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Attention: John Stevenson, Secretary
Ontario Securities Commission
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June 1, 2007

Subject: **Important Changes to New Canadian Securities Legislation**
Proposed National Instrument 31-103 [NI 31-103] / Registration Reform Project (RRP)
REQUEST FOR COMMENT to Canadian Securities Administrators (CSA)

Dear Mr. Stevenson:

Thank you for the opportunity to respond to the Canadian Securities Administrators NI 31-103 (RRP) proposal.

The Canadian Securities Administrators (CSA), under the guise of Registration 'Reform', now taking the form of National Instrument 31-103 generally known as the RRP (Registration Reform Project), has introduced and, with the inevitability of a steamroller, is determined to legislate dangerous anti-competitive legislation. Legislators must put this sinister self-serving special interest legislation under a powerful magnifying glass, see it for what it really is, and put a stop to it immediately.

Less than five years ago British Columbia and Alberta championed excellent progressive securities legislation called National Instrument 45-106 [NI 45-106] which has proven to be outstanding legislation that opened the investment market to a wider range of the investing public and made it possible for smaller firms to access capital directly via the securities instrument known as the Offering Memorandum, a detailed disclosure containing most, if not all, of the information contained in a prospectus. NI 45-106 has enjoyed tremendous success, so much success that large securities brokers (so-called 'registrants') and their large national trade organizations, the Investment Dealers Association (IDA) and the Mutual Fund Dealers Association (MFDA), are determined to undermine the progressive NI 45-106 exemption because it is cutting into their profits, as people who make investments via Offering Memorandum often make them directly, not using IDA and MFDA members. It's more economical.

NI 31-103 is regressive anti-competition legislation cleverly disguised as an initiative to harmonize *registration*. The truth is that the sole purpose of NI 31-103 is to give market advantage to an already bloated special interest group of large brokerage firms. For evidence look no further than the NI 31-103 'Steering Committee'; it is composed of eleven members, no fewer than six of which are not even securities regulators, but are members of large stock brokerages and their national trade associations, the IDA and MFDA – totally self-serving *industry* groups! NI 31-103 does absolutely nothing to protect the public. It is shocking to see such unnecessary self-serving repulsive legislation having been allowed to advance as far as it has.

WHAT RIGHT DO THESE SPECIAL INTERESTS HAVE TO 'REGULATE' THEIR COMPETITION?

NI 31-103 comes at a time when the public's attitude toward stock brokers, mutual fund peddlers, financial advisors, investment dealers, financial planners and the like, is cynical at best. The resulting concentration of power in the hands of large brokerages and the corresponding loss of rights to a dynamic and innovative – but unfortunately smaller and more vulnerable – sector of the investment community, i.e. private issuers, makes NI 31-103 not only unjust, but also dangerously anti-competitive.

I attach a detailed commentary on NI 31-103 for your review. I – and many others, including private issuers, intermediaries and ordinary individual and corporate investors – hope that provincial and federal governments and their securities regulators do not succumb to the pressure and demands of 'big brokerage', and that they put a stop this proposed legislation at once.

A copy of this letter and attached NI 31-103 commentary is being forwarded to a significant number of federal and provincial government representatives, regulators, private issuers, intermediaries and individual and corporate investors. I assume that, as per your CSA commitment, you will post the attached commentary to the Ontario Securities Commission (OSC) and Autorité des marchés financiers (AMF) websites, and that you will forward copies of the letter and commentary to all CSA jurisdictions.

I respectfully thank you for your kind attention and consideration in this matter.

Wayne Strandlund
Fisgard Capital Corporation

Encl. Commentary on NI 31-103

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Friday, June 1, 2007

COMMENTARY ON PROPOSED NEW SECURITIES LEGISLATION

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Founder & Owner **Fisgard Asset Management Corporation**
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Fisgard Capital Corporation:

Fund Size	**approximately $147,000,000**
Number of Shareholders	**approximately 2,500**
Fund Start-up	**April 14, 1994**

This commentary represents observations and opinions of the author as well as the opinions of numerous other parties who are seriously and adversely affected by the proposed new securities legislation.

SUBJECT **CANADIAN SECURITIES ADMINISTRATORS (CSA)**
REGISTERED REFORM PROJECT (RRP) / National Instrument 31-103

IMPORTANT CHANGES TO SECURITIES REGULATIONS CONCERNING PROPOSED NEW REGISTRATION REQUIREMENTS FOR EXEMPT ISSUERS
(EXAMPLE: NON-REGISTERED 'ISSUERS' USING AN OFFERING MEMORANDUM and NON-REGISTERED 'INTERMEDIARIES', e.g. FINDERS, REFERRAL AGENTS)

PURPOSE **This comment is a case against implementing the RRP (NI 31-103) because it does not protect the public interest – in fact it severely limits access to good investments by the public – but does much to expand the interest of large securities industry registrants and their national trade organizations, namely the Investment Dealers Association (IDA) and the Mutual Fund Dealers Association (MFDA), at the expense of other industry participants, namely non-registered exempt issuers and intermediaries whose interests under the RRP are severely diminished. The RRP is a sham, a contrivance cleverly disguised as an initiative to harmonize, streamline and modernize. It is an anti-competitive money grab, and must be dismissed by regulators and legislators.**

In reality RRP attempts to block access to public investment funds to all but Canada's already bloated major investment dealers. Many quality – generally smaller investments – are denied access to public investment funds. As a result, the investing public is denied access to many quality investments simply because they are not offered by 'the majors' called 'registrants'.

NI 31-103 must be stopped immediately. It is extremely regressive legislation, and couldn't come at a worse time, that is a time when the public's attitude toward investment dealers is cynical at best. The resulting concentration of power and the corresponding diminishment of rights to a successful – albeit smaller – sector of the investment community (private exempt issuers and intermediaries) makes NI 31-103 dangerously anti-competitive legislation.

The Canadian Securities Administrators (CSA) must protect the interest of the public as well as the interest of *all* industry stakeholders and participants, including non-registered exempt securities issuers and intermediaries. The RRP (NI 31-103) does not do this.

The public and lawmakers must demand answers from the creators and proponents of the RRP. They must ascertain the 'real' agenda behind the RRP, and they must carefully examine the RRP initiative from the point of view of competition legislation.

Comments on the RRP:

01) The composition of the RRP Steering Committee ('six' *industry* representatives and 'five' *regulatory* representatives suggests that the RRP is an *industry* initiative, not a *regulatory* initiative, and the RRP must therefore be viewed from that perspective. Evidence is that industry *registrants*, when pressed on the issue, invariably complain that *'all they really want is a level playing field'*. If all they want is a level playing field, why do we need regulation such as that proposed by the RRP? Why are *registrants* trying so hard to disguise the 'real' issue (competition) behind *Registration Reform* with niceties such as harmonizing, streamlining, modernizing? Are there *public perception* (marketing) concerns? Are there *legal* (competition) concerns? Yes, there are – and that is why the RRP is flawed from the outset.

02) Existing regulations are adequate to deal with *all* issuers and intermediaries, registered as well as non-registered. Regulators must enforce existing regulations instead of creating new regulations. Why not get the bad actors off the street instead of creating more barriers for good business people?

