

# Registration Reform

IN CANADA  
*The Finish Line is Here*

Section F of Stikeman Elliott's Report on Canada's New Registration Regime  
JULY 2009

**Impact on International Advisers**



## Impact on International Advisers

On July 17, 2009, the Canadian Securities Administrators (CSA) published their final proposal for National Instrument 31-103 - *Registration Requirements and Exemptions* (31-103). Subject to government and other local approval requirements, 31-103 will come into force on September 28, 2009 (the Implementation Date).

31-103 is intended to harmonize, streamline and modernize registration requirements and exemptions across all Canadian provinces and territories (jurisdictions) and represents a major overhaul of the current registration regime. The new registration regime has significant implications for Canadian and non-Canadian dealers, advisers and investment fund managers currently doing business on a registered or exempt basis in any jurisdiction of Canada. The new rules will also have significant implications for private fund offerings and other capital market activities in Canada.

### **Key Changes to Current Adviser Registration and Exemption Regimes**

Material changes introduced by 31-103 and related legislative amendments to the current adviser registration and exemption regimes for non-Canadian advisers include:

- the elimination of the international adviser registration category in Ontario and the portfolio manager & investment counsel (foreign) registration category in Alberta;
- the elimination of the adviser registration exemption in Quebec for advisory activities conducted solely with a specified sub-class of "accredited investors";
- the introduction of a single general category of adviser registration, for both resident and non-resident advisers, namely that of portfolio manager;
- the introduction of a new international adviser exemption that permits a non-Canadian adviser registered or operating under an

exemption from registration under the securities legislation of its home jurisdiction to advise "permitted clients" in Canada on "foreign securities", subject to certain conditions;

- the elimination of the "look through" analysis of certain CSA members with respect to the adviser registration requirement for non-resident advisers to foreign investment funds;
- the introduction of a harmonized exemption for general advice not purporting to be tailored to the needs of the recipient; and
- the addition of an exemption from the dealer registration requirement for registered advisers and exempt international advisers when distributing securities of their own non-prospectus qualified funds to a managed account of a client of the adviser.

### **Current Adviser Registration and Exemption Regime**

With the implementation of 31-103 and related legislative amendments in most Canadian jurisdictions, the adviser and dealer registration requirements will be triggered by being in the business of advising or trading in securities as principal or agent. While the business trigger for trading activities is a change to the existing rules in most Canadian jurisdictions, the current trigger for the adviser registration requirement under the local legislation is generally being in the business of advising others with respect to investing in securities.

Non-Canadian advisers with a limited range of clients and advisory activity most often have registered as advisers in categories specifically restricted to non-resident advisers (for example, the international adviser category in Ontario and the portfolio manager & investment counsel (foreign) category in Alberta). In other Canadian jurisdictions, such non-Canadian advisers often have been registered as portfolio managers with terms and conditions restricting their activities similar to the restrictions imposed on registered international advisers in Ontario.

Under the new registration regime, advisers are required to be registered in one of two categories, namely:

- portfolio manager, being an adviser that is permitted to advise in any securities; or
- restricted portfolio manager, being an adviser that is permitted to advise in respect of any security in accordance with the terms of its registration.

Individuals at firms registered as portfolio managers will be registered as:

- advising representatives; or
- associate advising representatives.

Portfolio managers will also be required to designate and register individuals as their ultimate designated person (UDP) and their chief compliance officer (CCO).

31-103 and related legislative amendments introduce a number of changes to the registration and ongoing compliance regime applicable to portfolio managers. Non-Canadian firms that are registered as a portfolio manager in one or more Canadian jurisdictions will be subject to requirements applicable to such category of registration generally. See the discussion under the topic Impact on Portfolio Managers and Investment Counsel.

### **International Adviser Exemption – Restrictions and Conditions**

Under 31-103, a non-Canadian adviser may rely on the international adviser exemption to advise "permitted clients" (described below) provided the non-Canadian adviser does not advise in Canada on securities of Canadian issuers, unless providing that advice is incidental to its providing advice on a foreign security.

In order to rely on the international adviser exemption, the non-Canadian adviser must be registered, or operate under an exemption from registration, under the securities legislation of the foreign jurisdiction in which its head office or principal place of business is located in a category of registration that permits the adviser to carry on the activities in that jurisdiction that registration as an adviser would permit it to carry on in the local Canadian jurisdiction. The non-Canadian adviser must also be engaged in the business of an adviser in that foreign jurisdiction. Furthermore, during its most recently completed financial year, not more than 10% of the aggregate consolidated gross revenues of the adviser, its affiliates and affiliated partnerships may have been derived from portfolio management activities in Canada. Note that under the current requirements in Ontario for registration as an international adviser, this figure is 25%.

