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BY COURIER AND E-MAIL

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

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Dear Sirs/Mesdames:

Re: Request for Comment - National Instrument 31-103 – *Registration Requirements* and the Proposed Companion Policy 31-103CP – *Registration Requirements*

Further to your request for comments dated February 23, 2007 on the proposed National Instrument 31-103 – *Registration Requirements* and the Proposed Companion Policy 31-103CP – *Registration Requirements* (collectively, the "Proposed Instrument"), we are pleased to provide the following comments on behalf of our client Orbis Investment Management Limited ("Orbis" or "our client").

We would like to thank the Canadian Securities Administrators (the "CSA") for providing the opportunity to comment on the Proposed Instrument.

We have generally limited our comments to provisions of the Proposed Instrument that deal with the business and affairs of international portfolio managers and international investment fund managers (as such terms are defined in the Proposed Instrument). We do, however, wish to commend the CSA concerning one particularly useful reform contained in the Proposed Instrument, and that is the move to a "business of" model for the registration requirement as it applies to securities trading activities. We think this change will be a distinct improvement for the reasons stated in the Proposed Instrument.

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About Orbis

Orbis is a Bermuda-based investment manager of "captive" mutual funds (the "Orbis Funds"). Orbis was established in 1990 and has more than US$19 billion under management. The Orbis Funds are organized as investment companies, limited partnerships or unit trusts in various non-Canadian jurisdictions around the world. The Orbis Funds are not necessarily mutual funds as that term is generally understood in Canadian securities regulation because, while their units are redeemable at net asset value, they are not in all cases redeemable on demand. While most of the Orbis Funds can be viewed as the foreign equivalents of Canadian mutual funds, some employ investment strategies that are typical of hedge funds.

Orbis is currently registered in an appropriate investment business category in Bermuda and other jurisdictions in which it has a permanent establishment or its funds are organized, including the United Kingdom, Luxembourg, Australia and the United States. None of Orbis or its affiliates is currently registered in any category under Canadian securities legislation, has any place of business in Canada or has ever filed, or been required to file, a prospectus in Canada.

Orbis's only clients are the Orbis Funds. Orbis does not engage in the business of structuring or advising with respect to segregated or pooled funds based on the investment needs of particular investors.

A small portion of the investors in the Orbis Funds consists of Canadian residents, including some Canadian pension funds.

Current Canadian Legal Regime

As was originally set out in the Notice of Proposed Rule 35-502 – *International Advisers*[1], the Ontario Securities Commission ("OSC") has adopted a "look-through" approach in identifying the "clients" of a non-resident adviser advising a fund located outside of Ontario. The most significant result of the "look-through" approach is that the activities of non-resident advisers outside of Ontario may permit the OSC to bring them within the ambit of the *Securities Act* (Ontario) (the "Act")[2] and accordingly, require such advisers to register as international advisers under the Act or rely upon an exemption from such registration requirement set out in Ontario Securities Commission Rule 35-502 – *Non-Resident Advisers* ("Rule 35-502").

Rule 35-502 has, and by implication the Proposed Instrument would have, a very wide extraterritorial reach, an attribute that generally Canadian regulators appear sensitive to avoid so as not to be perceived as having an expansionist agenda. We understand that, of all the other Canadian jurisdictions, only the Superintendent of Securities, Newfoundland and Labrador (the "Superintendent") agrees with the position of the OSC, based on the fact that only Newfoundland and Labrador has a rule in effect similar to Rule 35-502.

We question whether the OSC's "look-through" approach, whereby a non-resident adviser's "clients" include the investors in a fund that is located outside of Ontario and is advised by the non-resident adviser if the securities of the fund are distributed in Ontario, is legally sound. It is our contention that when a non-resident adviser advises a fund located outside of Ontario, the adviser's client should be thought to be only the fund that the adviser advises, manages or sponsors (even if the fund's investors include persons in Ontario). The adviser is concerned with the fund's performance, not with each investor's investment objectives. In this regard, the position of the OSC is inconsistent with the statements about what constitutes "advising in securities" in Section 2.4 of the Proposed Companion Policy 31-103 CP (the "Policy"):

