ORBIS INVESTMENT MANAGEMENT LIMITED

ORBIS HOUSE, 25 FRONT STREET, HAMILTON HM 11, BERMUDA
P.O. BOX HM 571, HAMILTON HM CX, BERMUDA

TELEPHONE: +1 (441) 296 3000, FACSIMILE: +1 (441) 296 3001, E-MAIL: CLIENTSERVICE@ORBISFUNDS.COM, WEBSITE: WWW.ORBISFUNDS.COM

Licensed to conduct investment business by the Bermuda Monetary Authority

13 January 2011

By Email (jstevenson@osc.gov.on.ca / consultation-en-cours@lautorite.qc.ca)

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
Superintendent of Securities, Yukon Territories
Registrar of Securities, Nunavut

c/o

John Stevenson,
Secretary
Ontario Securities Commission
20 Queen Street West, Suite 1903,
Box 55
Toronto, ON M5H 3S8

Anne-Marie Beaudoin,
Corporate Secretary
Autorité des marchés financiers
800, square Victoria, 22 étage
C.P. 246, tour de la Bourse
Montreal, QC H4Z 1G3

Dear Sirs/Mesdames:

Re: Proposed Amendments to National Instrument 31-103 *Registration Requirements and Exemptions* and Companion Policy 31-103CP *Registration Requirements and Exemptions* (together, "NI 31-103") – Response to Request for Comments

Further to your request for comments dated 15 October 2010 on proposed amendments to National Instrument 31-103 *Registration Requirements and Exemptions* and Companion Policy 31-103CP *Registration Requirements and Exemptions* (the "**Proposed Amendments**"), we are pleased to provide the members of the Canadian Securities Administrators (the "**CSA**") with the following comments on behalf of Orbis Investment Management Limited ("**Orbis**") and the other members of the Orbis group of companies (collectively, the "**Orbis Group**").

BACKGROUND

Orbis is a Bermuda-based investment manager of "captive" investment funds (the "**Orbis Funds**"). Orbis was established in 1990 and has over US$24 billion under management as at the date hereof. The Orbis Funds are investment funds organized as investment companies, limited

partnerships or unit trusts in various non-Canadian jurisdictions around the world. The Orbis Funds operate in various jurisdictions outside of Canada.

The 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 requirements, including the "accredited investor", "minimum amount" and "investment fund reinvestment" exemptions contained in National Instrument 45-106 *Prospectus Exemptions*. Currently, over 99% (by number) of the investors in the Orbis Funds are foreign investors, and under 1% are Canadian investors. Among the Canadian investors, the distribution of the Orbis Funds is principally limited to "permitted clients" as defined in NI 31-103 ("**permitted clients**"), holding an average investment of over $150 million. None of the Orbis Funds is a "reporting issuer" in any Canadian jurisdiction.

Orbis conducts its management and administrative responsibilities for the Orbis Funds from its head office in Bermuda. Orbis Investment Management Limited does not currently have an office or physical place of business in Canada. A member of the Orbis Group provides certain fund operations and information technology support services for the Orbis Funds from an office in British Columbia. In addition, to facilitate the distribution of the securities of the Orbis Funds directly to investors resident in Canada, another member of the Orbis Group, Orbis Canadian Client Services Limited, is currently registered as an exempt market dealer in Ontario and has applied for such registration in British Columbia, Alberta and Quebec. Orbis Canadian Client Services Limited carries on its activities from an office in British Columbia and is a member of the Investment Funds Institute of Canada.

COMMENTS

1. Scope of the International Investment Fund Manager Exemption

(a) Investments by Permitted Clients

We respectfully submit that international investment fund managers that manage funds which are only distributed to permitted clients be exempt from registration regardless of whether they have "a significant presence in the Canadian market".

As discussed above, Orbis principally limits the distribution of the Orbis Funds in Canada to permitted clients. Prior to the adoption of NI 31-103, the CSA published commentary with respect to the establishment of the "permitted client" category and, in its request for comments on NI 31-103 published on 29 February 2008, stated as follows:

> *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.*

Accordingly, NI 31-103 distinguishes permitted clients from other investors on the basis that permitted clients are sufficiently sophisticated and/or have sufficient resources to obtain appropriate advice with respect to potential investments without the benefit of certain disclosure and other protections which are mandatory for all other investors. In particular, the CSA

determined that in certain circumstances permitted clients do not require the relationship disclosure, leverage disclosure, suitability analysis or other know-your-client protections prescribed by NI 31-103 in relation to average investors.

