) Notify the person or company that a dispute resolution service is available to mediate the complaint, and</p> <p>(ii) Inform the complainant on how to use the service.</p> <p>Proposed NI 31-103 further requires that a registered firm have</p> <p>(i) written policies and procedures for documenting investigating, and resolving a complaint; and</p> <p>(ii) Within two months after the end of it's fiscal year</p>	None	<p>(i) S 5.12 of the Companion Policy<sup>6</sup> differentiates between an "expression of dissatisfaction" and a "complaint". These definitions need to be codified in Proposed NI 31-103 as many "expressions of dissatisfaction" can, we submit, be resolved before they become "complaints".</p> <p>(ii) A dispute resolution service should not be required for LMD/EMDs as their investor clients are by definition sophisticated individuals or institutions (i.e. accredited investors) that have the financial means to litigate where no reasonable resolution to a dispute appears possible. Many of our institutional investor clients have greater resources for dispute resolution services than do we. Therefore a dispute resolution service requirement is not only an inequitable requirement for IBK Capital but also prohibitively expensive and unnecessary.</p>

<sup>6</sup> *Ibid*, Companion Policy, s. 5.12, p. 83.

<p>(or on any other specific date mandated by the applicable securities regulatory authority), each LMD/EMD must file a report with the Regulator explaining its complaint handling policies and, the number and type of the complaints received during the reporting period.</p>		
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IBK Capital respectfully submits the above comments.

Yours very truly,

**IBK Capital Corp.**