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1 "...The [Ontario Securities] Commission considers a person or company to be acting as an adviser in Ontario if it, directly or through a third party, acts as an adviser for a person or company in Ontario, notwithstanding that the advice may be given from a place outside of Ontario. The [Ontario Securities] Commission also considers a person or company to be acting as an adviser in Ontario if it, directly or through a third party, acts as an adviser for a mutual fund or a non-redeemable investment fund that distributes its securities in Ontario, notwithstanding that the advice to the fund may be given to, and received by, the fund outside of Ontario. In these circumstances, the Commission considers that the Ontario investors in the fund are acquiring the advisory services of the portfolio adviser of the fund and that the securities of the fund are distributed in Ontario for the purpose of providing these advisory services in Ontario. Therefore, the portfolio adviser of the fund is considered to be acting as an adviser to Ontario purchasers of the fund, and hence acting as an adviser in Ontario, by virtue of the distribution of securities of the fund to those purchasers..." ((1998) 21 OSCB 6258)

2 R.S.O. 1990 c.S.5, as amended (the "Act").

> "Advising in securities" is intended to capture "specific advice"; in other words, advice tailored to the needs and circumstances of the person receiving the advice and that is about a particular security. Specific advice includes discretionary account management."

The advice a fund receives from an investment adviser is specifically tailored to the investment objectives and restrictions of the fund, not its investors. Unfortunately, however, the CSA in the Proposed Instrument appears to have accepted the "indirect advising" theory, without explicitly saying so. If the "indirect advising" theory were not accepted, we do not believe there would be any need, for example, for the exemption in Section 9.15 of the Proposed Investment for non-resident portfolio managers advising funds offered primarily outside of Canada and distributed in Canada exclusively on a private placement basis.

In this regard, we refer to the recent decision of the U.S. Court of Appeals for the District of Columbia Circuit in *Goldstein* v. *Securities and Exchange Commission* dated June 23, 2006 ("*Goldstein*").[3] In *Goldstein*, the court invalidated the hedge fund adviser registration rule (the "Registration Rule") under the *Investment Advisers Act of 1940* (the "US Advisers Act") that was adopted by the Securities and Exchange Commission ("SEC"). As part of the Registration Rule, the SEC expanded the scope of the term "client" so that each individual investor in a private fund was to be counted as a separate "client" (rather than counting only the private fund as the entity receiving the investment advice) for the purposes of registration under the US Advisers Act and the exemption from registration contained in Section 203(b)(3) of that Act[4]. In *Goldstein*, the court found that the expanded definition was arbitrary and unreasonable and therefore, untenable. The court stated that the SEC's

> "interpretation of the word 'client' comes close to violating the plain language of the [US Advisers Act]. At best it is counterintuitive to characterize the investors in a hedge fund as the 'clients' of the adviser. The advisor owes fiduciary duties only to the fund, not the fund's investors."

It is our submission that the SEC's theory underlying the expanded definition of "client" is precisely the same as that relied upon by OSC in adopting the "look-through" approach in

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[3] The full text of the U.S. Court of Appeals' decision is available at; http://pacer.cadc.uscourts.gov/docs/common/opinions/200606/04-1434a.pdf.

[4] Section 203(b)(3) exempts advisors who (a) during the previous 12 months have had a total of fewer than 15 clients; (b) do not hold themselves out generally to the public as an investment adviser; and (c) do not act as an investment adviser to a registered investment company or business development company. The SEC has interpreted this exemption as requiring US advisers to include all non-US clients when counting their total clients. However, non-US advisers need only count their US clients.

implementing Rule 35-502, as noted above, and that OSC's approach is equally untenable. Although clearly US precedents are not binding in Canada, we contend that the OSC's reasoning, which does not appear to have found favour elsewhere in Canada (outside of Newfoundland and Labrador and now the Proposed Instrument) or in the United States, is erroneous. In a common law world, based on notions of privity of contract, it is hard to see how a "client" can be a person other than the person that the adviser has contracted to advise. Furthermore, logic, as opposed to a practical goal of permitting the regulation of foreigners, does not supply a basis for a distinction as between domestic advisers and foreign advisers for identifying who are the clients. We submit that the "look-through" approach should be especially abandoned on a going forward basis.