Notwithstanding the foregoing, the international investment fund manager exemption contained in section 8.29.1 of the Proposed Amendments imposes significant additional restrictions on the ability of international investment fund managers to rely on the registration exemption even where such managers limit the distribution of their funds in Canada to permitted clients. This approach runs counter to the CSA's stated position that permitted clients are sufficiently sophisticated to not require the same level of protection as average investors in the Canadian marketplace.

We suggest that an international investment fund manager should be exempt from registration, regardless of whether it has "a significant presence in the Canadian market", provided that the funds being managed thereby are only being distributed to permitted clients, on the basis that permitted clients are sufficiently sophisticated and/or have sufficient resources to appropriately evaluate and analyze the investment opportunities provided by an international investment fund manager without the need for additional regulatory protections.

(b) Issues with Proposed Thresholds

We respectfully submit that the limits set out in section 8.29.1(4) of the Proposed Amendments do not provide reasonable measures of whether a manager has "a significant presence in the Canadian market" as suggested by the CSA, and are furthermore particularly problematic in the context of permitted clients.

First, the 10% asset limit proposed in section 8.29.1(4)(a) is in reference to the size of the fund rather than any "significant presence" of the manager or the fund(s) it manages in the Canadian market. For instance, this threshold could be crossed for the manager of a small international fund when a permitted client makes an investment in the fund simply because the fund does not have sizeable assets at the relevant time. For example, we believe that a $2.1 million investment into a $20 million fund should not trigger the need for registration on the basis that the investment fund manager has a "significant presence" in the Canadian market. What further complicates the practicality of such a threshold is that it can be triggered by the actions of others. For example, if sufficient non-Canadian investors redeem their holdings, a holding of less than 10% by Canadian investors can become a greater than 10% holding requiring either that the non-resident manager register or the Canadian investors divest, or be divested, so their holdings fall below 10%.

Second, the $50 million threshold proposed in section 8.29.1(4)(b) is arbitrary and, more importantly, far too low to serve as a relevant quantification of any "significant presence" of the manager or the fund(s) it manages in the Canadian market. According to the November 2010 estimates published by Investment Funds Institute of Canada[1], the approximate size of the investment fund space in Canada is in excess of $680 billion. The management of assets which conservatively equate to 0.007% of the Canadian market should not be considered a "significant presence" and thereby trigger the need for registration.

[1] IFIC's December Statistics Estimate (2010), online: The Investment Funds Institute of Canada <https://statistics.ific.ca/English/reports/2010/11/public/member_other_investment_funds.xls> (date accessed: 7 January 2011).

Furthermore, we suggest that it is inappropriate to use any form of fund-specific asset threshold in this exemption as such thresholds are more prone to trigger a registration obligation in circumstances where one is not warranted, as permitted clients are precisely the type of investors who seek to make significant investments.

Accordingly, we respectfully submit that the proposed international investment fund manager exemption be revised to remove the asset thresholds in section 8.29.1(4).

(c) Alternative to Proposed Thresholds – Condition of Registration in Home Jurisdiction

Should the CSA consider it necessary to impose additional *qualitative* conditions to the international investment fund manager registration exemption, we respectfully submit that the registration status of an international investment fund manager in their home jurisdiction should be considered as a possible condition for relying on the exemption in lieu of the current asset thresholds.

The Proposed Amendments would require international investment fund managers that are unable to rely on the proposed exemptions to register in Canada and comply with Canadian regulatory requirements without any consideration of the adequacy of the regulations to which they are already subject in connection with existing registrations in their home jurisdiction or elsewhere. We note that this approach is inconsistent with the approach taken in the international dealer exemption (section 8.18) and international adviser registration exemption (section 8.26), as well as with exemptions in other international jurisdictions (for example, registration exemptions provided by the Australian Securities and Investment Commission and the passport principles of the *Markets in Financial Instruments Directive* in the European Union).

