

NOTICE OF AND REQUEST FOR COMMENT ON PROPOSED AMENDMENTS TO

NATIONAL INSTRUMENT 31-103 *REGISTRATION REQUIREMENTS AND EXEMPTIONS*

Registration of International and Certain Domestic Investment Fund Managers

October 15, 2010

Introduction

The Canadian Securities Administrators (the CSA or we) are seeking comments on proposed amendments to National Instrument 31-103 *Registration Requirements and Exemptions* (NI 31-103 or the Rule) and Companion Policy 31-103 CP *Registration Requirements and Exemptions* (the Companion Policy) related to the registration of international and certain domestic investment fund managers.

In this notice, we refer to the following types of investment fund managers as non-resident investment fund managers:

- (1) international investment fund managers who carry out investment fund management activities from a location outside of Canada.
- (2) domestic investment fund managers with a head office in one province who carry out investment fund management activities in other provinces or territories.

On September 28, 2009, NI 31-103 came into effect, providing a new registration regime in Canada, including a new registration category for investment fund managers. NI 31-103 provides temporary exemptions for certain investment fund managers. Specifically, sections 16.5 and 16.6 of NI 31-103 currently provide temporary exemptions for non-resident investment fund managers, so that registration is not required in any province or territory until September 28, 2011.

We indicated in the Notice dated July 17, 2009 (the 2009 Notice) that accompanied NI 31-103 that we would publish a proposal for comment in 2010 to explain the circumstances where an international investment fund manager will need to register, and in what additional provinces and territories a domestic investment fund manager with a head office in Canada will need to register.

We are publishing for comment new exemptions in the Rule and additional guidance in the Companion Policy in these areas. The comment period will end on **January 13, 2011**. The proposed amendments to NI 31-103 are in Appendix A to this notice. The proposed guidance in the Companion Policy is in Appendix B.

The temporary relief provided in sections 16.5 and 16.6 of NI 31-103 will expire on September 28, 2011. In the event the proposed amendments are approved and implemented, we expect the implementation date of the proposed new exemptions to be very close to the expiry date of the existing temporary exemptions. We strongly encourage non-resident investment fund managers to assess their circumstances in advance to determine whether they will need to be registered in any province or territory by September 28, 2011.

1. Summary and purpose of the proposed amendments to the Rule and the Companion Policy

Scope of the investment fund manager category

The investment fund manager category is intended to ensure that investment fund managers have sufficient proficiency, integrity and solvency (including prescribed capital), to adequately carry out their functions. We identified the following risks in the CSA notice dated February 20, 2007 as being particular to the management of an investment fund:

- incorrect or untimely calculation of net asset value
- incorrect or untimely preparation of financial statements and reports
- incorrect or untimely provision of transfer agency or record-keeping services
- conflicts of interest between the fund manager and its investors

These risks concern investors in any investment fund regardless of where the investment fund manager is located. We think, however, that there will be circumstances where the investment fund manager registration requirement may be unduly burdensome to an investment fund manager who carries out activities outside of a particular province or territory, particularly where the investment fund has security holders in a province or territory due to circumstances beyond its control, for example when a security holder moves from one province to another.

Registration of non-resident investment fund manager

A non-resident investment fund manager would need to be registered in a province or territory in the following circumstances:

- (1) an international investment fund manager who carries out investment fund management activities from a location outside of Canada would need to register in the relevant province or territory, if the international fund it manages has security holders that are local residents and the international investment fund manager or the fund they manage, has actively solicited local residents to purchase securities of the fund.
- (2) a domestic investment fund manager who carries out investment fund management activities would also need to register in another province or territory in addition to the province or territory where its head office is located, if the domestic fund has security holders that are local residents and the domestic investment fund manager, or the fund it manages, has actively solicited local residents to purchase securities of the funds.

Active solicitation

In the proposed amendments to the Companion Policy, we provide guidance about

- our interpretation of the investment fund manager registration requirement, and
- what we mean by the term “actively solicited”.

Proposed exemptions

We are proposing the following exemptions from the investment fund manager registration requirement for non-resident investment fund managers:

1. Section 8.29.1 – *International investment fund manager* An international investment fund manager would not need to be registered if the investment fund it manages is only distributed to permitted clients, provided certain other conditions are met.

We are proposing thresholds for this exemption so that an international investment fund manager that has a significant presence in the Canadian market would not be able to rely on this exemption. The proposed thresholds are

- the fair value of all of the assets attributable to Canadian security holders of any investment fund for which it acts as investment fund manager should not be more than 10% of the fair value of all the assets of such fund
- the total assets of all funds managed by the investment fund manager that are attributable to Canadian security holders should be less than \$50 million

We specifically invite comments on the calculations required to monitor these thresholds and whether the thresholds proposed are appropriate.