In order to rely on the exemption, the non-Canadian adviser must have previously:

- submitted to the relevant securities regulatory authorities an executed Form 31-103F2 *Submission to Jurisdiction and Appointment of Agent for Service* (Form 31-103F2); and
- notified the permitted client (1) that it is not registered in Canada, (2) of its jurisdiction of residence, (3) of the name and address of the agent for service of process appointed by the non-Canadian adviser in the local jurisdiction, and (4) that there may be difficulty enforcing legal rights against the non-Canadian adviser because it is resident outside Canada and all or substantially all of its assets are situated outside of Canada.

A person relying on the international adviser exemption will be required to pay fees applicable to an unregistered exempt international firm under OSC Rule 13-502 *Fees* and submit a prescribed form to the Ontario Securities Commission on an annual basis. Other fee requirements may apply in other Canadian jurisdictions. In those other jurisdictions, the non-Canadian adviser must notify the local regulator 12 months after it first submits a Form 31-103F2 and each year thereafter if it continues to rely on the exemption.

## International Adviser Exemption – Permitted Clients

The list of permitted clients includes:

- most Canadian institutional investors;
- a person or company, other than an individual or an investment fund, with net assets of at least C\$25,000,000 as shown on its most recent financial statements;
- an investment fund managed by a person registered as an investment fund manager or advised by a person authorized to act as an adviser Canada; and
- an individual with net financial assets before taxes in excess of C\$5,000,000;

but excludes dealers and advisers registered in Canada (the Canadian Adviser/Dealer Exclusion).

The CSA have also expanded the regulated pension fund category to include a wholly-owned subsidiary of a registered pension fund in recognition of the fact that large Canadian pension plans now often invest through special purpose vehicles.

## International Adviser Exemption – Foreign Securities Restriction

Under the international adviser exemption, a non-Canadian adviser may not advise on securities of Canadian issuers, unless providing that advice is incidental to its providing advice on a "foreign security". The term foreign security is defined as a security of an issuer formed under the laws of a foreign jurisdiction and a security issued by a foreign government.

## Quebec Adviser Registration Exemption

The international adviser exemption effectively would replace the exemption under section 194.2 of the *Regulation Respecting Securities* (Quebec), on the basis of which many non-Canadian advisers have entered into portfolio management arrangements with Quebec-resident institutional investors. Non-Canadian advisers who propose to rely on the international adviser exemption should revisit these arrangements and consult with their Canadian counsel to ensure that they comply with both the procedural and substantive conditions of the exemption, including the foreign securities restriction and the Canadian Adviser/Dealer Exclusion.

## Elimination of "Look Through" Analysis for Advisers to Funds

Certain Canadian regulators (notably the Ontario Securities Commission) have historically taken the view that advice to an investment fund "flows through" to the investors in the fund. The effect of this interpretation has been to require that non-Canadian advisers providing investment advice to an investment fund located outside Canada be registered, or exempt from the registration

requirement, in the relevant Canadian jurisdiction in connection with the sale of securities of the fund in that jurisdiction.

In the Notice to 31-103, the CSA have confirmed that this interpretation will be discontinued. As a result, non-Canadian advisers to investment funds established outside Canada which sell securities in a Canadian jurisdiction will no longer have to be registered as an adviser or rely on an adviser registration exemption in that jurisdiction.

### **Adviser Registration Exemption for General Advice**

31-103 contains an exemption from the adviser registration requirement for advice that does not purport to be tailored to the needs of the person or company receiving the advice. As a result, for example, newsletter writers who provide general investment recommendations often will no longer be required to be registered as an adviser. 31-103 requires a person relying on the general advice exemption that has, or has certain specified relationships with a person that has, a financial or other interest in any recommended securities, to disclose the interest when making the recommendation.

### **Sub-Adviser Exemption**

The sub-adviser exemption under the preceding proposals for 31-103 has not been incorporated in the final instrument. The exemption will remain available in Ontario pursuant to section 7.3 of OSC Rule 35-502 *Non-Resident Advisers* and the CSA have stated that discretionary relief on a similar basis will be granted in other jurisdictions.

### **Trades to Managed Accounts of Securities of Non-Prospectus Qualified Funds**

31-103 exempts an adviser relying on the international adviser exemption from the dealer registration requirement in respect of a trade in a security of a non-prospectus qualified fund if (1) the adviser acts as the fund's adviser and investment fund manager, and (2) the trade is to a managed account of a client of the adviser. The exemption is not available however if the managed account or non-prospectus qualified fund was created or is used primarily for the purposes of qualifying for the exemption. Notice to the regulator is required for an adviser to rely on this exemption.

### **Commodity Futures**

The regulation of exchange-traded and other derivatives varies considerably across all Canadian jurisdictions. See the discussion under the topics Quebec's Derivatives Act and Trading or Advising in Commodity Futures.

### **Continuation of Existing Discretionary Relief**

A non-Canadian adviser relying on a discretionary exemption, waiver or approval granted by a local regulator prior to the Implementation Date is exempt from any substantially similar provision of 31-103.