We respectfully submit that the CSA should exempt international investment fund managers already subject to adequate regulation in their home jurisdictions when determining whether it is appropriate or necessary to require additional registrations in Canada.

(d) Alternative to Proposed Thresholds – Thresholds Relating to the Significance of Canadian Investors to the Manager's Business

Should the CSA consider it necessary to impose additional *quantitative* conditions to the international investment fund manager registration exemption, we respectfully submit that the application of thresholds intended to measure *the significance of Canadian investors to the international investment fund manager's business* are more relevant and appropriate than the proposed thresholds which are intended to measure *the significance of the manager's presence in the Canadian market.* As described below, this approach would be consistent with the approach taken with the international adviser exemptions elsewhere in NI 31-103. Furthermore, it is not clear why the significance of the manager's presence in the Canadian market should be a relevant trigger for investment fund manager registration where it was not considered of relevance in relation to the registration of the international adviser, international dealer or other categories of registration.

Accordingly, we respectfully submit any of the following threshold tests would, appropriately, fulfill the purpose of limiting the availability of the registration exemption to international investment fund managers with a proportion of Canadian investors that are only incidental to their overall business:

(i) Revenue Threshold

A revenue threshold would be internally consistent with the approach applied in relation to the international adviser exemption in section 8.26(4)(d) of NI 31-103.

(ii) Minimum Investment Threshold

Should the CSA consider the sophistication and resources of *all* permitted clients as insufficient to distinguish the entire category of such investors from those who may require or benefit from regulatory protection, at least those permitted clients who may invest an amount in excess of a significant threshold with a particular investment fund manager *should* be distinguished.

Accordingly, we respectfully submit that permitted clients with the sophistication and resources to invest amounts in excess of, for example, $25 million with a single investment fund manager *do not require the same level of protection as that which the registration regime should extend to other investors* and such investments should not engender the need for investment fund manager registration. In our experience investors who make investments of this or greater magnitude conduct extensive due diligence on the investment manager prior to investing including assessing the risks that the CSA has identified as being of particular concern, namely, NAV calculation, financial statement and report preparation, transfer agency and record keeping services and conflicts of interest.

(iii) Number of Canadian Investors Threshold

Many jurisdictions throughout the world exempt offers of securities and those offering them from registration where the number of investors resident in the jurisdiction is below a specified threshold, For example, Ireland has a 30 investor limit per fund. This private placement exemption based on the number of investors is widely acknowledged as a reasonable basis for determining an exemption threshold. We respectfully submit that the CSA consider a numerical threshold of investors per investment manager or per fund, as the basis for any exemption threshold, if any quantitative test is to be adopted.

2. Non-Resident Investment Fund Manager Exemption – Clarification of "Active Solicitation"

(a) Scope of Activities Caught by "Active Solicitation" – Responses to Unsolicited Queries

We respectfully submit that responses by international investment fund managers to unsolicited queries should not be considered "active solicitations".

The Proposed Amendments provide guidance regarding the interpretation of "active solicitation" of residents of the jurisdiction as it applies to the grandfathering provision provided in the proposed section 8.29.2(e). Among other things, the CSA state as follows:

> *Active solicitation refers to intentional actions taken by the investment fund or the investment fund manager to encourage a purchase of the fund's securities.*

While the guidance provided states that active solicitation "includes" direct communications with residents of the jurisdiction, advertising and certain sales compensation practices, the guidance does not provide a comprehensive explanation of what constitutes "active solicitation".

Given the breadth of the initial statement set out in the Companion Policy, we suggest that further guidance be provided by the CSA as to the limits of "active solicitation". In particular, we believe that it would be appropriate for the CSA to distinguish between (i) *re*-active actions undertaken by a manager *at the request of* or *in response to* an existing or prospective investor who first initiates contact with the investment fund manager, and (ii) *pro*-active, targeted, actions or communications first initiated by an investment fund manager for the purpose of soliciting an investment. Multiple IOSCO surveys and reports[2] support the finding that many regulators when assessing regulation of cross border activities distinguish between a "pull" approach where the services are initiated by the investor and a "push" approach where the services are initiated by the financial intermediary, restricting regulation to the latter.

