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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 Territory
Registrar of Securities, Nunavut

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Dear Sirs/Mesdames:

Marathon Asset Management LLP ("Marathon") appreciates the opportunity to comment on the proposed amendments to National Instrument 31-103 – *Registration Requirements and Exemptions* ("NI 31-103") relating to *Registration of International and Certain Domestic Investment Fund Managers.*

Introduction

Marathon is a fund manager and adviser, authorized and regulated by the Financial Services Authority ("FSA"), in London, England to:

(i) give investment advice;

(ii) act as a discretionary investment manager;

(iii) act as the operator of a collective investment scheme (a "fund"); and

(iv) deal in investments as agent and arrange deals in investments.

Please note that the FSA rules distinguish between the regulated activities described in (ii) and (iii) above so that they are separate activities requiring separate authorisation. Acting as a discretionary investment manager means that a firm manages assets belonging to another in circumstances involving the exercise of discretion. Acting as the operator of a fund is broader as it means that a firm establishes, operates or winds up a fund, and covers all the activities relating to the operational running of a fund. The operator of a fund would be an "investment fund manager" in that it would be "a person or company that directs the business, operations or affairs of an investment fund."

Marathon currently operates in Canada, under the international adviser exemption in section 8.26 of NI 31-103, in Ontario, British Columbia, Quebec, Manitoba and Alberta. It also currently operates in Canada, under the international dealer exemption in section 8.18 of NI 31-103, in Ontario, British Columbia and Quebec. Marathon provides advice to clients who are "permitted clients" within the meaning of that term in NI 31-103. Such advice is provided directly, through an investment management agreement with the client, or to a Canadian investment fund or an Irish investment fund (the "Canadian Fund" and the "Irish Fund" respectively, or, together, the "Funds"), in which a Canadian client may invest. Whether they invest in the Funds or have an investment management agreement with Marathon, all Canadian clients are "permitted clients". The Canadian Fund is a permitted client under paragraph (r) of the definition of "permitted client" in NI 31-103.

State Street Trust Company of Canada acts as the trustee for the Canadian Fund whilst State Street Custodial Services (Ireland) acts as the trustee for the Irish Fund. Marathon is the adviser to the Funds. The Canadian Fund has engaged State Street Global Markets Canada, Inc., an affiliate of the trustee, to act as the distributor of record of Units in the Canadian Fund. Marathon currently distributes securities of the Irish Fund, in reliance on the international dealer exemption, only to "permitted clients".

Securities of the Funds are only available to investors that also qualify as "accredited investors" for purposes of the exemptions from the prospectus requirement under applicable Canadian securities legislation.

Comments on the proposed amendments to NI 31-103

1. We understand that under the proposed amendments to NI 31-103, Marathon will be required to register in Canada as an investment fund manager.

Comment – The proposed exemptions from the investment fund manager registration requirement are set out in proposed sections 8.29.1 and 8.29.2 of NI 31-103. Marathon will not qualify for the exemption in proposed section 8.29.1, (i) in respect of the Canadian Fund because the Fund is not organized under the laws of a foreign jurisdiction, more than 10% of the Fund's assets are owned by residents of Canada and more than $50 million of assets of the Canadian Fund and the Irish Fund are attributable to residents of Canada, and (ii) in respect of the Irish Fund because more than $50 million of assets of the Canadian Fund and the Irish Fund are attributable to residents of Canada. Marathon does not wish to qualify for the exemption in proposed section 8.29.2 by refraining from soliciting new investors.

