



DAVIES WARD PHILLIPS & VINEBERG LLP

44th Floor
1 First Canadian Place
Toronto Canada M5X 1B1

Tel 416 863 0900
Fax 416 863 0871
www.dwpv.com

January 14, 2011

A. Timothy Baron
Dir 416.863.5539
tbaron@dwpv.com

BY COURIER AND E-MAIL

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

John Stevenson
Secretary
19th Floor, Box 55
20 Queen Street West
Toronto, ON M5H 3S8

Fax: (416) 593-2318
Email: jstevenson@osc.gov.on.ca

Anne-Marie Beaudoin
Directrice du secrétariat
Autorité des marchés financiers
C.P. 246, 22 étage
800, square Victoria
Montreal, QC H4Z 1G3

Fax: (514) 864-8381
Email: consultation-en-cours@lautorite.qc.ca

Dear Sirs/Mesdames:

Re: Request for Comment - National Instrument 31-103 – *Registration Requirements and Exemptions* – Registration of International and Certain Domestic Investment Fund Managers

Further to your request for comments dated October 15, 2010 on the proposed amendments to National Instrument 31-103 – *Registration Requirements and Exemptions* ("NI 31-103") and Companion Policy 31-103CP – *Registration Requirements and Exemptions* relating to the registration of international and certain domestic investment fund managers (collectively, the "**Proposed Amendments**"), we are pleased to provide the following

comments based upon our experience as counsel to numerous foreign and domestic investment funds and investment fund managers.

We would like to thank the Canadian Securities Administrators (the "CSA") for providing the opportunity to comment on the Proposed Amendments.

We have limited our comments to those aspects of the Proposed Amendments that deal with the registration trigger and certain terms of the exemptions available to international investment fund managers (as such term is utilized in the Notice of and Request for Comment on Proposed Amendments to National Instrument 31-103 – *Registration Requirements and Exemptions*).

* * * *

Registration Trigger for Non-Resident Investment Fund Managers

In its Notice of National Instrument 31-103 – *Registration Requirements and Exemptions* published July 17, 2009, the CSA announced the elimination of the "look-through" approach for investment advisers. Under the "look-through" approach, investment advice provided to a non-resident investment fund was perceived to "flow through" to the investors in the fund. The effect of this interpretation was that non-resident investment advisers were required to register or rely upon an exemption from registration in Canada to the extent any securities of the funds they advised were sold in Canada, despite the fact that such advisers provided advice only to non-resident investment funds.

Under the Proposed Amendments, the trigger for non-resident investment fund manager registration claws back this sensible approach by once again "looking through" a non-resident investment fund to the securityholders of such fund to determine whether the investment fund manager of such fund is required to register with Canadian securities regulators.

Reinstituting the "look-through" trigger under the Proposed Amendments is inconsistent with the regulatory approach taken in other jurisdictions, such as the United States, and would directly contradict, and eliminate the benefits of, its recent abolition by the CSA with respect to portfolio managers.

In our view, highly sophisticated Canadian investors should not be prohibited from making the responsible determination that, in seeking foreign exposure for a portion of their portfolios, they may elect not maintain the benefit of protections offered under Canadian securities laws. The rationale of responsible choice, which underlies the international dealer and international adviser exemptions, is not carried through in the Proposed Amendments.

We submit that the "look-through" approach should be abolished on a uniform basis. We do not see a practical or principled need to limit the freedom of sophisticated Canadian investors to seek a wide array of investments abroad by requiring that investment fund managers of non-resident funds be registered in Canada. A predictable effect of such a requirement will be the diminution in foreign investment opportunities available to sophisticated Canadians.

Comments on the Terms of the Proposed Exemptions

Exemption for Investment Fund Managers that Utilize Certain Exemptions

The "active solicitation" trigger for the exemption in section 8.29.1 attempts to limit the ambit of Canadian regulation to circumstances in which Canadian regulators have a legitimate interest in extraterritorial oversight, being the active solicitation by foreign investment funds and managers of Canadian investors. However, there are certain aspects of the Proposed Amendments that do not conform completely to this rationale.

In particular, we contend that the prohibition on the solicitation of sophisticated Canadian investors is without a sound policy basis to the extent the international investment fund manager undertaking such solicitation is *also* availing itself of the international dealer exemption in section 8.18 of NI 31-103 or the local dealer exemption in Section 8.5 of NI 31-103 (the "**local dealer exemption**"). International investment fund managers that avail themselves of the international dealer exemption or the local dealer exemption are either subject to regulatory oversight by securities regulators in their principal jurisdiction or the registered dealer they engage is regulated in Canada. As such, it is unnecessary to impose the full burden of Canadian regulatory requirements on such funds or their managers as well.

The effect of the Proposed Amendments, in light of the extremely stringent thresholds required to qualify for the exemption in proposed subsection 8.29.1(4), is that the most sophisticated Canadian investors may be limited in their ability to invest abroad in the event they are solicited by foreign investment managers or funds that cannot or will not register in Canada.

It is our view that the Proposed Amendments ought to be accommodating to Canadian institutional investors and individual investors of wealth and sophistication that choose to make certain of their investments abroad in connection with a solicited investment in a foreign investment fund, even if the investment does not meet the thresholds in section 8.29.1(4).

It is therefore our submission that the thresholds in proposed subsection 8.29.1(4) be removed in respect of "active solicitation" by non-resident investment fund managers that are also relying on the international dealer exemption or the local dealer exemption, in

order to allow sophisticated investors to take advantage of the full range of international investment opportunities.

Not only does this suggested revision reflect the fact that investment fund managers which avail themselves of the international dealer exemption are already regulated by the authorities in their principal jurisdiction, it also brings the exemption for international investment fund managers into line with the parallel exemptions available to international dealers and international advisers under NI 31-103. Efficient capital markets operate on the theory that capital is free to flow to the best investment opportunities. For sophisticated Canadian investors, committing a portion of their assets to foreign investments, even if they do not meet the strict thresholds in section 8.29.1(4), constitutes eminently sound portfolio management.

* * * *

We would like to thank the members of the CSA who participated in the preparation of the Proposed Amendments, and look forward to your responses to the comments of the various market participants and advisers who have submitted issues for your consideration.

Should you have any questions regarding the foregoing, please do not hesitate to contact me directly.

Yours very truly,



A. Timothy Baron

ATB/bab