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May 29, 2008

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Dear Sirs:

Re: CSA Registration Reform Project
Proposed Rule 31-103, First Revision published February, 2008

We are a law firm which has many clients who participate in raising capital through exempt transactions in the Province of Alberta. We commented previously on the first proposed version of Rule 31-103, and have the following comments on the revised version.

Background

We feel it is useful to repeat here some observations about the exempt market from our earlier comments. While some changes were made to the initial proposed form of the rule, and the

responses to comments indicated that a number of these observations were made by many commenters, and recognized by the Commissions, in a number of ways the proposed revision does not reflect this understanding.

Many of the participants in the exempt market operate in a way fundamentally different from a normal registered broker. In particular:

1. Exempt intermediaries generally do not open "accounts". They should not be required to, as the proposals seem to require.

2. Exempt intermediaries generally do not participate in capital markets transactions, such as purchases and sales on behalf of clients on stock exchanges.

3. Exempt intermediaries often deal with securities purchasers who are not their "clients" in the normal sense of the word, on an ongoing basis. The relationship often exists solely for the purpose of one transaction. The clients would feel it was an invasion of their privacy for the intermediary to inquire about the information needed for a normal "suitability" determination.

4. Exempt intermediaries often restrict their activity to specific securities - for example, real estate development projects, or even to securities of a particular issuer.

5. Exempt intermediaries do not generally handle the funds being invested. The funds go directly to the issuer by a cheque made out in the issuer's name. Insolvency of the intermediary would not affect this process or subject the investor to loss.

Comments

The proposed revision fails to recognize the nature of the exempt market in at least two remaining ways, which are the basis of our first two comments below.

1. **The Courier Misapprehension.** The revised rule continues to require bonding and capital requirements for exempt market dealers. The proposed exemption for dealers who do not "handle, hold, or have access to any client assets, including cheques and other similar instruments" is, to the extent it is intelligible at all, not responsive to realities or to any need for protection of the investor. The typical exempt market dealer transmits cheques payable to the issuer, from the investor to the issuer, along with a subscription form. This activity poses no risk of loss to the investor from lack of capital of the dealer. We suggest that couriers are not required to be registered under the Securities Acts and a courier function should not trigger additional requirements.

The unusual terminology in the exemption is confusing to say the least, but seems designed to avoid exempting this activity, by trying to analogize between it and other activities where capital might matter. What is "access"? How is a cheque an asset of the client? How does "handling" a cheque, payable to someone else, give access to the investor's assets? To treat the act of transmitting a third party cheque as the regulatory equivalent of a safekeeping arrangement for bearer bonds, or running a cash account, is not sensible.

Exempt market dealers who do enter into safekeeping arrangements for client securities or cash, or who maintain accounts of client securities, could be covered by the capital requirements. (Even this is less useful than it might appear, since such dealers are not trading on stock markets and do not have counterparties who rely on their solvency, as would a normal broker. Separate identification and segregation of client assets would protect their clients from creditors of the dealer.) Other exempt market dealers should not have to meet this requirement.

The same comment applies to capital requirements, account opening requirements, and all other places in the proposed rule where the convoluted reference to handling cheques currently appears. There is no need to impose any of these provisions on what is essentially a courier function.

2. **Suitability Issues.** The revised rule does not recognize the difference in suitability determinations by a dealer who has opened an account for an investor, is aware of a range of the investor's investments and has the account opening information on file, and a person who simply sells one investment to the investor. It gives no guidance as to the appropriate way to make a suitability determination in the absence of an ongoing relationship with the client, or of detailed knowledge of the client

It has been suggested to us that this requirement could be a principle-based provision, without detailed requirements, but if this is to be the case some guidance, at least in the companion policy, is necessary. For example, the risk acknowledgement required of all purchasers under the exemption in NI 45-106, section 2.9 contains an acknowledgement by the purchaser that he or she could lose their entire investment. In these circumstances, confirmation by the purchaser that he or she is able to withstand such a loss should be sufficient to determine suitability.

In fact, the size of the investment is one of the prime factors determining suitability in these cases, and is not even listed as a factor in the companion policy. (That is, a $25,000 investment in an offering may be suitable for a particular investor when a $200,000 investment in the same offering is not.) Similarly, whether the investment is made with borrowed funds is not listed. If the investment is risky, both these things are significant in determining suitability. Specific inquiry about most of the things listed in 5.2 of the Companion Policy will not always be relevant and so should not always be required. Similarly, it is difficult to see why knowledge of 10% shareholders of a corporation is necessary for a suitability determination, or for any other purpose related to exempt transactions.

3. **Phantom Uniformity.** Certain comments on the question raised by the British Columbia commission regarding the usefulness of the registration of exempt market dealers require response. We fail to see how the somewhat complicated new proposal by B.C. and Manitoba, exempting only dealers who do not register in any other province, is any more uniform than simply not requiring registration, as British Columbia initially proposed. No inconvenience or complexity arises from a lack of requirements in one or more jurisdictions. Uniformity is only desirable to keep things simple. When rules are made more complicated or unnecessarily restrictive in the interests of "uniformity", the tail is wagging the dog.

4. **Regulatory Creep.** There is a natural tendency to assume that, if a little regulation is good, more must be better. This is decidedly not true in the regulation of exempt market

dealers. While all should be of good character and deal in good faith, too many additional requirements will greatly adversely affect capital raising in Alberta. The issues discussed in the first two comments above are clearly issues which create serious adverse effects. (There may be others which are not yet apparent to us.)

Unless those issues are resolved, we urge the Alberta commission to adopt a position that no registration of exempt market dealers in Alberta is required. In that event, a uniform area of British Columbia, Alberta and Manitoba would be created in which the exempt market could operate as before. This is uniform enough.

Conclusion

Thank you for the opportunity to comment on the proposals. Please feel free to contact the writer directly if you have any questions or would like any clarification on any of the above.

Yours truly,

SCHINNOUR MATKIN & BAXTER

Dan L. Baxter
/ls

cc William S. Rice, Q.C.
Chairman, Alberta Securities Commission