03) Closely affiliated managers of exempt issuers are not intermediaries in the traditional *agency* sense because they represent the issuer and its single product only; therefore they need not be registered.

04) Non-registered issuers and intermediaries ought to be represented on the RRP steering committee. After all, 'they' are the targets of the RRP and, having a considerable presence in the market, they should have the right to advance their position on the RRP Steering Committee.

05) The Steering Committee is unfairly loaded in favour of *registered* securities industry representatives and *their* trade associations such as the IDA and the MFDA, clearly indicating a bias against non-registered exempt issuers and intermediaries. Where is the fairness in industry (*registered)* representatives and *their* national associations calling the shots for other vital industry sectors such as exempt issuers?

S**ix of eleven members of the CSA's RRP Steering Committee represent companies and industry trade associations (Investment Dealers Association, Mutual Fund Dealers Assocation, Odlum Brown Limited, National Bank Financial, Investors Group Inc., GP Capital Corporation). All are clearly special interest groups with no mandate but to advance their members' position. The IDA and MFDA are 'trade associations'. What business do they have 'regulating'?**

<u>WHAT RIGHT DO THESE SPECIAL INTERESTS HAVE TO 'REGULATE' THEIR COMPETITION?</u>

Non-registered exempt issuers and non-registered intermediaries are not even represented on the Steering Committee. They are rendered essentially defenseless against their competition.

Imagine a bunch of real estate brokers and their national *trade* association banding together and legislating builders and their closely affiliated managers to be licensed (*registered*) 'to sell their own product'. Imagine the outcry? Competition, anyone? Conflict of interest, anyone?

06) There is no evidence that the proposed *registration* is necessary, let alone in the public interest; and there is no evidence that non-registered exempt issuers and intermediaries cause more problems than registrants; therefore registration is not necessary to prevent such problems.

The Ontario Securities Commission representative at the Vancouver RRP consultation session on May 7, 2007 stated that the RRP was being tabled to protect investors; however, she had no numbers or statistics to justify her statement. Why not? Nor was she at all clear as to 'how' the Registration Reform Project (NI 31-103) did, in fact, protect the public. Attendees were told that $5 Billion was raised in 2004 by way of exempt offerings. We asked what percentage of problems resulted from exempt offerings. Once again, not surprisingly, the Ontario representative had absolutely no response.

The most generous and forgiving skeptic could not be faulted for concluding that both the BCSC and ASC RRP sessions were 'information' or 'briefing' sessions as opposed to 'consultation' sessions. The OSC and ASC representatives weren't 'listening' to anything.

07) Non-registered exempt **'issuers'**, who are seriously and adversely affected by the RRP, and are the target of the RRP, have not been appropriately and adequately informed of RRP consultation sessions, and are not properly represented.

[Invitations to the BCSC and ASC consultation sessions were sent to an unrealistically small number of non-registered exempt 'issuers', essentially a 'hand-picked' audience – certainly a far cry from a truly representative number. On such a critical issue invitations should have been sent to *all* such issuers. The livelihood of many private exempt issuers is at stake.

Invitees to the RRP consultation session in Vancouver on May 7, 2007 were advised that there were 3,500 non-registered exempt issuers and intermediaries in Canada. That's a very significant constituency; yet only a tiny fraction of them were invited to the consultation sessions. Why not all of them? Who decided who got invited and who didn't? What were the invitation criteria?

08) Non-registered **'intermediaries'**, who are seriously and adversely affected by the RRP, and are the targets of the RRP, have not been appropriately and adequately informed of RRP consultation sessions, and are not properly represented.

[Very few <u>non-registered 'intermediaries'</u> were invited to the consultation sessions – again a 'hand-picked' audience, and not at all a representative number. On such a critical issue *all* intermediaries should have been invited. It is unacceptable that intermediaries were essentially left out of the consultation process. Again, the livelihood of many intermediaries is at stake.]

09) 'Suitability assessment' and 'know-your-client' reviews create a conflict for single-product issuers and their managers; therefore these parties must be prohibited from using them.

The best way to fix something that isn't broken is to leave it alone. **NI 45-106 (**Prospectus and Registration Exemptions) is not broken. In fact, it is accomplishing exactly what it was designed to accomplish, and doing so perfectly well. Thanks to NI 45-106 non-registered as well as registered industry participants are able to offer investments to the public – good investments, with excellent disclosure. Introducing new regulation, such as NI 31-103, that simply disguises the real reason behind the RRP is reprehensible. NI 45-106 is in its infancy, and already big brokerage and its national monopolies, the Investment Dealers Association and the Mutual Fund Dealers Association, are determined to kill it by legislating rules designed for no other purpose than to increase their already bloated market share. Large brokerages and their clubs, the IDA and MFDA, recognize that the investing public has developed a healthy appetite for private issues that tend to by-pass the big brokerage houses, thereby eating into their potential revenues (fees, trading, etc). Big brokerage, the IDA and the MFDA are determined to regain this market share, even if it means regulating their competition out of business.

The sudden urgent need to *'register'* non-registered exempt issuers and intermediaries as if 'we' exempt issuers and intermediaries are 'the problem' is a red herring – a conveniently manufactured problem. The '*registration problem*' is a construct of belligerent industry registrants to lessen competition. Therefore their solution, under the guise of *Registration Reform* (the RRP), must be dismissed by regulators and legislators.

Most exempt **Issuers** and their **Managers** are closely related, sharing directors, officers, office premises and administration. The issuer and the manager may have separate legal counsel and auditors, and the issuer is managed under a Management Services Agreement, which often requires that the manager provide advertising and promotion of the issuer's product. The manager promotes only the issuer's product. It is extremely important when considering the RRP proposal in NI 31-103 to keep this in mind; that is, the exclusive relationship between the issuer and the issuer's manager, because, in the writer's opinion, there is no reason why the issuer ***or its closely related manager*** should be required to be registered.

The relationship between issuer and manager, including substantial reference to the Management Services Agreement, is exhaustively detailed in the typical Offering Memorandum under the headings:

- Reliance by the Issuer on the Management Company
- Key Personnel
- Conflict of Interest

It is impossible for a reader of the Offering Memorandum not to clearly understand the issuer-manager relationship; the reader is easily able to draw correct conclusions as to the effect the relationship may have on his or her security. The degree of affiliation is a major factor, warranting, as is the case at the present time, registration relief for both the issuer *and* its closely affiliated manager.

Where close and exclusive relationships exist between issuers and managers, the managers should not be considered to be intermediaries, and should not have to be registered.

Why – all of a sudden – must the Issuer and the Manager be *registered*? Could it be that NI 45-106 (Prospectus and Registration Exemptions) is working 'too well' – so well that it must be stopped? The writer, and many others, believe that this is the case. NI 45-106 is working extremely well for the investing public, and this is drawing business (although a paltry portion at best) away from the large registered trading firms who make big money in the prospectus/IPO business and the *trading* business. NI 45-106 companies, on the other hand, don't trade. Investors are perfectly fine with that; but brokers, obviously, aren't.