Impact of the Proposed Instrument on Non-Resident Advisers

General Observations

The Proposed Instrument, if adopted in its current form, will have a significant impact on non-resident advisers carrying out advisory activities outside Canada but with some element of Canadian connection, both those that currently are registered as international advisers and those that rely on exemptions.

The Proposed Instrument would eliminate the "international adviser" category of registration, a significant change as it would require all non-resident advisers performing advisory activities in Ontario to register as a full portfolio manager unless they are able to rely on an exemption from registration for international portfolio managers contained in the Proposed Instrument. On page 10 of the Proposed Instrument, the CSA make the following comment:

> "The category of international dealer in Ontario and Newfoundland and Labrador and the category of international adviser in Ontario have been eliminated. Under the Rule, persons who currently fall into these categories will become exempt from registration in all CSA jurisdictions, subject to conditions that generally mirror the conditions currently imposed on these categories. The move to an exemption means that the protections offered by registration no longer extend to clients of international dealers and international advisers. Consequently, the types of clients that they are permitted to have under the Rule has been narrowed somewhat from those permitted under the current registration categories. While not all CSA jurisdictions currently have an international dealer or international adviser category, some jurisdictions have granted discretionary relief to international dealers and international advisers on terms

> and conditions similar to but not identical to the exemptions proposed in the Rule."

Comments on Section 9.14

In fact, the restrictions on non-Canadian advisers in the Proposed Instrument, as compared with the existing regimes in Ontario and Newfoundland and Labrador, are dramatically, not "somewhat", increased. The Proposed Instrument, among other things: (i) reduces the number of exemptions from the adviser registration requirement that are currently available under Rule 35-502, for example, the exemptions in Sections 7.1, 7.6, 7.7 and 7.9 of Rule 35-502 are not carried forward; (ii) restricts the application of the registration exemptions available to non-Canadian advisers to only international portfolio managers and international investment fund managers that have no establishment, officers, employees or agents resident in Canada (whereas Rule 35-502 stipulates that the adviser registration requirement does not apply to a person or company not ordinarily resident in Ontario); (iii) reduces the types of sophisticated Canadian investors to whom an international portfolio manager would be permitted to provide advisory services (as compared with the types included in the prescribed list of "permitted clients" for non-resident advisers in Rule 35-502); (iv) establishes in Section 9.14(2)(a) a ceiling of 10% for the percentage of the aggregated consolidated gross revenue that an international portfolio manager is permitted to derive from "activities ... in Canada" (presumably looking through foreign funds to their Canadian holders and then ascribing the portion of fund fees earned from Canadian fund holders as the percentage of revenues from "activities in Canada"); and (v) imposes a ban on the solicitation of new clients in Canada. Additionally, the Proposed Instrument, while limiting the number of exemptions available, proposes to impose additional requirements that apply to international portfolio managers, including, most significantly, requiring submission to jurisdiction and the appointment of a local agent for service of process in each Canadian jurisdiction where investors reside, notwithstanding that sophisticated "clients" (under the indirect advising theory discussed earlier) have sought investment management services outside Canada. We note that no policy rationale whatsoever for these new restrictions on non-resident advisers is suggested in the Proposed Instrument. There is no suggestion that non-resident advisers have abused or misused the existing somewhat more permissive regime.

We contend that the general prohibition on the solicitation of new clients in Canada with respect to the exemption available under Section 9.14 of the Proposed Instrument is ambiguous and creates uncertainty. It is our belief that the CSA has not demonstrated any policy rationale for a general restriction of this nature that limits the availability of this exemption.

We do not see a practical need to limit the freedom of Canadian investment sophisticates to seek investments abroad by requiring that the portfolio advisers to or managers of foreign funds that the investment sophisticates may wish to purchase be registered in Canada. A predictable effect of such a requirement, which could be short-sighted on a policy basis,

will be a diminution in foreign investment opportunities available to sophisticated Canadians.

