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Mr. John Stevenson
Secretary
Ontario Securities Commission
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Me Anne-Marie Beaudoin
Corporate Secretary
Autorté des marchés financiers
800, square Victoria, 22e étage
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Dear Sirs/Mesdames:

I am writing to comment upon proposed Multilateral Instrument 32-102 *Registration Exemptions for Non-Resident Investment Fund Managers* (the "Instrument"). The following comments are my own and do not necessarily reflect the overall view of my Firm or our clients.

1. Differing CSA interpretations of the same registration trigger

The interpretation of the registration in securities legislation for a manager of an investment fund, as set out in the Instrument, is inconsistent with interpretation of the business trigger in securities legislation for a portfolio manager of an investment fund. When National Instrument 31-103 was introduced, the CSA stated it was discontinuing the view that advice to an investment fund "flows through" to the investors in the fund.[1] Yet it seems that the CSA jurisdictions supporting the interpretation of the registration trigger in the Instrument are of the view that merely having a fund's investors in a jurisdiction makes the fund manager acting in the investor's jurisdiction. But the other CSA jurisdictions that support Proposed Multilateral Policy 31-202 *Registration Requirement for Investment Fund Managers* appear to disagree with that interpretation.

We are accustomed to the different CSA jurisdictions sometimes having differing rules driven by their individual policy-driven approaches. But this is different.

[1] **(2009) 32 OSCB (Supp-2), at 6.**

All of the CSA jurisdictions have essentially the same trigger for registration, including as investment fund manager, through their concerted efforts leading up to National Instrument 31-103. Therefore, the interpretation of whether that registration trigger applies is not just a matter of different rules being adopted by jurisdictions, but widely differing legal interpretation of the same rules by different securities commissions.

Unlike the Proposed Multilateral Policy 31-202 *Registration Requirement for Investment Fund Managers*, the Instrument and its Request for Comment do not even mention that other CSA jurisdictions have taken a different interpretive approach to the same laws. The Instrument and the regulators' responses to the comments published with the Request for Comments do not explain why those jurisdictions which are proposing the Instrument believe their legal interpretation of the registration trigger is correct.

2. Actions that do not meet the trigger for registration should not be called "exemptions"

If the proposed interpretation is to be continued, then the Instrument and the associated Companion Policy 32-102CP (the "Companion Policy") should more clearly distinguish between activities of an investment fund manager that do not trigger the registration requirement versus activities that are being exempted pursuant to the Instrument that would otherwise require registration.

For example, the Companion Policy states, "An investment fund manager is required to register if it directs or manages the business, operations or affairs of an investment fund." However the nexus with any of the local jurisdictions proposing the Instrument is not clear.

The Companion Policy also states, "A non-resident investment fund manager triggers a registration requirement ***if*** either the investment fund or the investment fund manager distributes or has distributed investment fund securities in the local jurisdiction. If an investment fund has security holders in the local jurisdiction, this gives rise to investment fund management activities in such jurisdiction..." [*emphasis added*]

However, the Companion Policy in Part 2 describes "exemptions" from registration where the investment fund manager does not have a place of business in the local jurisdiction, does not have security holders of the fund resident in that jurisdiction and there has been no active solicitation in that jurisdiction.

I question why these are described as "exemptions"? Would it be not more correct to describe them as a situations that do not trigger the registration requirement in the first place? What distinction is being made in the Instrument between actions that do not trigger registration at all, versus those actions which would require registration, but which are exempt from registration?

I assume the exemption proposed in Section 4 of the Instrument, for distributing securities only to permitted clients, would be an example of the latter, where registration would ordinarily be triggered by the actions, but because the clients are permitted clients, among other conditions, the exemption in Section 4 would apply.

In contrast, I would respectfully suggest that the so-called exemption in Section 3 of the Instrument should be deleted and those actions re-characterized in the Companion Policy as actions that do not trigger the requirement for registration in the first place. The distinction is an important one.

3. Impact under Ontario's Fees Rule

The lack of clarity around the registration trigger versus exemptions is particularly problematic in light of Ontario's fee regime.

Subsection 3.1(2) of OSC Rule 13-502 *Fees* (the "Fee Rule") imposes an obligation upon unregistered investment fund managers to pay the Ontario participation fee.

An "unregistered investment fund manager" is defined in the Fee Rule to mean "a person or company that acts as an investment fund manager and is not registered under the Act." [i.e., the *Securities Act* (Ontario)] Since the ***reason*** for the investment fund manager not being registered under the Act is not specified in the Fee Rule, this could produce some odd results.

For example, if a non-resident investment fund manager is not registered under the Act on the basis of the proposed exemption in Section 3(a) of the Instrument, because the manager does not have a place of business in Ontario and the investment fund has no security holders resident in Ontario, nevertheless, the manager would appear to be required to file a Form 13-502F4, and even if its specified Ontario revenues, as defined in the Fees Rule, were zero, pay the minimum fee every year thereafter, currently $1,035.

Similarly, if a foreign investment fund has a single, though unsolicited, Ontario investor, and the proposed exemption in Section 3(b) of the Instrument applied, again the fund manager would be required to file the form and pay the Ontario fee.

The Fee Rule includes in its definition of "capital markets activities" as clause (b): "acting as an investment fund manager", whether or not those activities require a registration under the Act or even an exemption from registration under the Act. That is because, "Acting as an investment fund manager" is a separate element of the definition of "capital markets activities" on its own apart from clause (a) of the definition: "activities for which registration under the Act or an exemption from registration is required". This renders the interpretation of capital markets activities for investment fund managers very difficult and unacceptably broad.

To which unregistered investment fund managers does Ontario's Fee Rule not apply? Theoretically, every investment fund manager anywhere in the world, managing funds with never any security holders nor solicitation in Ontario, is caught by this broad definition and the Instrument's "exemption" in Section 3(a), so even if its specified Ontario revenue is zero, it ought to be paying the Ontario Securities Commission a "participation" fee every year.

This illustrates the unacceptably broad reach of the Fees Rule in assessing fees to exempt firms, both unregistered investment fund managers and also other exempt international firms.

At the very least, the Fees Rule ought to be amended to bring it more in synch with its provisions for exempt international firms, which only apply to those dealers or advisers that are not registered under the Act and are exempt only because of Section 8.18 or 8.26 of NI 31-103. At most, the Fees Rule should only apply to unregistered investment fund managers which are exempt from registration only through reliance upon Section 4 of the Instrument.

Thank you for this opportunity to comment on the proposed Instrument.

Yours very truly,

Ross McKee

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