It is Marathon's submission that sections 8.29.1 and 8.29.2 should be revised or an additional exemption added to provide a similar exemption for international investment fund managers to those set out in section 8.18 of NI 31-103 for international dealers and section 8.26 of NI 31-103 for international advisers. Both the international dealer and international adviser exemptions take account of the foreign jurisdiction in which the dealer or adviser is registered or operates and its registration in that foreign jurisdiction which permits it to carry on those activities. Such recognition of an investment fund manager's registration in a foreign jurisdiction is not currently contained in the proposed sections 8.29.1 and 8.29.2 and it is submitted that this is inconsistent with the policy evidenced by the international dealer and international adviser exemptions which are set out in the same National Instrument. In effect, the activities which the new investment fund manager registration requirement is seeking to regulate are already subject to regulatory oversight, in the case of Marathon, by its home jurisdiction regulatory authority (the FSA) under the terms of its registration for establishing and operating collective investment schemes. In relation to the Canadian Fund, while Marathon remains responsible for these activities, the performance of these activities has been delegated to an entity (State Street Trust Company of Canada) which is subject to Canadian regulatory authorisation and oversight as a trust company.

It is Marathon's submission that revising sections 8.29.1 or 8.29.2 or inserting an additional exemption to provide for recognition of a foreign investment fund manager's registration in its home jurisdiction will provide a uniform and consistent exemption policy throughout NI 31-103.

This is relevant to Marathon since it is exempt from registration as an exempt international dealer and exempt international adviser in several Canadian provinces but as the proposals currently stand, it will have to register as an investment fund manager. We understand that registration is required if Canadian clients invest in the Funds, however, registration would not be required if the same Canadian clients were advised on investments directly through an investment management agreement. This is the result of the inconsistency between sections 8.18 and 8.26 and the proposed sections 8.29.1 and 8.29.2. By making it a requirement for foreign investment fund managers to register with the Canadian authorities when offering pooled fund products in Canada, a barrier may be created for pooled fund products. We believe that this may reduce the willingness of foreign fund managers to offer investment fund products to Canadian clients, leading to a reduced choice of investment options for Canadian investors. As a result, Canadian investors would not benefit from the cost benefit of pooled funds such as the shared costs borne by all investors and shared economies of scale in making investments.

2. We understand that the proposed exemptions in sections 8.29.1 and 8.29.2 are only available where the investment fund is incorporated, formed or created under the laws of a foreign jurisdiction.

Comment – Marathon questions why the exemptions are only available to investment funds incorporated, formed or created under the laws of a foreign jurisdiction. Marathon submits that the place of formation of an investment fund is not relevant to the CSA's stated rationale behind requiring investment fund managers to register in Canada or the policy reason for providing an exemption from the registration requirement. This is relevant to Marathon since it manages the Canadian Fund which is established under the laws of Ontario. In addition, the exemptions as currently drafted may give rise to the unintended consequence of incentivising foreign investment fund managers to establish investment funds in jurisdictions other than Canada, which may amount to a competitive disadvantage for those who service the Canadian fund industry. The fact that an investment fund is established in Canada should not, *per se*, subject its investment fund manager to registration.

3. The proposed exemption in section 8.29.1 is subject to threshold limits, so that the exemption is not available if more than 10% of any investment fund is owned by Canadian residents or Canadian residents own more than $50million worth of assets in aggregate in all the investment funds managed by a single investment fund manager.

Comment – In Marathon's view it is inappropriate to set threshold limits using arbitrary amounts as these will require frequent and continuous monitoring by all CSA members to ensure that the limits remain relevant and up-to-date. The other problem with setting fixed amounts is that the rules cannot apply proportionately to investment fund managers which will vary in size, scope and scale of their activity. We suggest that it may be more appropriate to introduce something along the lines of a threshold test of "significant activity" in a Canadian province or territory. We suggest that there should be no per fund threshold and that an exemption should be available if the fair value of the assets attributable to securities owned by residents of Canada is not more than 10% of the fair value of all the assets of all the investment funds managed by an international investment fund manager. This would be consistent with the approach in the international adviser exemption.

4. We understand that the proposed amendments will require foreign investment fund managers to register with the Canadian Securities Administrators for the first time.