We also are uncertain as to the policy rationale behind the reduction in the types of "permitted clients" to whom a non-resident adviser can provide advice (again, on the indirect flow-through theory) while being able to rely on the registration exemption provided under Section 9.14 of the Proposed Instrument. The thrust of the proposed changes is to suggest that many categories of sophisticated Canadian investors will no longer be trusted to invest abroad (despite the fact that under the current regime international advisers are permitted to advise some of these sophisticated Canadian investors as they fall within the definition of "permitted clients" for the purposes of Rule 35-502). In addition, it is our submission that the securities legislation ought to be more accommodating to Canadian investors of wealth and sophistication who choose to make some of their investments abroad in connection with an investment in a foreign investment fund advised by a non-resident adviser. Can such investors truly not be trusted to have made a responsible determination that, in seeking foreign exposure for a portion of their portfolios they can dispense with the protections of Canadian securities laws? If the CSA has concerns that the existing regime is likely to lead to the proliferation of investments in funds located outside of Canada by Canadian investors who, in the opinion of the CSA, do not have the necessary sophistication to make such investments, we submit that a more effective risk management device may be to raise the wealth standard built into the definition of "accredited investor" (as such term is defined in MI 45-106) when applied to Canadians investing in foreign investment funds, much as the SEC proposes to do by raising its "accredited investor" thresholds for people proposing to invest in hedge funds[5] and as Ontario has already done with the definition of "permitted client" in Rule 35-502.

We note also that the Proposed Rule restricts the scope of securities in respect of which an international portfolio manager can advise its clients[6]. However, we do not see the legislative rationale behind limiting the jurisdiction of the issuer of securities in which a foreign adviser may invest its clients' assets just because among those clients are some resident in Canada. Efficient capital markets operate on the theory that capital is free to flow to the best investment opportunities. For some foreign advisers, exposing their Canadian clients to a meaningful amount of securities of Canadian issuers from time to time may be an eminently sound course, a point we doubt the CSA would dispute.

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[5] See the new category of "accredited natural person" in the SEC's Proposed Rule 206(4)-8 under the US Advisers Act.

[6] Section 9.14(2)(d) "[The registration requirement does not apply to an international portfolio manager that is acting as portfolio manager for a permitted international portfolio manager client provided that it] does not advise clients in Canada with respect to securities of Canadian issuers, unless providing advice on securities of a Canadian issuer is incidental to providing advice on securities of a foreign issuer;".

Comments on Section 9.15

It appears to us that the requirement for international portfolio managers to have no "agents" resident in Canada is also an ambiguous one, particularly since the exemption available pursuant to Section 9.15 of the Proposed Instrument requires the distribution of securities of an investment fund (in respect of which the international portfolio manager is acting as adviser) through one or more registrants. We assume that the registrants would not be considered resident Canadian "agents" of the foreign portfolio manager but would like to see clarification of the point.

The manager of an international investment fund will be exempt from the requirement to register as an investment fund manager under the Proposed Instrument if (i) the fund manager has no establishment in Canada or officers, employees or agents resident in Canada, (ii) the fund manager engages in the business of a portfolio manager in the jurisdiction in which its head office or principal place of business is located; and (iii) securities of the investment fund managed by the fund manager are primarily offered outside of Canada and are only offered in Canada through a registrant pursuant to an exemption from the prospectus requirement (*e.g.*, securities offered only to accredited investors on a private placement basis) and (iv) the manager appoints a local Canadian agent for service of process, a requirement to which we have addressed negative attention above. As for the registrant requirement in point (iii), it would be helpful for the CSA to suggest a policy rationale and a cost benefit analysis to justify the (presumably) one-time intervention of a registrant in an otherwise ongoing advisory relationship between the foreign advisor and the foreign fund it advises, an intervention precipitated by an otherwise exempt distribution. It would also be helpful for the CSA to clarify the role it expects registrants to play in the connection with the distribution of the foreign funds to Canadian investment sophisticates. For example, would it be as simple as the registrant undertaking the know-your-client and suitability obligations in connection with the distribution or is it necessary for the registrant to receive consideration in connection with the distribution and is it necessary that a contract note be issued by the registrant in connection with the distribution?

