

# Registration Reform

IN CANADA  
*The Finish Line is Here*

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

**Impact on Non-Canadian Investment Funds  
Privately Placing Securities in Canada**



## Impact on Non-Canadian Investment Funds Privately Placing Securities in Canada

Traditionally, the most significant issues for non-Canadian funds offering securities in Canada on a private placement basis have been: (1) whether the person selling the securities had the benefit of a dealer registration exemption and (2) whether, in Ontario, the “look through” analysis that the Ontario Securities Commission (OSC) applied on the adviser registration issue required a person providing investment advice to the investment fund outside of Ontario to register as an adviser in Ontario, or an adviser registration exemption was available. There has also been the matter of the capital markets participation fee payable in Ontario by unregistered investment fund managers.

The final proposal for National Instrument 31-103 *Registration Requirements and Exemptions* (31-103) and the related amendments to the securities legislation do not make a distinction between non-Canadian funds and Canadian funds per se in the application of the new registration regime. Accordingly, non-Canadian funds proposing to privately place securities in Canada, or who have previously privately placed funds in Canada, will want to canvass their situation with their counsel and the application of the new registration regime to such funds’ activities will need to be considered under the basic principles of the regime.

These basic principles are generally that a person in the “business of trading” in securities is required to be registered as a dealer; a person in the business of advising others as to the investing in or the buying or selling of securities is required to be registered as an adviser and a person who acts as an investment fund manager (that is, who directs the business, operations or affairs of an investment fund) is required to be registered as an investment fund manager.

In addition, the following issues will continue to be relevant in connection with prospective private placements in Canada:

- capital markets participation fees; and
- prospectus exemptions.

### **Dealer Registration Requirements**

A few matters to note on the dealer registration issue are:

- with the removal of the accredited investor exemption from the dealer registration requirement in all provinces and territories, there is no bright line exemption from the dealer registration requirement except in very limited circumstances in Alberta, British Columbia, Manitoba, New Brunswick and the territories. (See the discussion under the topic Impact on Limited Market Dealers and Unregistered Dealers Trading in the Exempt Market.) Under the new regime the dealer registration requirement is triggered when a person is in the “business of trading” in securities;
- there is a dealer registration exemption for trades by a person or company where the trade is made solely through an agent that is a registered dealer. The Canadian Securities Administrators (CSA) note in Companion Policy 31-103CP *Registration Requirements and Exemptions* that this exemption is not available for trades where an intermediary is involved and that it is only available where a person trades their own securities directly with a registered dealer.

### **Adviser Registration Requirements**

The CSA have clarified in the Notice to 31-103 that the look through analysis on the adviser registration question will no longer be applied anywhere in Canada. As a result, an investment adviser that is providing investment advice to an investment fund outside Canada where the investment advice is received by the fund outside Canada generally will not be required to register as an adviser under securities legislation in Ontario simply because the securities of the investment fund are sold to Ontario residents.

### **Investment Fund Manager Registration Requirements**

The CSA plans to publish a proposal for comment during the next year to explain under what circumstances an investment fund manager that has a head office outside Canada would need to register, and in what circumstances an investment fund manager with a head office in one jurisdiction in Canada would need to register in other jurisdictions.

### **Capital Market Participation Fees**

In Ontario firms registered as investment fund managers will be required to pay participation fees under OSC Rule 13-502 *Fees* (Ontario Fee Rule). Participation fees must also be paid under the Ontario Fee Rule by any investment fund manager who continues to operate on an unregistered basis in accordance with an exemption from the investment fund manager registration requirement. Fees may also be applicable in other jurisdictions.

## Prospectus Exemptions

As part of the registration reform project, changes are also being made to National Instrument 45-106 *Prospectus and Registration Exemptions* (45-106) and OSC Rule 45-501 *Ontario Prospectus Registration Exemptions* (45-501), as well as related rules and provisions of the securities legislation cross country. The changes to these rules are largely the removal of the dealer registration exemptions which will no longer apply. There is no change to the trigger for the prospectus filing and delivery requirement. It remains the “distribution” of a security. A non-Canadian fund as an issuer distributing securities will need to identify a prospectus exemption for the distribution or file and deliver a prospectus. The prospectus exemptions are for the most part unchanged so, for example, a non-Canadian fund as an issuer will still have a prospectus exemption for trades with an “accredited investor”. As there are some changes to these rules, and there are still some differences in approach among the jurisdictions, non-Canadian funds will want to canvass with their advisers the prospectus exemptions that may be available under the amended rules and legislation for future distributions.

# 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)**

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