2. Section 8.29.2 - *Non-resident investment fund manager* – This is a grandfathering exemption for non-resident investment fund managers where neither the investment fund manager nor the investment fund has actively solicited local residents after September 28, 2011.

Notice to clients by non-resident investment fund manager

We are also proposing a new notice requirement in section 14.5.1 of NI 31-103. This section would require all international and domestic investment fund managers to provide a notice to investors informing them of its non-resident status, as well as the risk that investors may not be able to enforce legal rights in the province or territory.

We are also proposing a transition period for this notice requirement.

We specifically invite comments from international and domestic investment fund managers on complying with this proposed requirement.

Passport system

Most investment fund managers can rely on the passport system to register in multiple jurisdictions with a single filing with the principal regulator. For more details on how a firm or individuals can register in multiple jurisdictions, please refer to National Policy 11-204 *Process for Registration in Multiple Jurisdictions*. We note however, that notification of reliance on the proposed exemption in section 8.29.1 is to be given to each regulator.

2. Authority for the proposed amendments

In Ontario, the rule making authority for the proposed amendments is in paragraphs 7 and 8 of subsection 143(1) of the *Securities Act*.

3. Unpublished materials

In developing the proposed amendments, we have not relied on any significant unpublished study, report or other written materials.

4. Anticipated costs and benefits

The proposed amendments will make the Rule and the Companion Policy and the ongoing requirements more targeted, to the benefit of registrants and the investors they serve.

5. Request for comments

We would like your input on the Rule and the Companion Policy. We need to continue our open dialogue with all stakeholders if we are to achieve our regulatory objectives while balancing the interests of investors and registrants.

All comments will be posted on the Ontario Securities Commission website at www.osc.gov.on.ca and on the Autorité des marchés financiers website at www.lautorite.qc.ca.

All comments will be made publicly available.

Please note that we cannot keep submissions confidential because securities legislation in certain provinces requires publication of a summary of the written comments received during the comment period. In this context, you should be aware that some information which is personal to you, such as your e-mail and residential or business address, may appear in the websites. It is important that you state on whose behalf you are making the submission.

Thank you in advance for your comments.

Deadline for comments

Your comments must be submitted in writing by **January 13, 2011**.

Please send your comments electronically in Word, Windows format.

Where to send your comments

Please address your comments to all CSA members, as follows:

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
Superintendent of Securities, Yukon Territory
Registrar of Securities, Nunavut

Please send your comments **only** to the addresses below. Your comments will be forwarded to the remaining CSA member jurisdictions.

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6. Where to find more information

We are publishing the proposed amendments with this Notice. The proposed amendments are also available on websites of CSA members, including:

www.lautorite.qc.ca
www.albertasecurities.com
www.bcsc.bc.ca
www.msc.gov.mb.ca
www.gov.ns.ca/nssc
www.sfsc.gov.sk.ca
www.osc.gov.on.ca

APPENDIX A

AMENDMENTS TO NATIONAL INSTRUMENT 31-103 *REGISTRATION REQUIREMENTS AND EXEMPTIONS*

1. ***National Instrument 31-103 Registration Requirements and Exemptions is amended by this Instrument.***
2. ***Section 1.3(2) is replaced by the following:***

Except under the following sections, if a person or company is required to give notice to the regulator or the securities regulatory authority under this Instrument, the person or company may give the notice by giving it to the person or company's principal regulator:

- (a) section 8.18 [*international dealer*];
 - (b) section 8.26 [*international adviser*];
 - (c) section 8.29.1 [*international investment fund manager*]
 - (d) section 11.9 [*registrant acquiring a registered firm's securities or assets*];
 - (e) section 11.10 [*registered firm whose securities are acquired*].
3. ***Part 8 is amended by adding the following after section 8.29:***

8.29.1 International investment fund manager

- (1) In this section, "permitted client" has the meaning given to that term in section 1.1 [*definitions*] except that it excludes paragraph (m) and (n) and includes a registered charity under the *Income Tax Act* (Canada) that obtains advice on the securities to be traded from an eligibility adviser, as defined in section 1.1 of NI 45-106, or an adviser registered under the securities legislation of the jurisdiction of the registered charity.
- (2) Subject to subsections (3) and (4), the investment fund manager registration requirement does not apply to a person or company in respect of its acting as investment fund manager for an investment fund if all securities of the

investment fund distributed in Canada were distributed under an exemption from the prospectus requirement to a person or company that was a permitted client.