Finally, we note that the Proposed Instrument is silent on how foreign advisors of foreign funds with Canadian private placement investors are to comply with the exemption in Section 9.15 in respect of such Canadian investors to whom the distribution took place before the Proposed Instrument will have come into force. We presume that grandfathering is the intention; yet if the purpose of Section 9.15 is to provide an exemption for rendering "indirect advisory services", the fund's investors would seem to be receiving those services on an ongoing basis for so long as they own fund units. On that theory, some further exemptive relief may be required.

Interplay with Multilateral Instrument 45-106 – Prospectus and Registration Exemptions ("MI 45-106")

As the law currently stands, an "accredited investor" as defined in MI 45-106 could choose to invest in a foreign investment fund without any requirement that such foreign investment fund provide the investor with a prospectus. However, it is our submission that such prospectus exemption does not really exist in practice so long as such exemption cannot be relied upon without ensnaring the foreign adviser of the foreign mutual fund in the registration requirements imposed upon by Canadian securities legislation. Accordingly, it is our contention that the proposed registration regimes appear to cut back on the prospectus exemptions currently available under MI 45-106.

Role of Service Providers and New Registration Category of Investment Fund Manager

Offshore and onshore investment funds may utilise the services of Canadian service providers to effectively address many of the risks identified by the CSA as justification for requiring the registration of investment funds managers, namely, incorrect or untimely calculation of net asset value, preparation of financial statements and reports or provision or transfer agency or record keeping services. Unless the CSA's objective is to discourage the use of Canadian service providers, clarification is required that fund administration service providers performing such services are not to be considered Canadian agents of foreign investments managers since, if they were to be so considered, the effect would be that all foreign managers using Canadian service providers would themselves have to be registered as fund managers in Canada.

Foreign funds typically delegate to their managers oversight of such functions and permit sub-delegation. The CSA implicitly recognise this relationship in their description of the role of an investment manager in Canada in Section 2.6 of the Companion Policy:

> "Persons or companies in the business of managing an investment fund must register in the category of investment fund manager. Managing an investment fund includes administering the funds but does not include acting as a portfolio manager for the fund. National Instrument 81-102 Mutual Funds defines a manager as "a person or company that directs the business, operations and affairs of a mutual fund". The fund manager generally organizes the fund and contractually accepts responsibility for its management and administration. The administrative services may include information gathering, performance reporting and handling clients assets. The mutual fund trust or company very broadly delegates these responsibilities to the fund manager under a management agreement. Most agreements provide the manager with the ability to sub-delegate these

> responsibilities to other service providers. As mentioned below in Section 5.1 on outsourcing, the fund manager remains fully liable for the sub-delegated responsibilities."

As a means to respond to a number of issues identified by the CSA with respect to investment funds, the Proposed Instrument introduces a proposed new category of registration for fund managers to be known as the "investment fund manager" designation. In the Notice and Request for Comments that accompanies the Proposed Instrument, it is stated that:

> "This registration requirement applies to managers of all investment funds (e.g., domestic, foreign, reporting issuers and non-reporting issuers) other than private investment clubs. A fund manger will register in the CSA jurisdiction in which the fund is located."

Clarification about the jurisdiction of registration for foreign fund managers that have no funds located in CSA jurisdictions would be appreciated.

We also suggest the CSA explicitly address the issue whether providers of "back-office" services described either are themselves subject to registration under the new category of investment funds manager or else jeopardize the availability to fund managers that retain them of the exemption in section 9.16 of the Proposed Instrument. It is our understanding that the provision of such services by Canadian firms operating in Canada to Canadian as well as international investment fund managers is becoming commonplace and we believe that legal status of using these service providers needs to be clarified in light of the expanded reach of the registration requirements, particularly in relation to the provisions of section 9.16(1)(a) of the Proposed Instrument.

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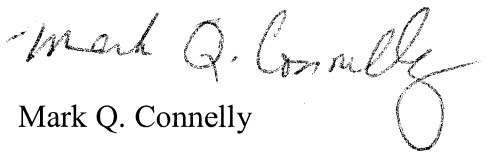
We would like to thank the members of the CSA who participated in the production of Proposed Instrument, and look forward to your responses to the comments of the various market participants and advisers who have submitted issues for your consideration.

Should you have any questions regarding the foregoing, please do not hesitate to contact me directly or my partner, Banu Unal.

Yours very truly,



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MQC/sac