We are strongly of the view that the actions of a manager resulting from unsolicited advances are reactive or passive in nature and therefore should not be caught by wording intended to prohibit "active solicitation".

We therefore respectfully submit that such activities should be excluded from the scope of "active solicitation" and suggest that additional guidance be provided in the Proposed Amendments to clarify this point.

(b) Scope of Activities Caught by "Encourage Their Purchases of the Fund's Securities"

The Proposed Amendments state that "direct communication with residents of the jurisdiction to encourage their purchases of the fund's securities" would be considered by the securities regulators to amount to "active solicitation". We note that an investment fund manager may communicate directly with existing or prospective investors for a variety of reasons and it is not clear what the scope of the phrase "to encourage their purchases of the fund's securities" may include. Furthermore, this test appears to differ from other registration triggers described or discussed in NI 31-103, such as the "business trigger", and it is not clear to what extent it differs from the concept of an "act in furtherance of a trade" included in securities legislation.

We respectfully submit that the fundamental day-to-day activities of a fund manager may erroneously be caught by the wording of the Proposed Amendments. Specifically, we consider erroneous the notion that matters of basic customer service, for example: (i) providing factual information about the manager's fund(s), including information regarding subscription and redemption procedures, (ii) any actions intended as a facilitation of an administrative process, i.e. disseminating transaction forms to a prospective investor or routing such forms and other documentation received from a prospective investor to the transfer agent of a fund, or (iii) preparing and distributing periodic and *ad hoc* reports to existing and prospective investors, may be caught by wording intended to prohibit "active solicitation".

Once again, we respectfully submit that such activities should be excluded from the scope of "active solicitation" and suggest that additional guidance be provided in the Proposed Amendments to clarify this point.

---

[2] Regulation of Market Intermediaries in a Cross Border Environment, Survey Regarding Cross-Border Activities of Market Intermediaries in Light of Technological Advances, IOSCO February 2003; [2] Regulation of Remote Cross-Border Financial Intermediaries, IOSCO February 2004.

3. An Alternative to Full Registration for International Fund Managers

An alternative approach to registration that we believe the CSA should consider is to provide an exempt reporting manager category requiring mandated and filed disclosure with the CSA providing the necessary disclosure about these risks. This is the approach that the SEC is proposing in the draft Rules Implementing Amendments to the US Investment Advisers Act of 1940 mandated by Title IV of the Dodd-Frank Act.[3]

4. Impact of the Proposed Amendments on International Fund Managers Generally

The Proposed Amendments provide disparate treatment for international managers that offer their services through a separate account to a permitted client versus those offering the mandate through the convenience and efficiency of a fund. For example, if a permitted client wished to retain an international adviser for an emerging markets separate account mandate, the international manager would qualify for the registration exemption under section 8.26. However, if the same manager provided the same mandate through a fund, often times to afford better economies of scale and administrative convenience to the permitted client; it may nonetheless need to become registered under the Proposed Amendments. There are also unexplained and seemingly unjustifiable differences between the exemption available to international advisers and the exemption available to international investment fund managers under the Proposed Amendment. For example, the international adviser exemption is dependent on the adviser not exceeding a 10% revenue test whereas the international fund manager exemption is dependent on the investment not exceeding a 10% asset test in a fund and an overall limit of $50 million.

5. Impact of the Proposed Amendments on Institutional Investors' access to Global Managers

The registration obligations and the additional regulatory burden and costs which these would impose on many international investment fund managers may have a significant impact on the willingness of such managers to offer their services and investment products in Canada and may curtail the ability of Canadian investors (particularly large institutional investors) to access international expertise and specialized investments that may be important to their investment strategy and their beneficiaries.

* * * *

We would like to thank the CSA for providing the opportunity to comment on the Proposed Amendments. If you have any questions or would like to discuss any issues related to these comments, please do not hesitate to contact the undersigned at j.dorr@orbisfunds.com.

Yours truly,

James J. Dorr,
General Counsel

[3] See Part IIB of Release No IA-3110 of the US Securities and Exchange Commission, 17 CFR Part 275 beginning at page 35.