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RE: RESPONSE TO REQUEST FOR COMMENTS - PROPOSED NATIONAL INSTRUMENT 31-103 *REGISTRATION REQUIREMENTS*

Thank you for the opportunity to comment on the revised draft National Instrument 31-103 *Registration Requirements* ("NI 31-103") that was published for comment on February 29, 2008.

The Canadian Securities Administrators are to be commended for their effort to harmonize, streamline and modernize the registration requirements across Canada. The objectives of harmonizing, streamlining and modernizing are critical to ensuring a robust and efficient securities regime and capital markets in Canada.

The purpose of this submission is to address the implications of NI 31-103 in the context of one class of participants in Canada's capital markets, mortgage investment corporations ("MICs"), with the hope that further clarification of the implications of NI 31-103 on MICs can be introduced into the National Instrument or its Companion Policy.

This submission canvasses the following two issues relating to MICs:

i) A MIC should not be presumed to be trading in securities for a business purpose, and

ii) A MIC that is required to register should not be considered handling client funds when it accepts payments to be used in its mortgage investment business.

These issues will be discussed in turn.

There Should Be No Presumption That a MIC Must Be Registered

As NI 31-103 introduces the "business trigger" for registration, the critical question in assessing whether registration is required is, of course, whether a person is trading or advising for a business purpose. Section 1.3 of the Companion Policy provides useful guidance to assist generally in the analysis of whether the "business trigger" has been trigged. However, with respect to MICs, the Companion Policy may inadvertently (and it is suggested, inappropriately) lead to the presumption that registration is required for all MICs.

Section 1.4.2. of the Companion Policy provides as follows:

> **1.4.2 Mortgage investment companies**
>
> Mortgage investment companies (MICs) are securities issuers. In many cases, they are in the business of trading in securities and are therefore required to register in an appropriate dealer category.
>
> While MICs can have various business models, they typically:
>
> - solicit investors actively
> - trade in securities frequently
> - do not expect to be remunerated for issuing their own securities to investors, but may act as intermediaries to the extent that their business

model is based on obtaining a return on the further investment of their investors' funds in securities (the mortgages)

- select mortgage investments, rather than develop the underlying real estate

- only allow investors to withdraw their capital by exercising redemption rights through the MIC

By the Companion Policy stating that "in many cases, [MICs] are in the business of trading in securities and are therefore required to register in an appropriate dealer category," the Companion Policy appears to be suggesting that it would be only in an exceptional situation that a MIC need not so register. This bias in favour of registration is problematic since it will detract from the specific analysis of business purpose that is the underpinning of NI 31-103. Moreover, the Companion Policy does not indicate what the situations might be in which a MIC need not register. It is submitted that the Companion Policy should provide further guidance and direction so that MICs do not unnecessarily incur the burden and expense of registration in circumstances where doing so was not intended or required, and does not serve the purpose of the new registration requirements.

This concern could be addressed by adding to Section 1.4.2 of the Policy text along the following lines:

> "The foregoing is not to suggest that all MICs are required to register as a dealer. An analysis of the precise business model utilized must be undertaken to determine whether a particular MIC is in the business of trading in securities."

It is submitted that one circumstance in which an issuer is not trading securities for a business purpose is where the MIC issues securities to existing shareholders from the profits otherwise distributed to them or from additional funds they may have. Offering existing shareholders the opportunity to reinvest should be specifically stated to <u>not</u> trigger the business trigger. If a MIC primarily issues securities to existing shareholders, and issues a limited number of securities to new shareholders, the issuances to existing shareholders should be disregarded in considering the business of the MIC in the context of the registration requirements. It is submitted that the relationship between an issuer and its shareholders differs in character from the relationship between an issuer and a potential new shareholder. Existing shareholders have a relationship with the issuer and are familiar with it. Consequently, the issuer is required to exert less effort to provide these shareholders with the opportunity to reinvest. This reduced effort enables the MIC to devote less resources to this form of fundraising, correspondingly increasing its attention to the underlying mortgage investment business with the result that the share issuances to existing shareholders is less likely to trigger the business trigger. MICs would find it useful for the Companion Policy to provide clarification on this point.

A MIC Should Not Be Considered To Be Handling Client Assets

If a MIC handles, holds or has access to client assets, it does not do so with respect to any business of trading in securities, but in respect of its mortgage investment business. Consequently, if a MIC is required to register as an exempt market dealer because the business trigger is triggered, NI 31-103 should specifically state that if the only securities it trades in are its own, and the only funds it handles are payments to itself, that MIC should be considered not to be handling, holding or having access to client assets, and therefore that MIC should benefit from the less onerous registration requirements applicable to exempt market dealers who do not do so.

Section 4.7.1 of the Companion Policy provides that any dealer who "holds client's... cash", "accepts funds from clients" or has "access to, the client funds" is required to satisfy the capital, insurance and audited financial statement delivery requirements of NI 31-103. This section should specifically provide that funds received by an issuer for the business purposes of that issuer should not be considered as handling, holding or having access to client assets.

Although not an issue specific to MICs, there is one additional aspect of handling, holding and accessing client assets that merits comment. Section 4.7.1 of the Companion Policy indicates that a dealer or adviser who "handles client cheques in transit (e.g. a cheque made payable to a third party issuer)" is considered to be handling, holding or having access to client funds. With respect, holding cheques made payable to third parties should not be included in this list. It is submitted that an exempt market dealer who acts as an intermediary between an issuer and an investor should be entitled to so act without the need to satisfy capital, insurance and audited financial statement delivery requirements. Since the cheques are not payable to the exempt market dealer, there is no regulatory objective served by having such a dealer required to incur the significant expense of these requirements. Imposing these requirements on such a dealer will either:

(a) require the dealer to insist on the cheque being delivered directly to the issuer (thereby running the risk of cheques being cashed by the issuer prematurely or inappropriately);

(b) require the cheque to be delivered to another party requiring additional costly transaction structures to be developed for cheques to be delivered to third parties such as legal counsel or an escrow agent (which costs will either be passed on to the issuer or the investor); or

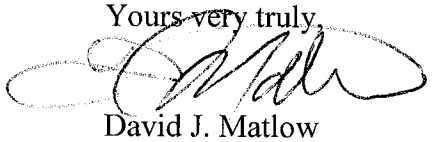
(c) force the dealer to cease to participate in transactions such as these, reducing choice in the market- place.

Since the cheque is made payable to the issuer (and as a result, cannot be cashed by the dealer) it is not apparent why alternative structures need to be developed or expensive regulatory requirements satisfied for an exempt market dealer to handle client cheques in transit. Instead, the Canadian Securities Administrators should consider stating the very opposite in the Companion Policy, namely that handling cheques payable to an issuer is <u>not</u> considered handling, holding or having access to client assets.

* * *

Thank you again for the opportunity to comment on NI 31-103. Should you have any questions respecting this submission please feel free to contact the writer. These submissions represent the views of the writer himself together with the views of certain clients he represents and not the collective views of Goodmans LLP.

Yours very truly,



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