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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

c/o

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Secretary
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Anne-Marie Beaudoin
Corporate Secretary
Autorité des marchés financiers
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Dear Sirs/Mesdames:

Proposed National Instrument 31-103 – *Registration Requirements,* Companion Policy 31-103CP – *Registration Requirements,* and Related Forms - Response to Request for Comments

Further to your request for comments dated February 29, 2008 on 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 members of the Canadian Securities Administrators (the "**CSA**") with following comments on behalf of our client, Orbis Investment Management Limited ("**Orbis**" or "**our client**").

Background

Orbis is a Bermuda-based investment manager of "captive" mutual funds (the "**Orbis Funds**"). Orbis was established in 1990 and has more than US$20 billion under management. The Orbis Funds are investment funds organized as investment companies, limited partnerships or unit trusts in various non-Canadian jurisdictions around the world. The head offices or principal places of business of the Orbis Funds are located in various jurisdictions located outside of Canada.

Securities of the Orbis Funds are distributed primarily to investors resident outside of Canada either in compliance with applicable registration and prospectus (or equivalent) requirements in the applicable jurisdictions or in some cases in reliance on exemptions from those requirements. In addition, a very small portion of the securities of the Orbis Funds are distributed to investors resident in certain Canadian jurisdictions in reliance on exemptions from the applicable prospectus and, where available, registration requirements, including pursuant to the "accredited investor", "minimum amount" and "investment fund reinvestment" exemptions contained in National Instrument 45-106 *Registration and Prospectus Exemptions*. Currently, over 99% of the investors (i.e., by number) in the Orbis Funds are foreign investors.

A member of the Orbis group of companies provides certain fund operations and information technology support services for the Orbis Funds from an office in British Columbia. These activities will also include a call centre that will receive and respond to general and administrative enquiries from existing and prospective foreign and Canadian investors. In addition, another member of the Orbis group of companies is currently seeking registration with the Ontario Securities Commission as a limited market dealer to allow the distribution of securities of the Orbis Funds directly to investors resident in Ontario. This Orbis entity will also carry on its activities from an office in British Columbia.

For further information regarding Orbis and the Orbis Funds, please refer to the previous comment letter dated June 18, 2007 in respect of the Proposed Instrument submitted on behalf of Orbis by Davies Ward Phillips & Vineberg (the "**Previous Comment Letter**").

Comments

1. Jurisdictional Scope of the Proposed Instrument

As described above, Orbis intends to operate a call centre and provide certain fund operations and information technology support services for the Orbis Funds from an office in British Columbia. In the course of planning these activities, our client reviewed and considered the application of the Proposed Instrument to the services it intends to provide from its office in British Columbia to both foreign and Canadian residents. As part of this review, our client identified certain ambiguities in the scope of the Proposed Instrument, particularly with respect to how a registrant's obligations under the Proposed Instrument might apply to dealings with foreign investors.

Subject to certain limited exemptions, an entity registered as an exempt market dealer under the Proposed Instrument must comply with the conduct rules contained in Part 5 of the Proposed Instrument with respect to dealings with its clients. These conduct rules create significant obligations for registrants, particularly related to know-your-client enquiries and suitability analysis. These rules will clearly apply to an exempt market dealer with respect to its dealings with investors resident in Canadian jurisdictions where it is registered. However, there is some uncertainty whether an exempt market dealer would be required to adhere to these same conduct rules and obligations with respect to its dealings, from within Canada, with investors resident outside of Canada, in particular where the activities are such that they would not otherwise require registration in Canada. For example, an existing foreign investor wishing to switch from one Orbis Fund to another may telephone the Orbis call centre in British Columbia to enquire about the mechanics of doing so. Our client considers that the mere provision of administrative information by a representative of an exempt market dealer should not precipitate the need for a suitability review of the investment decision of a foreign investor in relation to their investment in an investment fund or other issuer located outside of Canada, on the basis that the laws of the jurisdictions where the investor and the issuer are located should appropriately regulate these activities.

The CSA should clarify whether and how the proposed conduct rules contained in Part 5 of the Proposed Instrument apply to an exempt market dealer when dealing with persons resident outside of Canada, in particular where such dealings do not require registration in Canada. One approach that may assist on this issue would be to provide clarification regarding the meaning of the term "client" (i.e., to clarify the nature of the relationship that must exist before a person is considered to be a "client" of the registrant). An alternative approach would be to clarify that these rules do not apply in relation to activities which do not otherwise require registration in Canada.

Our client submits that this uncertainty in the ambit of the new Canadian registration regime will discourage international fund managers and investment companies from establishing administrative support centres in Canada which aim to provide services to a global client base. The CSA should provide clarification in the Proposed Instrument on this point so as not to stifle the development of these types of support centres in Canada.

2. Application of Suitability Obligations to Exempt Market Dealers

Orbis does not undertake suitability reviews for investors in the Orbis Funds and specifically requires investors to either make their own determination as to the suitability of an investment in the Orbis Funds or where required by applicable law, consult with a registered broker or dealer. In its latest request for comment, the CSA stated that:

> We believe that, at the upper end of the accredited investor spectrum, there are investors who are sufficiently sophisticated, or have sufficient resources to obtain expert advice, that they may neither need nor wish for the same level of protection as that which the registration regime extends to other investors.