Comment – In Marathon's view, the proposed amendments will require foreign investment fund managers to register for the first time with the securities authorities in each Canadian province or territory where it has investors. The effect of this should not be under-estimated – foreign investment fund managers will need to spend time and resources on the registration process as well as on an ongoing basis, once registered. This may be a disproportionate burden for many foreign investment fund managers, especially for those whose activities in Canada do not amount to a significant proportion of their business. As discussed earlier, the result of the proposed amendments may lead foreign investment fund managers to limit their pooled fund offerings to Canadian investors or to establish funds in jurisdictions other than Canada.

5. We understand that the registration requirements for investment fund managers are intended to ensure that investment fund managers, including foreign investment fund managers, have sufficient proficiency, integrity and solvency to adequately carry out their functions, as well as address specific operational risks identified by the CSA.

Comment – Marathon is authorised and regulated in the United Kingdom by the FSA and is already subject to regulatory oversight in relation to proficiency (known as "competence" in the UK), integrity and solvency, by way of capital resources requirements. We do not think that additional regulatory oversight from the CSA will add any additional meaningful benefits to clients of Marathon that are not provided under its existing regulatory status.

It is not clear to us how the imposition of the proposed registration requirement will reduce the risks identified in the CSA notice of February 20, 2007 (the "2007 Notice"):

- incorrect or untimely calculation of net asset value;
- incorrect or untimely preparation of financial statements and reports;
- incorrect or untimely provision of transfer agency or record-keeping services; and
- conflicts of interest between the fund manager and its investors.

Under Marathon's operational model, the activities at risk described above (with the exception of the last one) are carried out by competent, qualified third party administrators which are appointed by Marathon. In relation to the Funds, Marathon has appointed State Street Canada or Ireland to act as its administrator, each of which is subject to authorisation and regulatory supervision in its home jurisdiction.

The operational model of appointing an independent third party to carry out an investment fund's operational activities and administration is used by nearly all European fund managers. This enables the fund manager to concentrate on its discretionary investment management activities, while retaining the services of skilled specialists for fund administration activities. The fund manager retains the responsibility for carrying out the fund's operational activities and has oversight of the administrator's activities. This oversight is typically exercised by a firm's compliance officer and, where applicable, the management company, board of directors or other governing body of the relevant fund. We note that in many jurisdictions, including the UK, the role of compliance officer is subject to regulatory approval and oversight which includes an on-going assessment of the individual's competence.

One of the registration requirements applicable to an investment fund manager that must seek registration relates to proficiency of the chief compliance officer ("CCO") which an investment fund manager must appoint. Marathon submits that the proposed proficiency requirements will be unlikely to be satisfied by the CCO of a foreign investment fund manager because none of the Canadian Securities Course, the PDO Exam or the other required courses are specifically focussed on the operation of an investment fund, particularly a foreign investment fund, and thus will not be relevant to such a CCO. This makes satisfying the registration requirement particularly difficult for a foreign investment fund manager.

To the extent that the CSA considers there is a need for proficiency requirements Marathon submits that:

- Proficiency requirements, including those related to examinations, should be restricted to the specific activities in the 2007 Notice;

- There should be an appropriate exemption where the CCO is a compliance officer that has been formally approved or is subject to regulatory oversight in his or her home jurisdiction in relation to overseeing these activities; and

- There should be an appropriate exemption where the specific activities in the 2007 Notice are performed by independent third parties which are appropriately regulated in Canada or in the home jurisdiction of the investment fund.

There are also other obstacles to a foreign investment fund manager that must seek registration such as the requirement to prepare financial statements in accordance with Canadian GAAP. Marathon submits that the registration requirements applicable to investment fund managers be reviewed to reflect that foreign firms may seek such registration and that there may be alternatives to the prescribed requirements that will address the risks referred to in the 2007 Notice without being unnecessarily burdensome on a foreign firm.

If you would like to discuss these comments further, please contact me.

Yours faithfully,

Bridget Hui
Legal Counsel
Marathon Asset Management LLP