- (3)** The exemption in subsection (2) is not available unless all of the following apply:
- (a) the investment fund manager does not have a physical place of business in Canada;
 - (b) the investment fund is incorporated, formed or created under the laws of a foreign jurisdiction;
 - (c) the investment fund is not a reporting issuer in any jurisdiction of Canada;
 - (d) the investment fund manager has submitted to the securities regulatory authority a completed Form 31-103F2 *Submission to Jurisdiction and Appointment of Agent for Service*.
- (4)** The exemption in subsection (2) is not available to an investment fund manager if, as at the end of its most recently completed financial year end, any of the following apply:
- (a) for any investment fund for which it acts as an investment fund manager, the fair value of the assets of the fund attributable to securities beneficially owned by residents of Canada is more than 10% of the fair value of all of the assets,
 - (b) for all investment funds for which it acts as an investment fund manager, the fair value of the assets of the funds attributable to securities beneficially owned by residents of Canada is more than \$50 million.
- (5)** If an investment fund manager relies upon the exemption in subsection (2), it must have previously notified the permitted client in writing of all of the following:
- (a) the investment fund manager is not registered in the local jurisdiction to act as an investment fund manager;

- (b) the foreign jurisdiction in which the head office or principal place of business of the investment fund manager is located;
 - (c) all or substantially all of the assets of the investment fund manager may be situated outside of Canada;
 - (d) there may be difficulty enforcing legal rights against the investment fund manager because of the above;
 - (e) the name and address of the agent for service of process of the investment fund manager in the local jurisdiction.
- (6) A person or company that relied on the exemption in subsection (2) must notify the regulator by December 1 of each year.

8.29.2 Non-resident investment fund manager

The investment fund manager registration requirement does not apply to a person or company in respect of its acting as an investment fund manager of an investment fund if all of the following apply

- (a) the activities of the investment fund manager are not conducted from a physical place of business in the local jurisdiction;
- (b) the investment fund manager is not incorporated, formed or created under the laws of the local jurisdiction;
- (c) the investment fund is not incorporated, formed or created under the laws of the local jurisdiction;
- (d) the investment fund is not a reporting issuer; and
- (e) except for a solicitation for a trade referred to in section 8.17 [*reinvestment plan*], neither the investment fund manager nor the investment fund has , after September 28, 2011, actively solicited residents of the local jurisdiction to purchase securities of the fund.

4. Section 14.1 is replaced by the following:

14.1 Investment fund managers exempt from Part 14

Except for the following provisions, this Part does not apply to an investment fund manager in respect of its activities as an investment fund manager:

- (a) section 14.5.1 [*notice to investors by non-resident registered investment fund managers*];
- (b) section 14.6 [*holding client assets in trust*];
- (c) section 14.12(5) [*content and delivery of trade confirmation*];
- (d) section 14.14 [*account statements*].

5. Part 14 is amended by adding the following after section 14.5:

14.5.1 Notice to investors by non-resident registered investment fund managers

- (1) A registered investment fund manager whose head office is not located in the local jurisdiction must provide or cause to be provided to security holders with an address of record in the local jurisdiction on the records of each investment fund in respect of which the investment fund manager acts as an investment fund manager a statement in writing disclosing the following:
 - (a) the non-resident status of the investment fund manager;
 - (b) the investment fund manager's jurisdiction of residence;
 - (c) the name and address of the agent for service of process of the investment fund manager in the local jurisdiction;
 - (d) the nature of risks to security holders that legal rights may not be enforceable in the local jurisdiction.
- (2) This section does not apply to an investment fund manager whose head office is in Canada if the investment fund manager has a physical place of business in the local jurisdiction.

6. Form 31-103F2 Submission to Jurisdiction and Appointment of Agent for Service is amended

a. after the title by replacing “(section 8.18 [international dealer] and 8.26 [international adviser])” **with the following:**

“(section 8.18 [international dealer], 8.26 [international adviser] and 8.29.1[international investment fund manager])”,

b. by replacing paragraph 4 with the following:

4. Section of NI 31-103 the International Firm is relying on:

- Section 8.18 [*international dealer*]
- Section 8.26 [*international adviser*]
- Section 8.29.1 [*international investment fund manager*]
- Other,

c. replacing paragraph 9 with the following:

9. Until 6 years after the International Firm ceases to rely on section 8.18 [*international dealer*], section 8.26 [*international adviser*] or section 8.29.1 [*international investment fund manager*], the International Firm must submit to the securities regulatory authority

- a. a new Submission to Jurisdiction and Appointment of Agent for Service in this form no later than the 30th day before the date this Submission to Jurisdiction and Appointment of Agent for Service is terminated; and
- b. an amended Submission to Jurisdiction and Appointment of Agent for Service no later than the 30th day before any change in the name or above address of the Agent for Service.

7. (1) Except as set out in (2) this Instrument comes into force on •.

(2) Section 5 comes into force on •.