The Proposed Instrument distinguishes this group of investors, referred to as "permitted clients", from accredited investors but provides no further rationale for the selection of the permitted client eligibility criteria in relation to the existing criteria for accredited investor status. Our client believes that the CSA should clarify the basis upon which the determination was made, including the basis upon which they have concluded that certain accredited investors are sufficiently sophisticated and/or have sufficient resources to obtain appropriate advice, with respect to an investment made without the benefit of a prospectus but yet fail to be sufficiently sophisticated and/or have sufficient resources, to make an investment without the benefit of a suitability assessment conducted by a registrant.

The proposal to require exempt market dealers to undertake a suitability assessment for clients that do not qualify as "permitted clients" will, for example, require fund managers such as Orbis that sell their funds directly to investors to either change their business model to include suitability assessments for accredited investors that do not qualify as "permitted clients" or to require such investors to involve another registrant. Fund managers may choose not to conduct a suitability assessment for a number of reasons, including the costs, training and competence, liability and record keeping associated with complying with the requirement, or because of the inherent conflict of interest associated with an assessment of the suitability of "in-house" funds. In those circumstances, the manager will have no choice but to prohibit these accredited investors from purchasing their funds without the involvement of a third party registrant. Third party registrants involved in the investment process will understandably seek to be compensated for undertaking this function and for bearing the liability associated with it. These added costs will inevitably be passed onto these investors, who are otherwise considered to possess the necessary sophistication and financial resources to assess the risks associated with and the suitability of an investment without the necessity of a prospectus. Our client believes that this involvement may have the effect of reducing the efficiency of capital raising activities in the exempt market without apparent justification.

Our client submits that the proposed exemptions from certain of the conduct rules applicable to exempt market dealers, including the suitability obligations, should be extended, for reasons of consistency and market efficiency, to include all accredited investors and not simply a subset thereof.

Furthermore, our client supports the decision of the British Columbia and Manitoba Securities Commissions to not impose the exempt market dealer registration requirement on entities that trade in securities on a private placement basis solely in British Columbia or Manitoba. However, our client does not agree with the approach currently proposed in British Columbia and Manitoba, whereby entities operating nationally would be required to register as exempt market dealers in British Columbia and Manitoba simply because they hold registrations in other Canadian jurisdictions. Our client submits that for consistency, the British Columbia and Manitoba Securities Commissions should not require exempt market dealer registration within their jurisdictions, regardless of an entity's registration status in other jurisdictions.

3. Application of Dealer Registration Trigger to Fund Related Activities

The proposed Companion Policy provides guidance regarding the application of the business trigger for registration generally, as well as specific guidance in the context of certain types of activities, including with respect to the marketing and wholesaling activities of investment fund managers. Our client believes that it would be useful if further specific guidance was provided in the context of other activities typically associated with investment funds to clarify the circumstances in which such activities will trigger the requirement for dealer registration, for example in relation to (i) providing information about the funds, including information regarding subscription and redemption procedures, (ii) providing middle and back office services, including the processing of documentation related to the purchase or redemption of securities of the funds, (iii) forwarding subscription forms and other documentation received from investors to the transfer agent of the funds, (iv) preparing and distributing periodic and ad hoc reports to existing and prospective clients, and (v) activities of the type typically performed by a registrar or transfer agent, particularly in the context of transactions that do not involve a registered dealer. For example, it is unclear whether these types of activities would trigger the dealer registration requirement where both the investor and the issuer of the security involved are located outside of Canada, and the only connection to Canada is the occurrence of the noted activity.

4. Impact of the Proposed Instrument on Non-Resident Fund Managers and Advisers Generally

We note that the CSA have made several amendments to the previously published draft of the Proposed Instrument which address certain comments raised by our client in the Previous Comment Letter. Our client recognizes and supports the changes made by the CSA to the Proposed Instrument which would (i) expand the list of "permitted clients" in section 1.1 to more closely align with the list of permitted clients under Ontario Securities Commission Rule 35-502 *Non-Resident Advisers* ("**OSC Rule 35-502**"); (ii) remove the restriction included in the previous Proposed Instrument which precluded foreign advisers from soliciting new clients; (iii) clarify that the "flow-through" theory of registrable activity espoused in OSC Rule 35-502 will not be maintained under the Proposed Instrument; and (iv) clarify that a foreign fund manager will not be required to register under the new investment fund manager category of registration provided it does not direct the management of the fund from a location within Canada.

However, our client notes that the Proposed Instrument continues to impose significant new restrictions on the business of non-Canadian investment fund managers and advisers.

Trigger for Investment Fund Manager Registration

In the Proposed Instrument, the CSA have clarified that a foreign fund manager will not be required to register under the new investment fund manager category of registration provided it does not direct the management of the fund from a location within Canada. This clarification is useful. As highlighted in our client's Previous Comment Letter, foreign fund managers may utilize the services of Canadian

service providers for, among other things, the calculation of net asset value for investment funds, the preparation of financial statements, and the provision of transfer agency and record keeping services for their foreign investment funds. The Proposed Instrument should clarify further whether the use of Canadian services providers for such services, typically considered "back office" services, would result in the foreign fund manager inadvertently being considered to direct the management of the fund from inside Canada.

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We would like to thank the CSA for providing the opportunity to comment on the Proposed Instrument. If you have any questions or would like to discuss any issues related to these comments, please do not hesitate to contact Jason Brooks at 604-640-4102 (or jbrooks@blgcanada.com) or Jennifer Wilson at 604-640-4148 (or jwilson@blgcanada.com).

Yours truly,

Borden Ladner Gervais LLP

By: *(signed) Jennifer Wilson*
Jennifer Wilson