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The Secretary
Ontario Securities Commission
20 Queen Street West
19th Floor
P.O. Box 55
Toronto, ON M5H 3S8

RE: Request for Comments - OSC Rule 13-502 *Fees*

Dear Sirs/Mesdames:

The following comments are submitted in response to the Request for Comments on the amendments proposed to Ontario Securities Commission Rule 13-502 *Fees* (the "Proposed Rule") as published in the Ontario Securities Commission Bulletin dated August 23, 2012.

The writer acts for a large number of international dealers and international advisers that provide their services in Ontario pursuant to the relevant registration exemptions in National Instrument 31-103 as well as non-resident investment fund managers, who may be subject to capital markets participation fees. These comments are not made on behalf of Blakes as a firm nor any particular client and are general, however they focus primarily upon their application to these unregistered capital markets participants (as they are styled in the Proposed Rule).

A. First, as a general comment, the second paragraph under the heading of "Capital Markets Participation Fees" in the Request for Comments stated that "Capital market participation fees are imposed on **registered firms**, as well as unregistered investment fund managers". This is not accurate and highlights the fees problem for unregistered exempt international firms. A "registrant firm" is defined as a person or company registered under the Act as a dealer, adviser or investment fund manager. However, both the current Rule and the Proposed Rule also extend these capital market participation fees to unregistered capital markets participants as well.

Since this is not a tax approved by the provincial legislature, then to be valid, it must be a user fee. Unlike taxes, user fees are specific charges linked to the cost or value of particular goods or services that an individual or organization receives. According to the Auditor General of Ontario¹ (citing the Supreme Court of Canada²), for a fee to be constitutionally valid, there must be a reasonable relationship between the cost of the service provided and the amount charged.

¹ http://www.auditor.on.ca/en/reports_en/en09/305en09.pdf

² *Eurig Estate* (Re), [1998] 2 S.C.R. 565 (1998)
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If capital markets participation fees are defended as user fees, one must question what are the services being provided to these users? The OSC incurs costs to regulate marketplaces in Ontario and to regulate reporting issuers in Ontario, which are broad worthy objectives. But under the relevant registration exemptions for unregistered exempt international firms, their trades and advice may only be with respect to foreign securities. They are generally prohibited from trading on Canadian marketplaces and from trading with or advising Ontario clients in securities of Canadian issuers, so they don't participate in the benefits of that OSC regulation. These participation fees used to be payable when international dealers and international advisers used to be registered by the OSC, so services used to be provided then. But since they became unregistered firms in 2009, the unregistered firms remained subject to the participation fees on the same basis.

Given that the Ontario Securities Commission does not register these unregistered capital markets participants nor any of their individuals, does not receive nor review their financial statements nor monitor any other aspects of their business operations, nor do much other than review their OSC fee calculation forms, I question whether a fee that is based upon an unregistered firm's revenue, even Ontario revenue, bears any relationship between the cost of the service provided and the amount charged. This is especially notable if an unregistered capital markets participants has no Ontario revenue at all, and thus there has been no service provided by the OSC at all, where the firm must nevertheless still pay the OSC a minimum fee.

In this case, the capital market participation fee assessed to unregistered capital markets participants appears to be simply a toll payable for the OSC granting access to Ontario investors. With the exception of Saskatchewan which imposes a flat renewal fee to international dealers and international advisers, no other jurisdiction of Canada imposes a fee on unregistered capital markets participants.

I have some specific issues with the Proposed Rule as well.

B. The definition of "unregistered investment fund manager" as proposed corrects the previous error in the existing Rule which was referred to in my prior comment letter with respect to Multilateral Instrument 32-102.

However, the participation fee can work unfairly in the case of an unregistered investment fund manager who gains and loses Ontario investors. For example, consider the case of an unregistered investment fund manager ("UIFM") who has prior investors and later solicits in Ontario.

1. If the UIFM has an investor (A) in a fund since 2011 but does no active solicitation in Ontario, then the UIFM owes no participation fee, since it falls outside the definition of UIFM as proposed.
2. If during 2013, that UIFM solicits a new Ontario permitted client (B) who invests into a different fund, it would become a UIFM subject to the OSC participation fee. The fee is based upon Ontario revenue derived from both investor A (previously grandfathered) and B.
3. If in 2014, that new client B redeems out of its fund, but the original investor A remains, the UIFM remains subject to the OSC participation fee indefinitely until investor A redeems as well.
4. The facts above would apply even if new client B didn't actually invest but was merely solicited and decided not to invest.

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It seems unfair to collect fees in respect of revenue based on investors for whom the UIFM would otherwise be grandfathered.

C. Why are unregistered investment fund managers allowed to pay their participation fees up to 90 days after the end of their fiscal year and allowed to file their completed Form 13-502F4 when they pay those fees, while unregistered exempt international firms are required to pre-estimate their revenues in order to file their Form by December 1 and pay fees December 31?

The vast majority of exempt international firms have a December 31 year end, so this fee calculation timing forces them to guess their Ontario revenues well before those actual financial results are determined. Many international advisers earn compensation on the basis of asset values managed, so would seem to have the same difficulties in estimating as are faced by unregistered investment fund managers.

Given that the OSC year end is March 31, would it be feasible to extend the same timing to unregistered exempt international firms as for an unregistered investment fund manager, without affecting OSC revenues?

D. The calculation of specified Ontario revenues in Part III of Form 13-502F4 is unclear.

Item 2 in the calculation list is "Revenue not attributable to capital markets activities". Does this intend to mean capital markets activities anywhere in the world, or only those in Ontario? The latter appears that is the case, because "capital markets activities" is defined in the Proposed Rule (for this purpose) as "activities for which registration under the Act or exemption from registration is required". Therefore revenue from capital markets activities outside Ontario would seem to be covered by that exclusion.

The interaction of this item 2 with the definition of "Ontario percentage", which is also based upon the percentage of the participant's total revenues for the fiscal year "attributable to capital markets activities in Ontario", is unclear. What are the words "in Ontario" intended to add here? By definition, "capital markets activities" already seems limited to Ontario.

The calculation seems to suggest that revenue from activities that are not attributable to capital markets activities in Ontario is deducted in item 2 and is likewise not included in the percentage calculation in item 9. This produces significant confusion when calculating specified Ontario revenues.

This is an existing interpretation problem under the current Rule.

Thank you for your attention to these comments.

Yours very truly,



Ross McKee

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