## Transition to New Regime

Under the transition provisions of the new registration regime, persons that are fully registered as an investment counsel, portfolio manager or portfolio manager/investment counsel (or, in Ontario, non-Canadian investment counsel & portfolio manager) will be registered automatically in the new category of portfolio manager. Generally, the only persons who will be reregistered as restricted portfolio managers are those persons presently registered in Quebec as “restricted practice advisers”.

The registration of non-Canadian advisers registered as international advisers in Ontario and the registration of non-Canadian advisers registered as portfolio managers & investment counsel (foreign) in Alberta will be revoked within 12 months following the Implementation Date. During that transition period, non-Canadian advisers registered in Ontario and Alberta may continue to operate under their current conditions of registration (including those set out in OSC Rule 35-502 *Non-Resident Advisers* for Ontario registrants) and would have to consider whether they can rely on the international adviser exemption or will be required to register as portfolio manager. In the former case, the non-Canadian adviser must deliver an executed Form 31-502F2 to the local regulator in the relevant Canadian jurisdictions or register by the end of the transition period.

In other Canadian jurisdictions where there is no category of international adviser, non-Canadian advisers may apply to be registered as portfolio managers with similar terms and conditions restricting their activities. The CSA recommend that such firms consider relying on the international adviser exemption and surrender their registrations or apply for portfolio manager registration in those other jurisdictions.

# Registration Reform in Canada:

## *The Finish Line is Here*

Canada's new registration rule was published by the Canadian securities administrators in final form on July 17, 2009.

The new regime is expected to be in force September 28, 2009 with transition periods for implementation of aspects varying. The new regime, which has been several years in the making, is intended to harmonize, streamline and modernize registration requirements and exemptions across all Canadian jurisdictions. It regulates dealers and advisers, effectively eliminating the dealer registration exemption for trading in the exempt market in Canada, and imposes a new registration requirement for investment fund managers.

The new regime has significant implications for Canadian and non-Canadian market participants, particularly those now doing business on an unregistered or exempt basis.

This document is one part in a series that details the regime and its impact on particular types of market participants and their business activities. The complete document includes the following sections:

- A** Overview of Canada's New Registration Regime
- B** Impact on Limited Market Dealers and Unregistered Dealers Trading in the Exempt Market
- C** Impact on Investment Fund Managers
- D** Impact on Portfolio Managers and Investment Counsel
- E** Impact on International Dealers and Non-Canadian Dealers Trading in the Exempt Market
- F** Impact on International Advisers
- G** Impact on Investment Dealers and Mutual Fund Dealers
- H** Impact on Issuers Generally
- I** Impact on Investment Funds
- J** Impact on Private Equity and Venture Capital Funds
- K** Impact on Non-Canadian Investment Funds Privately Placing Securities in Canada
- L** New Compliance Requirements for Registrants
- M** Registering in Multiple Jurisdictions
- N** Quebec's *Derivatives Act*
- O** Trading or Advising in Commodity Futures
- P** Useful Links

**If you would like a copy of any of the other sections, in electronic or print format, please contact your Stikeman Elliott representative, email us at [info@stikeman.com](mailto:info@stikeman.com) or visit our website at [www.stikeman.com](http://www.stikeman.com)**

# Canadian Business Law – Worldwide

---

**Stikeman Elliott is recognized nationally and internationally** for the sophistication of its business law practice. The firm is a Canadian leader in each of its core practice areas – corporate finance, M&A, securities, banking, corporate-commercial, real estate, tax, insolvency, structured finance, competition, intellectual property, employment and business litigation – and has developed in-depth knowledge of a wide range of industries.



London-based *World Finance* magazine named Stikeman Elliott as the *2008 Best Corporate & Commercial Team in Canada*. Additionally, the *International Financial Law Review* honoured Stikeman Elliott as *2007 National Law Firm of the Year (Canada)*, while Chambers Global identifies it as one of Canada's two top-tier Corporate/M&A practices. The firm is frequently ranked among Canada's leaders in domestic and cross-border M&A and corporate finance league tables. The National Litigation Group, whose specializations include class actions, securities litigation and restructurings, has been ranked among the top three business litigation practices in Canada by Lexpert. Among Stikeman Elliott's other highly regarded practices are competition/antitrust (named as a leader by the *Global Competition Review*), taxation (highly ranked by Lexpert) and structured finance (widely considered to be Canada's foremost practice in that field).

The firm's clients can expect a consistently high level of service from each of its eight offices who work together on major transactions and litigation files, and regularly collaborate with prominent U.S. and international law firms on cross-border transactions of global significance. The firm has invested heavily in leading-edge knowledge management systems in order to assure our clients of advice of the highest quality, grounded in the accumulated expertise of Stikeman Elliott's national and international practice.

**STIKEMAN ELLIOTT**

---

MONTRÉAL TORONTO OTTAWA CALGARY VANCOUVER NEW YORK LONDON SYDNEY

[www.stikeman.com](http://www.stikeman.com)