APPENDIX B

AMENDMENTS TO COMPANION POLICY 31-103CP REGISTRATION REQUIREMENTS AND EXEMPTIONS

1. ***Companion Policy 31-103CP Registration Requirements and Exemptions is amended by this Instrument.***

2. ***Section 1.1 [introduction] is amended in the first paragraph under the heading “Delivering disclosure and notices” by adding the following after “• 8.26 International adviser”:***

- 8.29.1 *International investment fund manager*

3. ***Section 1.2 [definitions] is amended***

a. in the second paragraph under the heading “Permitted client” by adding after “• 8.26 International adviser” the following:

- 8.29.1 *International investment fund manager*

b. replacing the paragraph under the heading “Exemptions from registration when dealing with permitted clients” with the following:

NI 31-103 exempts international dealers, international advisers and international investment fund managers from the registration requirement if they deal with certain permitted clients and meet certain other conditions.

4. ***Section 1.3 [fundamental concepts] is amended by replacing the heading “Registration trigger for investment fund managers” and the text under that heading with the following:***

Registration trigger for investment fund managers

A person or company that directs or manages the business, operations or affairs of an investment fund is an investment fund manager. A firm must register in each jurisdiction where it acts as an investment fund manager. Investment fund managers are not subject to the business trigger.

You are required to register in a jurisdiction if you direct or manage the business, operations or affairs of an investment fund from a physical place of business in that jurisdiction. An investment fund manager that does not

have a physical place of business in a jurisdiction will also need to register in that jurisdiction if

- the investment fund has security holders resident in that jurisdiction, and
- after the investment fund manager registration requirement came into force (on September 28, 2009), the investment fund manager or the investment fund actively solicited the purchase of the fund's securities by residents in that jurisdiction.

This means that an international investment fund manager that carries out its investment fund management activities from a physical place of business outside of Canada will be required to register in each jurisdiction where it has security holders that have been actively solicited. In addition, a domestic investment fund manager that carries out its investment fund management activities from a physical place of business in a jurisdiction will be required to register in that jurisdiction; it will also have to register in each other jurisdiction where it has security holders that have been actively solicited.

Investment fund managers that do not have a physical place of business in a jurisdiction and have not actively solicited in that jurisdiction after September 28, 2011, and meet certain other conditions, will not be required to register. For guidance on the non-resident investment fund manager exemption, see section 8.29.2 of this Companion Policy.

Active solicitation

Active solicitation refers to intentional actions taken by the investment fund or the investment fund manager to encourage a purchase of the fund's securities.

It includes:

1. direct communication with residents of the jurisdiction to encourage their purchases of the fund's securities

advertising in Canadian publications or other Canadian media (including the internet), if the advertising is intended to encourage the purchase of fund securities by residents of the jurisdiction in response to the recommendation.

It would not include advertising in international publications or other international media (including the internet) – including advertising to promote the image or general perception of a fund – unless the

advertising specifically encouraged an investment in the fund by residents of the jurisdiction.

5. Section 7.3 [investment fund manager category] is amended by replacing the first paragraph with the following:

Investment fund managers direct the business, operations or affairs of an investment fund.

6. Part 8 is amended by adding after section 8.28 [capital accumulation plan exemption] the following:

8.29.1 International investment fund manager

An investment fund manager that does not have a physical place of business in Canada is exempt from the investment fund manager registration requirement if the investment fund only distributes its securities in Canada to permitted clients and certain other conditions set out in section 8.29.1 are satisfied, including limitations on the fair value of the assets of the funds it manages that are attributable to Canadian investors.

If an investment fund manager is relying on the exemption in more than one jurisdiction, it must provide an initial notice by filing a Form 31-103F2 *Submission to Jurisdiction and Appointment of Agent for Service* (F2) with the regulator in each jurisdiction where it relies on the exemption. If there is any change to the information in the investment fund manager's F2, it must update it by filing a replacement F2 with them.

So long as the investment fund manager continues to rely on the exemption, it must file an annual notice with each regulator. Subsection 8.29.1(6) does not prescribe a form of annual notice. An email or letter will therefore be acceptable.

8.29.2 Non-resident investment fund manager

An investment fund manager that does not have a physical place of business in a jurisdiction, but manages an investment fund with security holders in that jurisdiction, is not required to register in that jurisdiction if neither it nor the fund has actively solicited residents in that jurisdiction after September 28, 2011 (except in respect of a reinvestment plan), and it meets certain other conditions. For guidance on the meaning of the term "actively solicited", see section 1.3 of this Companion Policy.

2. purchase of the fund's securities by residents of the jurisdiction (either directly from the fund or in the secondary/resale market)
3. purchase recommendations being made by a third party to residents of the jurisdiction, if that party is entitled to be compensated by the investment fund or the investment fund manager, for the recommendation itself, or for a subsequent