Take a Section 130 Mortgage Investment Corporation (MIC) for example. Such a company invests in mortgages. It does nothing else. Its focus, by law, is very narrow. It is the *mortgage business*, not in the *securities business*. If you ask its shareholders what the issuer does, they tell you that *the company is in the mortgage business*. They do not say that the company is in the *securities* business. This ought to be the test of the nonsensical *'in the business'* proposition so conveniently and glibly advanced by RRP proponents as a reason for requiring *registration*. Shareholders of a MIC, a type of company that is not suited to a *trading* environment, do not advocate or support *registration*. It's a waste of money. *Their* money.

The issuer-manager relationship is a classic case of where regulators can properly exercise their authority to waive registration of both issuer *and* its closely related manager based on the degree of affiliation between issuer and manager. The affiliation is a matter of fact, and easily measured.

The CSA's website states:

> **"The principal objective of the RRP is to create a flexible registration regime leading to administrative efficiencies and a reduced regulatory burden."**

Business – and the general public I'm sure – are in favour of flexibility, and we are on the same page as the Government of British Columbia in terms of reducing regulatory burden. Unfortunately the proposed RRP is not flexible. It *is* in the public interest for regulators to waive registration for exempt issuers and related managers that handle the issuer's investment *only*. I sincerely hope that regulators will not succumb to pressure from the industry *registrants* referred to above, and abdicate their present flexible position for one that does not allow them to make exceptions as circumstances warrant. Common sense must prevail.

RECOMMENDATION: that issuers as well as their closely related managers not be classified as intermediaries, and not have to register.

I challenge the reader to reconcile 'reduced regulatory burden' in the context of the proposed RRP regime. The following is just a taste of what is clearly dramatically 'increased' regulatory burden.

The invitation I received to the RRP consultation session in Vancouver states:

> **"What will the new registration requirements be? The broad features of the Working Group's proposal are that. . . "**
>
> **1) Individuals must pass the Canadian Securities Course**
>
> This reduces regulatory burden? Why should representatives of non-registered exempt issuers and/or their closely related affiliated managers have to take the Canadian Securities Course? *The course is not relevant*.

The Working Group must provide clear evidence (including examples) of why it is in the public interest for directors, officers, significant securityholders and employees of exempt issuers and intermediaries to take the Canadian Securities Course, a course clearly designed for people who wish to be in the securities business as stock brokers, financial planners, investment advisors and so forth. The course has no relevance whatsoever for 'issuers' and closely related managers. The course is unnecessary, and a waste of time and money.

To use our MIC example, and the details of one in particular, which MIC employs people licensed under the Mortgage Brokers Act and the Real Estate Services Act. The MIC's employees are professionals in the real estate and mortgage business. *This* is the product their investors are interested in. *This* is the product the employees are trained and licensed to handle. The MIC's licensees have an average of eighteen years experience. Two have thirty-nine years, one has twenty years and three have seventeen years. Not only are they trained and experienced, but they are 'otherwise licensed' to the hilt. How many more licenses do they need? How many more fees must they be forced to pay? How much more red tape must they be buried under? Why should they take a course that is totally irrelevant to their investors' needs? Why should they take a course designed for 'brokers' when they don't 'broker' anything, nor do they give financial or investment advice for a fee.

The investors are interested in what the personnel know about the MIC's investment product (mortgages secured by Canadian real estate property), *not* what they know about brokering stock, selling mutual funds and giving financial and investment advice.

The Working Group must provide clear examples of where *harm to the public* could have been prevented had representatives of non-registered exempt issuers or their affiliated managers taken the Canadian Securities Course. I will be surprised if the Working Group is able to dig up even one example. Education is good, but irrelevant courses do not advance 'education'. The costly time-consuming irrelevant Canadian Securities Course must not be required.

At the second BCSC consultation session the Ontario Securities Commission RRP proponent talked about the three criteria of **'proficiency'**, **'solvency'** and **'integrity'**, but did not explain how the Canadian Securities Course satisfies the requirement for 'proficiency'. That's because the CSC has nothing to do with *proficiency* in terms of exempt investments. The 'proficiency' required from a public protection point of view, is that the marketer know all about the specific product being offered. The truth is that absolutely nothing in the Canadian Securities course has anything to do with that. The course is irrelevant.

RECOMMENDATION: that directors, officers, significant securityholders and employees of non-registered exempt issuers and their affiliated managers not be required to take the Canadian Securities Course.

2) firms must maintain a minimum of $50,000 working capital at all times (plus additional amounts if the firm holds investments or maintains un-reconciled client accounts)

How does this square with reducing the regulatory burden? How is $50,000 arrived at? What is the justification for that amount particularly?

In BC, real estate and property management companies require start-up working capital of $5,000 after which they must maintain a positive working capital position at all times (current assets must exceed current liabilities). These companies regularly hold trust money. In the case of property management firms the trust deposits are often large; and even so, they are not required to maintain *excess* working capital. What's the difference in the securities market?

Working Capital is disclosed under the **Issuer Risk** section of an Offering Memorandum under the headings:

- **Future Operations,** and
- **Possible Need for Additional Funds**

The Working Group must provide examples that clearly demonstrate the risk to the public of non-registered exempt issuers and intermediaries not maintaining $50,000 working capital.

RECOMMENDATION: that non-registered exempt issuers and intermediaries not be required to maintain $50,000 excess working capital.

3) firms must maintain a financial institution bond in the amount that is the greater of 1% of total firm assets, 1% of client assets held by the firm, or the lesser of $50,000 per employee or $200,000

How does this reduce the regulatory burden? By wiping out competition?

Surety bonding is required in situations where clients place money or other assets in *trust*. In the case of the MIC for example, the purchase money is not trust money, and goes directly to purchase shares of the issuer once the 48-hour rescission period has passed. Shareholders do not open *accounts* that are maintained by the issuer or manager; they buy shares, and their ownership is recorded in a share register. They do not have *client accounts*.

There is a clear and important distinction between the situation where the investor simply buys a product and the situation where the investor opens an account with a financial or investment advisor, investment dealer or mutual fund dealer, and, in addition to possibly buying investment products, pays a fee for brokerage and/or financial and investment advisory services.

<u>The distinction is extremely important.</u>

In the case of the non-registered exempt issuer MIC type of single product situation:

1) neither the issuer nor the issuer's manager needs to maintain a trust account for shareholder funds or other shareholder assets; and

2) neither the issuer nor the issuer's manager holds trust money as an agent or stakeholder for a principal.

Therefore, what is the justification for an exempt issuer or the issuer's closely related manager being required to maintain a financial institution [surety] bond when neither issuer nor manager are stakeholders, and neither holds money or assets *in trust* for investors? I think none.

The Working Group must:

1) provide a detailed rational, with examples, for this financial institution bond requirement, including a detailed rational for the particular dollar amount required;
2) provide evidence that investors in the exempt market have in fact been unable to recover lost money ***because of the lack of bonding***;

Perhaps the Working Group will also:

1) detail any research they've conducted into assessing the difficulty non-registered issuers and intermediaries will have in obtaining a financial institution bond; and
2) provide an estimate of how many non-registered exempt issuers and intermediaries will be needlessly put out of business as a result of this requirement of the RRP.

Surety bonds are expensive and difficult to obtain, so it is critical that the need for a bond in the first place be clearly established and justified, as well as the amount of such a bond.

How much money has been misappropriated by *non-registrants*, including their closely related (affiliated) managers? By comparison, how much has been misappropriated by *registrants*? How much money has been misappropriated by non-registered exempt issuers or intermediaries distributing under an Offering Memorandum compared to that misappropriated by issuers distributing under a Prospectus?

The point is that a few hard statistics are required to justify such wide-ranging regulatory change as that proposed in NI 31-103.

When concern was expressed at the first ASC RRP consultation session about costs associated with the RRP, including courses, registration fees, increased working capital requirements, surety bonding, additional filing, additional administration and so forth, ASC's Shaun Fluker casually responded that the cost was '*not that high*' and was *'just the cost of doing business'*.

Has Fluker ever run a business? Is Fluker able to detail the costs he is so flippant about? Has Fluker ever had to procure a surety bond? What is 'not that high'?

RECOMMENDATION: that a financial institution bond be required *only* in situations where the exempt issuer or the issuer's affiliated manager holds money or other assets 'in trust' for clients, and that the bond amount be fair, and appropriately match the potential loss it insures against.

4) firms must maintain appropriate books and records for all securities transactions and file annual audited financial statements

Non-registered issuers distributing under an Offering Memorandum already maintain records of all securities transactions. We are audited every year and we file audited statements with all appropriate securities commissions. All share purchases, including the names, addresses and compensation of referral agents, are filed with appropriate securities commissions.

RECOMMENDATION: that the status quo be maintained for non-registered exempt issuers and their affiliated managers, and that they not be required to register.

5) firms and individuals must meet conduct standards that other registrants meet today, such as avoiding and managing conflict, disclosing conflicts, costs, and compensation, know-your-client reviews, suitability assessments, and other conduct requirements in today's securities laws

Offering Memorandums of most, if not all, non-registered exempt issuers detail the following:

- resale restrictions
- purchaser's rights
- net proceeds
- use of net proceeds
- reallocation
- working capital deficiency
- business of the issuer
- tax criteria
- development of the issuer's business
- history of the issuer's business
- long term objectives
- short term objectives
- material agreements

- directors, management, promoters and principle holders
- management experience
- penalties, sanctions and bankruptcy
- share capital
- securities offered
- voting rights
- redemption and retraction rights
- method for payment
- method of subscribing
- two-day hold (rescission) period
- acceptance of subscriptions and closings
- investor qualifications
- tax consequences and income-tax rulings
- shareholder dividends and dispositions
- eligibility for Deferred Income Plans (RRSPs, RRIFs, etc)
- compensation paid to sellers and finders
- commissions and finders fees as a percentage of gross proceeds
- risk factors (market condition factors)
- investment risk (market limitations, liquidity, etc)
- absence of management rights for securityholders
- lack of separate legal counsel for securityholders
- issuer risk
- key personnel of issuer and manager
- conflicts and potential conflicts of interest
- future operations and possible need for additional funds
- industry risk (insurance, default, yield, competition, etc)

As an experienced issuer and manager I can assure securities regulators that matters of conflict (avoiding, managing, disclosing), and all costs and compensation (fees, commissions, management, etc) are clear for investors to see, and are routinely dealt with on a day to day basis. The conduct of non-registered exempt issuers and affiliated managers is exemplary, as is well evidenced by the public's satisfaction and growing demand for exempt investments.

Non-registered issuers and affiliated managers display at least the level of professional conduct and care as registrants.

The Working Group must provide clear evidence that the conduct and business practices of non-registered exempt issuers are inferior to that of *registrants*. And they must demonstrate that, if the conduct and business practices of non-registered issuers and intermediaries are inferior to that of registrants, implementing the RRP's *registration* will remedy the situation.

ASC's Shaun Fluker asserts that there is *empirical evidence* that non-registered exempt issuers cause many complaints – the obvious inference being 'more complaints than registrants'. Given the seriousness of this indictment the Working Group *must* provide unequivocal evidence that this is, in fact, the case.

In short, prove it.

'Suitability assessment' and 'know-your-client' reviews have a place amongst brokers, mutual fund dealers and advisors selling financial planning services, people who are paid by their *clients* to provide advice and financial services; but they have no place in the single product exempt market where no such services are provided, let alone paid for by the investor.

In the case of the exempt issuer, for example, the person being interviewed regarding the issuer's product (shares in a MIC for example), is a 'customer', not a 'client'. The customer is purchasing shares. The customer is not 'opening an account' and is not becoming a 'client'.

It is critically important to recognize that neither the non-registered issuer nor its affiliated manager is paid by the investor for brokerage services, financial advice or investment advice.

Look at the facts. EVERY Offering Memorandum clearly advises

"You must seek your own independent legal and accounting advice"

and the investor must sign a Risk Acknowledgement that screams

WARNING

and contains the following statement in bold-face type

"The person selling me these securities is not registered with a securities regulatory authority and has no duty to tell me whether this investment is suitable for me."

The Working Group must explain how, after insisting that the customer acknowledge that *"The person selling me these securities is not registered with a securities regulatory authority and has no duty to tell me whether this investment is suitable for me."* it then becomes appropriate for the representative of the exempt issuer or its manager/marketer to insist that the customer complete a 'know-your-client' and 'suitability assessment'.

This is what exempt issuers distributing under an Offering Memorandum do now:

1) They must warn John Doe that they have no duty to tell him whether or not the investment is suitable for him; and then

2) They must insist that he read and acknowledge the WARNING, and evidence his approval and acceptance by signing it.

Here is what the RRP proponents want these same issuer to do:

1) and 2) above; and then

3) complete a know-your-client and suitability assessment for John Doe to sign.

Know-your-client and suitability assessments make no sense in this situation because the exempt issuer is not providing, nor being paid for, investment or financial advice. The exempt issuer is selling a product, the issuer's product – nothing else. The fact is that a direct sale of an exempt issuer's product is simply a buy-sell transaction to a customer – a 'customer', not a 'client' – and the purchase money is not 'trust' money. Big difference.

Perhaps the Working Group will:

1) explain why know-your-client and suitability assessments are required in single product exempt market situations where *investment advice* is not provided, or paid for; and

2) explain how one of Canada's 'Big Five' bankers, through its *trust* arm, a *registrant*, protected a young investor by charging $243 a year on his $660 self-directed RRSP.

Perhaps the CSA's RRP Steering Committee or Working Group will have some thoughts on the above – particularly how *registration* helped the investor.

What macabre legislation would compel a single-product issuer or its manager to hold itself out as an *'agent'* for an investor and refer to the investor as a *'client'*, and give the client investment and financial advice (but not get paid for it) while selling its single investment product? Maybe the Working Group or Steering Committee knows. I think it's madness.

Existing regulations protect the public. Singling out non-registered issuers and intermediaries as '*the problem*' is dishonest. If regulations are being breached, enforcement is the solution, for *all* issuers, registered *and* non-registered. We don't need more rules; we need enforcement.

RECOMMENDATION: that non-registered issuers and their affiliated managers be prohibited from using know-your-client reviews and suitability assessments; and that they be subject to the same conduct and business practices requirements, penalties and sanctions as registrants.

6) firms maintain and monitor a compliance system to comply with the proficiency, conduct, and financial viability requirements

We exempt issuers and managers continually monitor compliance, conduct, proficiency and financial viability. We do this at all times, as a matter of course. Speaking of 'regulatory burden', why do we need another regulation to make sure we do what we're already doing – what we're already required to do?

RECOMMENDATION: that existing regulations be maintained, and that regulators enforce rules already in place, and size sanctions and penalties to suit the offence.

The typical MIC, for example, provides a plain-language Offering Memorandum that tells investors what they need to know about the MIC's product, the issuer, the manager and the risks involved. MIC investors don't want to *trade*; they prefer the non-traded exempt product. They like the fact that the MIC product, the *issuer's* product, is explained in detail. They like the fact that MIC personnel don't push other products they know nothing about. Investors know that the MIC is *not registered*. They know the MIC is *exempt*. They are okay with that. And they know perfectly well that the MIC personnel don't give financial or investment advice.

What's the problem? Where are the complaints?

From time to time an investor may rescind the investment, perhaps as a result of the WARNING in the RISK ACKNOWLEDGMENT. Rescissions are a clear indication that the Offering Memorandum, Subscription Agreement and Risk Acknowledgment *are* read, and that they *do* have an effect on prospective investors.

THEY INDICATE THAT THE PRESENT SYSTEM (NI 45-106) WORKS.

Is the pubic aware:

- that the issuer is an exempt issuer? Yes.
- that the issuer can be sued for damages? Yes.
- that the investment can be cancelled? Yes.

The first page of the Offering Memorandum states in bold print:

Offering Memorandum for Non-Qualifying Issuers

Resale Restrictions

You will be restricted from selling your securities for an indefinite period. See item 10, Resale Restrictions.

Purchaser's Rights

You have 2 business days to cancel your agreement to purchase these securities. If there is a misrepresentation in this Offering Memorandum, you have the right to sue either for damages or to cancel the agreement. See item 11, Purchasers' Rights.

No securities regulatory authority has assessed the merits of these securities or reviews this Offering Memorandum. Any representation to the contrary is an offence. This is a risky investment. See item 8, Risk Factors.

Clear enough?

Here is the FORM 45-106F4 Risk Acknowledgement and the attendant warning contained in every Offering Memorandum.

FORM 45-106F4

Risk Acknowledgement

I acknowledge that this is a risky investment:

- I am investing entirely at my own risk.
- No securities regulatory authority has evaluated or endorsed the merits of these securities or the disclosure in the offering memorandum.
- The person selling me these securities is not registered with a securities regulatory authority and has no duty to tell me whether this investment is suitable for me.
- I will not be able to sell these securities except in very limited circumstances.
- I may never be able to sell these securities.
- I could lose all the money I invest.

WARNING

I am investing $_____ [total consideration] in total; this includes any amount I am obliged to pay in future. Fisgard Capital Corporation will pay $_____ of this to _____ as a fee or commission.

I acknowledge that this is a risky investment and that I could lose all the money I invest.

_____ _____

Signature of Purchaser Signature of Purchaser

_____ _____

Date Print name of Purchaser

Sign 2 copies of this document. Keep 1 copy for your records.

You have 2 business days to cancel your purchase

To do so, send a notice to Fisgard Capital Corporation stating that you want to cancel your purchase. You must send the notice before midnight on the 2nd business day after you sign the agreement to purchase the securities. You can send the notice by fax or email or deliver it in person to Fisgard Capital Corporation at its business address. Keep a copy of the Notice for your records.

Fisgard Capital Corporation

3378 Douglas Street
Victoria, BC V8Z 3L3
Phone: (250) 382-9255 or 1-866-382-9255
Investor Fax: (250) 382-9295 or 1-866-384-1498
Email: info@fisgard.com

[Instruction: The purchaser must sign 2 copies of this form. The purchaser and the issuer must each receive a signed copy.]

You are buying *Exempt Market Securities*

They are called *exempt market securities* because two parts of securities law do not apply to them. If an issuer wants to sell *exempt market securities* to you:

- the issuer does not have to give you a prospectus (a document that describes the investment in detail and gives you some legal protections), and
- the securities do not have to be sold by an investment dealer registered with a securities regulatory authority.

There are restrictions on your ability to resell e*xempt market securities. Exempt market securities* are more risky than other securities.

You will receive an Offering Memorandum

Read the Offering Memorandum carefully because it has important information about the Issuer and its securities. Keep the Offering Memorandum because you have rights based on it. Talk to a lawyer for details about these rights.

You will not receive advice

You will not get professional advice about whether the investment is suitable for you. But you can still seek that advice from an adviser or investment dealer. In Alberta, Manitoba, Northwest Territories, Prince Edward Island, Quebec and Saskatchewan, to qualify as an eligible investor, you may be required to obtain that advice. Contact the Investment Dealers Association of Canada (website at www.ida.ca) for a list of registered investment dealers in your area.

The securities you are buying are not listed

The securities you are buying are not listed on any stock exchange, and they may never be listed. You may never be able to sell these securities.

The Issuer of your securities is a non-reporting Issuer

A *non-reporting issuer* does not have to publish financial information or notify the public of changes in its business. You will not receive ongoing information about this issuer.

For more information on the *exempt market*, contact your local securities Commission.

Clear enough?

The FORM then proceeds to provide detailed contact information for the thirteen securities commissions in all provinces and territories.

The Offering Memorandum is an excellent disclosure document; but unfortunately – and unfairly – its RISK ACKNOWLEDGEMENT is designed to dissuade buyers from dealing with any investment not accompanied by a 'prospectus', suggesting that the prospectus offers *more* materially important information and protection. The mandatory RISK ACKNOWLEDGEMENT also unfairly suggests that the 'prospectus' gives the buyer some legal protections that the Offering Memorandum does not. First it says:

> ***" . . . the issuer does not have to give you a prospectus (a document that describes the investment in detail and gives you some legal protections) . . .***

Then a few lines later it instructs the prospective buyer to

> ***"Keep the Offering Memorandum because you have rights based on it. Talk to a lawyer for details about these rights."***

The RISK ACKNOWLEDGEMENT suggests that a prospectus gives the buyer some legal protections, and that an Offering Memorandum does not. The mandatory RISK ACKNOWLEDGEMENT then goes on to state that the Offering Memorandum *does* in fact provide the buyer with legal rights. In short, the buyer clearly has legal rights under the Offering Memorandum. Why the contradiction – a 'mandatory' contradiction at that?

The RISK ACKNOWLEDGEMENT, where it states ***"the issuer does not have to give you a prospectus (a document that describes the investment in detail . . .)*** suggests that the Offering Memorandum does not describe the investment in detail. This is misleading. The Offering Memorandum describes the investment in great detail and contains audited financial statements, information no less accurate than a prospectus.

Then, regardless of whether it is true or not, we exempt issuers are obliged to declare:

> ***"Exempt market securities are more risky than other securities."***

Fortunately the public is getting wise to the market. People have seen through the myth of *liquidity*, the myth that their *security* lies in their ability to *trade* the investment. They know how costly that so-called *benefit* can be – and who benefits. They know that exempt securities are no more *risky* than publicly-traded securities, and that the information they need to make an informed decision is contained in an 'Offering Memorandum', not only in a 'Prospectus'. More people are buying exempt products, thanks to the decision by certain provinces, notably BC and Alberta, to adopt NI 45-106 (Prospectus and Registration Exemptions). So far, investors haven't needed *registrants* to buy these products; but now, compliments of RRP *registration*, they will. This is progress? This is protecting the public interest? This is reducing 'regulatory burden'?

The RRP is industry's attempt – by imposing a costly and unnecessary registration regime on private exempt issuers – to severely limit such issuers from selling their products on their own or through their closely affiliated managers. The result is that these presently-exempt issuers will end up 'paying' a *registrant*. Indirectly the RRP is industry's attempt to also force the investing public to use the services of *registrants*, whether the public needs – or wants – to.

The CSA states:

> **"The Project has a steering committee made up of three industry representatives, and representatives of the Investment Dealers Association, Mutual Fund Dealers Association and securities regulators in British Columbia, Alberta, Quebec and Ontario."**

There are four (not three) industry reps on the Steering Committee – not surprisingly, all are *registrants*.

Since non-registered issuers and their closely related managers (so-called intermediaries) are adversely affected, why are non-registered issuers and intermediaries not represented on the Steering Committee? Who appointed this 'Steering Committee'? Why haven't the regulators insisted that *all* affected parties be represented on the Steering Committee? Of course it makes sense that the three industry reps and their IDA and MFDA will promote *their* agenda; it would be a conflict of interest for them to do otherwise because the mandate of these trade organizations is to promote the interest of their members – obviously – and not the

interest of non-members. Naturally they would be inclined to force registration on non-registered exempt issuers and intermediaries, whether it's needed or not. What possible mandate would the *industry* reps, the IDA and the MFDA possibly have with respect to non-registered exempt market issuers and intermediaries?

None I can think of – except to get rid of them.

I believe it is the responsibility of securities regulators to ensure that *all* issuers, including non-registered exempt issuers, are protected from being dominated by a particular interest group, such as *registrants*.

1) Is the RRP clearly *in the public interest*? Is the public better served and protected?

No, it is not clear that *registration* is in the public interest, nor that the public is better protected.

The fact is that the RRP proposal embodied in National Instrument 31-103 severely restricts access to public investment capital for non-IDA and non-MFDA members. It also severely limits peoples' ability to make investments of their choice unless they are prepared to deal through 'registrants', almost all of whom are members of the Mutual Fund Dealers Association and Investment Dealers Association.

2) Is the RRP in the interest of non-registered exempt issuers and intermediaries?

No, the RRP has precisely the opposite effect; many non-registered exempt issuers (and intermediaries) with excellent investment products will likely be driven out of business, at considerable disadvantage to the investing public.

3) Is *registration* of exempt issuers and affiliated managers in the interest of registrant brokerages and their national trade associations such as the IDA and MFDA?

Of course, more competition – good legitimate competition – will be wiped out.

4) Is the RRP in the interest of stock brokers, investment dealers, financial planners and advisors, mutual fund dealers, etc; i.e. *'registrants'*?

Yes, more non-trading non-registered exempt issuers – issuers that neither need, want, nor can afford, expensive and unnecessary brokerage and underwriting services – will be forced out of business, or forced, at considerable expense, to use broker services *whether they need them or not,* or whether the public prefers to use them or not.

Given the appalling lack of evidence that *registration* is necessary – or is in the public interest – I do not see why British Columbia or any other province or territory would support the RRP. **BC and Alberta have done extremely well as a result of the NI 45-106 initiative, and should stay the course.** Apparently the Registration Reform Project originated in Ontario. Maybe they need it. We don't.

It was encouraging to learn that some regulators disagree with the RRP and acknowledge that not *all* provinces and territories have to go along with it. The RRP is not an all-or-nothing proposition. Provinces and territories are welcome to adopt Registration Reform as they see fit. BC and Alberta certainly don't need it; we're doing very well without it – evidently *too well* to suit some jurisdictions and *registrants*. For BC and Alberta to adopt the RRP (NI 31-103) would be a counterproductive regressive step. Very unfortunate.

In accordance with Sections 11 and 169 of the Securities Act and the requirements of the Freedom of Information and Protection of Privacy Act, BCSC staff cannot provide us with details of the *problems* that have given rise to *Registration Reform*. Too bad. But hopefully the Working Group can provide us with:

1) the *number* of problems (10? 100? 1000?);
2) the *geographical location* (city, province, etc) of each of the problems;
3) a brief description of each problem (misrepresentation, theft, breach of trust, etc);

4) the *origins of the complaints* (was a particular complaint brought on by a securities commission, an industry competitor, an aggrieved member of the public?);
5) the *targets of the complaints* (was the complaint made against an exempt issuer, a traded issuer, a securities commission, a non-registered intermediary, a registrant?); and
6) the amount that was lost or misappropriated, as the case may be.

This information can be formatted into a table, and needn't disclose details (names, complainants, etc); just the nature, location and magnitude of '*the problem*'. As a regulator (I am a member of the British Columbia Real Estate Council, a SRO) I am familiar with licensing, education, complaints, discipline, hearings, etc, and I know that a table of this type can be produced with relative ease, without compromising privacy rights.

Is *registration* being introduced to:

1) manage a current problem caused by non-registered exempt issuers and intermediaries; or

2) avert an anticipated problem reasonably likely to be caused by non-registered exempt issuers and intermediaries?

Whatever the reason, the outcome is quite simply that a certain sector of the industry – *registrants* and members of the IDA and MFDA – will enjoy increased market share at the expense of a much smaller and more vulnerable sector composed of non-registered exempt issuers and intermediaries who will have severely diminished access to public investment funds, and at the expense of investors who will now have no choice but to use registrants to make investments.

Who is not happy with NI 45-106? Regulators? Brokers? IDA? MFDA? Ontario? Who is driving the RRP? Regulators? IDA? MFDA? Ontario? Who proposed *registration* in the first place – the industry or regulators? Which regulators? It is obvious that brokers aren't happy that exempt issuers as well as many investors neither need nor want their services. It is obvious why they – and their IDA and MFDA – want *registration*: **It's in *their* interest, since they are *already* registered**.

Where are the public complaints? Where are the complaints about lack of registration, lack of working capital, lack of financial institution bonding, lack of $50,000 working capital reserve, lack of know-your-client forms? Where are the complaints about significant securityholders not being registered? Where are the complaints about the deplorable absence of 'Chief Compliance Officers' and official 'Ultimate Designated Persons' – especially in one or two person firms marketing a tiny private exempt issue? Where are all the complaints about non-registered issuers not having taken the Canadian Securities Course, etc, etc, etc?

WHERE ARE THE COMPLAINTS?

It is the responsibility of regulators to prohibit a sector of the industry – *registrants* in this case (mainly IDA and MFDA members) – from imposing a costly, unnecessary and oppressive registration regime on another sector that does not warrant it, and whose investors neither need – nor want – it.

It is the responsibility of securities regulators to permit equal access to public capital for *all* issuers, not just members of the IDA and MFDA.

It is the responsibility of securities regulators to allow the public full access to investment products offered not only under a prospectus but also investment products offered under an Offering Memorandum without having to purchase investments only through registrants, almost exclusively IDA and MFDA members.

A revealing approach to identifying '*the problem*' is to consider the amount of capital invested in exempt products. At the first BCSC consultation session $6 Billion was referenced by regulator staff as the amount that went into the exempt market in the course of 2004. Is this not a cause for celebration? Is this not a perfect validation of the tremendous success of the NI 45-106 harmonization and streamlining initiative?

Securities staff referred to the $6 Billion as '*a problem*'. A problem for whom? No other *problem* has been identified, and it is painfully obvious that '*the problem*' is simply that the $6 Billion didn't go into the *right* investments, investments created and marketed by *registered* – mainly IDA and MFDA – issuers and dealers.

The problem is not regulatory; it's about *competition*. It's about *market share*. It's big guys whining about little guys sharing in what big guys think is 'their' business, and no one else's.

WHERE ARE THE COMPLAINTS? As a veteran non-registered exempt issuer and manager-marketer of an investment product offered under an Offering Memorandum, I have not received a single complaint from the public or any of my 2,500 investors since bringing the product to market in 1994. And I'm sure there are other exempt issuers with the same experience and track record. I expect that my shareholders would be outraged if they knew what's going on with the RRP, and that they would have to complete 'know-your-client' and 'suitability assessments' to make an investment in my issue. They would consider such a requirement to be nothing more than useless bureaucratic nonsense – and utterly intrusive.

WHERE IS THE PUBLIC IN ALL THIS? Has the public been surveyed to see how they feel about the RRP? Have exempt-product shareholders been consulted? It's easy enough to do as every investor/shareholder is clearly identified on every filing with relevant securities commissions. Isn't regulation supposed to be for the public good? Isn't regulation supposed to put the public first? Isn't regulation supposed to allow people freedom to invest where *they* choose to invest, and in what products *they* chose to invest? Isn't regulation supposed to allow people to purchase investment products directly, without always having to deal through brokers? The RRP is not for the public good, it's for the good of a particular sector of the industry, namely registrants who are members of the IDA and MFDA.

ARE THE POLITICIANS AWARE OF WHAT'S GOING ON?

The Myth of "In the Business"

When defending *registration* there is always a retreat by its proponents to the concept of *"in the business"*.

The invitation I received to the BCSC RRP consultation session states:

"Today, a person who *trades* in securities must register as a dealer or find an exemption in the securities laws from the requirement to register. The Working Group proposes that a person who is *in the business* of dealing in securities, advising on securities, or managing investment funds must register. The proposed definition of "in the business" is attached as Schedule A."

Schedule A (not re-printed in this report) is headed: **Draft definition of *in the business***. It is extremely broad. Too broad.

Here is an "in the business" parallel from the real estate industry. ABC Condominium Developer may sell *its own* condominiums without being licensed [registered]. It is limited, under the Real Estate Services Act, to selling *its own* products, and does not have to be licensed to do so. ABC's employees and promoters do not have to be licensed as long as they limit their marketing to ABC's products. They do not have to take a real estate course, maintain $50,000 working capital, buy a $200,000 bond, provide yearly audited statements, designate Chief Compliance Officers and Ultimate Designated Persons, complete know-your-client and suitability assessments, register all directors, officers and significant securityholders, etc, etc, etc. It would be madness (and anti-competitive) to require a builder [read *issuer*] to do this. Likewise, a non-registered exempt issuer should not have to be registered to market its own product. Nor should its manager, provided it handles only the issuer's product, and no other. Is ABC "*in the business*"? ABC is in the business of *building* condominium homes. *Marketing* the homes is just an associated activity. It is clear to the public that ABC is in the home-building business, *not* in the marketing business in the sense that real estate brokers and stock brokers are in the *marketing business*, an activity for which they must be licensed [registered].

There is a difference between selling your own product and selling someone else's product. It's common sense; the public understands the difference – how come *registrants* and promoters of the RRP don't?

If you were to ask condominium buyers what ABC's *business* is, what do you think they would say: "building condominiums" – or "marketing condominiums"?

> **Non-registered exempt issuers <u>and</u> their closely affiliated managers should not be required to register because:**
>
> **1) they do not sell products other than their own, and**
> **2) they do not provide investment advice and financial planning services, and get paid for it.**

The CSA's RRP Consultation Paper on the Registration Trigger and Regulated Activities states:

> **"The Canadian Securities Administrators (CSA) created the Registration Reform Project as an ongoing initiative to harmonize, streamline and modernize the registration regime across the country. The Project's steering committee includes three industry representatives and members of the Investment Dealers Association, the Mutual Fund Dealers Association, and the securities regulators in British Columbia, Alberta, Quebec and Ontario. The objective is to create a flexible regime leading to administrative efficiencies and reduced regulatory burden that will be implemented jointly by the securities regulators and the self regulatory organizations."**

Implemented jointly by the securities regulators and the self regulatory organizations? The self regulatory organizations are the Investment Dealers Assocation (IDA) and the Mutual Fund Dealers Assocation (MFDA). I wonder where non-registered exempt issuers and intermediaries fit in.

Harmonization, *streamlining* and *modernization* are laudable objectives. But, where is the evidence that the RRP accomplishes these objectives, and benefits anyone but industry registrants and their national trade organizations, all of whom are well represented on the Steering Committee. Of course *they* will benefit; **<u>they don't have to do anything!</u>** The people being hit on, the people being forced for no reason to jump through the RRP hoops, are non-registered exempt issuers and intermediaries.

Where is the evidence that *registration* is in the public interest? Is putting the squeeze on non-registered exempt issuers and intermediaries in the public interest? Is the public's opportunity to access good products improved by *registration*? Are registrants smarter and more educated than non-registrants? Are registrants more honest and law-abiding than non-registrants? Are registrants more trustworthy than non-registrants? Do registrants have a better track record with investments than non-registrants?

The truth is that the trouble exempt issuers and their managers face is the black eye that the industry – that is *registrants* – have given the investment business, not the other way around. I find that many investors who are suspicious about investments are suspicious because of the way they've been treated by so-called industry 'experts' (*registrants*) such as stock brokers, financial planners, investment advisors, mutual fund dealers and the like. I find that many investors want to make investments directly, and not through registrants. We exempt issuers and managers are victims of a registrant-caused industry problem, not the cause of it.

The proposition that *registration* is necessary for *harmonization*, *streamlining* and *modernization* is specious. The IDA, MFDA and *registrants* are targeting competition (non-registered exempt issuers and intermediaries) for more cost and regulation, fatuously insisting that *registration – not* harmonization – is the primary concern. By doing this they conveniently ignore the most important issue, which is the wish of investors to simply invest as much as *they* want, *directly* if they want (that is, not through brokers) anywhere in Canada – in exempt products if *they* want – and not be arbitrarily and unreasonably limited by regulations of their home province or the CSA or the IDA or the MFDA.

Harmonization is what we need – not registration. Registration – RRP style – is regressive.

If we genuinely want a strong healthy investment environment across Canada, all provinces and territories must remove inter-provincial investment barriers and harmonize policies on *that* front, liberating Canadian citizens to invest where *they* want, not where the home province or territory wants. The present depressing

fortress mentality must go. Once inter-provincial investment barriers have been removed, we can then revisit the idea of registration – *if necessary*. I'm convinced that it will not be necessary. What's wrong with what we have? Let's give NI 45-106 the chance it deserves. It is working very well. Let's get our priorities right, and deal with harmonization – not registration – first. Look at how BC and Alberta have benefited from NI 45-106. Why would we turn out backs on such success? It's senseless to do that.

The Myth of the 'Level Playing Field'

At the BCSC consultation session we [eventually] learned that brokers (*registrants*) simply want a *level playing field*. Level playing field? The field has been tilted so far in favour of the IDA, FMDA and large brokerages for so long now they can't even see the other end. For a change – and in the public interest – why not make the field level for non-registered exempt issuers and intermediaries?

When registrants get backed into a corner over the obvious lack of need for *registration* – that is, when they get exposed – they inevitably try to sell the myth about the absence of a *level playing field*. They complain that *all they 'really' want is a level playing field*. Hang on – weren't the RRP Steering Committee and the Working Group talking about *harmonization*, *streamlining* and *modernization*. Where does 'level playing field' come in?

The CSA's RRP Consultation Paper on the Registration Trigger and Regulated Activities states:

"The Canadian Securities Administrators (CSA) created the Registration Reform Project as an ongoing initiative to harmonize, streamline and modernize the registration regime across the country."

What's with the 'level playing field'? I don't read any 'level playing field' in the CSA statement. That's because the CSA's RRP is not supposed to be about a 'level playing field'; it's supposed to be about harmonization, streamlining, modernization. Unfortunately the real issue – as we can clearly see – is a market issue. It's about 'competition'. If it is not about competition, why then are registrants constantly referring to a 'level playing field' in the context of Registration Reform?

What is a level playing field anyway? As I recollect, it used to be a field that is 'level', a field upon which one team didn't have the dubious task of running uphill while the other had the enviable task of running downhill. From a marketing perspective what's so 'level' about my having to have RISK ACKNOWLEGMENT in my Offering Memorandum advising prospective buyers that they can LOSE ALL THEIR MONEY, and that THIS IS A RISKY INVESTMENT, and have WARNING plastered on the document? Where does 'level' come in? Who's doing all the uphill running? Who's doing the downhill running? How about requiring the same form of RISK ACKNOWLEDGEMENT in a prospectus? How about a prospectus offering that restricts Alberta investors from investing more than $10,000 in a BC investment, *because of the risk*? The field isn't level now; and registration, RRP style, will make it even less level.

Is *registration* as proposed in NI 31-103 the only way to create a level playing field between prospectus and non-prospectus issuers, while protecting the public interest? Of course not. Registration, as proposed in the RRP, is arguably the least effective way, the least streamlined, and the least fair.

Anyway, a 'level playing field' is not even supposed to be the issue. It is – but it's not supposed to be.

Perhaps it makes sense that people who want to sell stock, sell mutual funds, sell financial advice and investment advice should take the Canadian Securities Course, that they should maintain a certain level of working capital, a financial institutions bond and so forth, as described in the six proposed RRP requirements listed above. But non-registered exempt issuers and their closely affiliated managers do not carry on these activities; they simply sell one product, their own product, and nothing else. So, why should we non-registered single-product issuers have to meet the same requirements as *registrants* when our situation is distinctly and qualitatively different? The answer is simply that registrants and their large national associations are intent on making it as difficult as possible for non-registrants to function at all in the market. The whole effort is clearly another way to reduce – hopefully eliminate – competition. It's a market issue.

And it's anti-competitive.

The RRP is not about protecting the public, leveling the playing field, harmonizing, streamlining, modernizing. The RRP does not improve investment opportunities. The RRP does not address imperatives of proficiency, solvency and integrity [which are already dealt with by regulation]. The RRP is a reaction by large brokerage against the success of NI 45-106 (Prospectus and Registration Exemptions) that *does* benefit the investor and *is* in the public interest. NI 45-106 – a breath of fresh air – opened the door for buyers to a new array of investments. Very importantly, it also allowed product developers who did not fit into the traditional often cost-prohibitive IPO to access public investment capital through reasonably-priced mechanisms such as the plain-language Offering Memorandum that provides excellent disclosure and protection for the investor.

Perhaps the only parties that don't benefit from the excellent NI 45-106 initiative are the big brokers who own most of the securities business anyway. Hence the RRP. I sincerely hope that securities regulators do not support this self-serving industry initiative. It would be an unfortunate step backward.

The present exemption (NI 45-106) works. It's good for the entrepreneur and good for investors. It creates business that might otherwise never get off the ground; it is good for progressive registrants who are willing to come up for air out of the mutual fund tank; it's particularly good for the smaller investor; and it's good for the overall economy. It's just what we need. Leave it alone!

The RRP is a step backward. **The industry does not need it. The public does not need it.**

Perhaps securities regulators may even want to take a look at the RRP through the lens of competition legislation. Frankly, it doesn't feel particularly *competitive*. In fact, it feels downright *anti-competitive*.

I strenuously object to the CSA Registration Reform. It is not in the public interest and does not improve the regulatory regime. Nor does it improve markets or satisfy the needs of investors. And it is anti-competitive.

Worst of all, it is simply unnecessary.

I wish to thank the regulators for recognizing that the proposed Registration Reform Project requires much analysis, research and input from as many sources as possible, particularly from the non-registered exempt issuers, who are the most vulnerable and disadvantaged by the RRP. The RRP would not be published for consultation and comment were it not for the fact that regulators feel some doubt, and they know that a lot of questions must be asked – and answered. We must not make the mistake of handing the entire securities business over to a small handful of industry goliaths to do with what they will.

In summary I recommend:

1) that all shareholders, directors, officers and employees of non-registered exempt issuers that distribute under an Offering Memorandum – and their closely affiliated managers – not be deemed to be *intermediaries*, and not have to register;

2) that *all* exempt issuers, regardless of their particular exemption, be listed with all securities commissions with which they file, and be subject to the same code of conduct, penalties, and disciplinary sanctions as registrants; and

3) that enforcement of regulations – as opposed to creating new regulations – be preferred by securities regulators, with regulators being encouraged to apply the full force of law to *all* issuers and intermediaries, registered and non-registered alike, who breach the regulations.

4) that the Registration Reform Project be terminated, and that the CSA, *if necessary*, devise a less burdensome, less intrusive, more streamlined – **and fairer** – program to achieve national registration uniformity, a program that enhances rather than compromises NI 45-106.

Respectfully submitted,

Wayne Strandlund