

CSA publish FAQ regarding new registration regime

ALSO INSIDE

AMF issues foreign sub-adviser exemption in Quebec

On December 18, 2009, staff of the Canadian Securities Administrators (CSA) published a staff notice (the FAQ) setting out their answers to frequently asked questions regarding National Instrument 31-103 *Registration Requirements and Exemptions* (31-103) and amendments to National Instrument 33-109 *Registration Information* (NI 33-109). 31-103 and the amendments to NI 33-109 came into effect on September 28, 2009 (the Effective Date). The questions were compiled from informal public enquiries received by CSA members and the responses are based on views of CSA staff. Summarized below are responses to some of the more substantive issues.

Chief compliance officer proficiency requirements and exemptions

Under Part 3 of 31-103, an individual who satisfies the proficiency requirements for a chief compliance officer (CCO) of a portfolio manager (PM), also satisfies the proficiency requirements for a CCO of a mutual fund dealer (MFD), exempt market dealer (EMD) and investment fund manager (IFM). There is, however, no provision to accommodate for MFD, EMD and IFM registrations a CCO of a PM whose proficiency is grandfathered for the PM registration under subsection 16.9(2) of 31-103. The FAQ indicates that the CSA plan to issue an order providing a CCO of a PM whose proficiency is grandfathered under subsection 16.9(2) with an exemption from the proficiency requirements applicable to a CCO of an MFD, EMD or IFM where the firm was registered as a PM on the Effective Date and the individual was designated as the firm's CCO on the Effective Date and remains so registered.

The FAQ reiterates that the grandfathering of a CCO's proficiency requirements is only available in those Canadian jurisdictions where prior to the Effective Date the firm was required to identify its compliance officer on the National Registration Database (NRD), as these were the only jurisdictions where compliance officers were required to satisfy proficiency requirements. The jurisdictions that had this requirement were British Columbia, New Brunswick and Ontario. While an individual acting as *personne responsable (ou chef) de la conformité* in Quebec could have been acting in a similar capacity to a compliance officer, he or she did not have to be identified on NRD. In this regard, the FAQ makes clear that an individual acting as *personne responsable (ou chef) de la conformité* in Quebec could have his or her proficiency grandfathered only if he or she

was identified on NRD on the Effective Date as the firm's CCO in British Columbia, New Brunswick or Ontario. Otherwise he or she is required to satisfy the proficiency requirements under 31-103 by no later than September 28, 2010.

Exempt market dealer underwriting activities

The FAQ clarifies that, while an EMD can *trade* a prospectus-qualified security and provide a purchaser with a copy of the prospectus where an exemption from the prospectus requirement would be available, an EMD cannot *underwrite* a prospectus-qualified distribution even if the EMD only distributes securities to clients that may purchase securities offered under a prospectus exemption. EMDs are restricted to underwriting distributions made under an exemption from the prospectus requirement.

Sale of principal protected notes by mutual fund dealers in Quebec

The FAQ clarifies that pursuant to the exemption under paragraph 9° of section 3 of the *Securities Act* (Quebec) (QSA) an MFD in Quebec does not have to register as an EMD to sell market-linked GICs. Further, pursuant to paragraph 14° of section 3 of the QSA, an MFD in Quebec does not have to register as an EMD for the sale of market-linked notes issued or guaranteed by a bank or an authorized foreign bank, unless the market-linked notes confer a right of payment ranking lower than a deposit contemplated in paragraph 9° of section 3 of the QSA and are entrusted to the issuer or guarantor of the market-linked notes.

Investment fund manager registration requirement

The FAQ reiterates that registration as investment fund manager is required where the collective investment vehicle being managed is an "investment fund". While the FAQ refers to the guidance provided in Companion Policy NI 81-106CP *Investment Fund Continuous Disclosure*, what constitutes an "investment fund" is not clarified further in the FAQ. The FAQ confirms, however, the CSA staff's view that an investment fund is not restricted to funds that invest in securities, and provides as examples funds that invest in uranium or gold bullion as funds that may fall within the definition of an investment fund.

The FAQ clarifies that a firm that qualifies for the one-year exemption under section 16.4 of 31-103 from the requirement to register as an IFM, and registers as an IFM prior to end of such one-year period must comply with the requirements of 31-103 as soon as it becomes registered as an IFM.

Foreign dealer trading through or to a registered dealer

The FAQ confirms that the dealer registration exemption in section 8.5 of 31-103, for trades made solely through or to a registered dealer, is available to foreign dealers trading on behalf of their clients provided that all trading activity that occurs within the local jurisdiction be done through or with the locally registered dealer. The intermediation by the foreign dealer does not in itself mean that the trade in the local jurisdiction was not made "solely" through a registered dealer. However, if the foreign dealer or its client is engaged in other trading activity in the local jurisdiction in connection with the transaction, then it is not a trade "solely" through a registered dealer and the exemption in section 8.5 is not available. The FAQ provides as an example, a foreign dealer or its client contacting the purchaser in the jurisdiction and directly soliciting the purchase of securities. "Trading" is broadly defined under securities legislation and includes acts directly or indirectly in furtherance of a trade.

Registered firm relying on international dealer and adviser exemptions

The FAQ clarifies that a registered firm can rely on the international dealer exemption under section 8.18 of 31-103 or the international adviser exemption under section 8.26 of 31-103 in the local jurisdiction whether it is registered there or elsewhere in Canada. The required notification to clients is met by notifying the client that it is not registered in the jurisdiction in respect of the activities for which the exemption is being relied upon.

Insurance requirements for firm registered as portfolio manager and investment fund manager

The FAQ confirms that insurance requirements are not cumulative. A firm registered in the categories of PM and IFM must maintain insurance that satisfies the highest insurance requirement of its categories of registration.

The FAQ clarifies that the “assets under management” referred to in the PM insurance calculation under section 12.4 of 31-103 refers only to those client assets which the PM holds or to which it has access. The “assets under management” referred to in the IFM insurance calculation under section 12.5 of 31-103 refers only to the assets under management of its own funds for which the registrant is acting as IFM.

Requirement to deliver Form 31-103F1 *Calculation of Excess Working Capital*

The FAQ clarifies that despite the one-year transition under section 16.11 of 31-103 for previously registered firms to comply with the new capital requirements, there is no corresponding transition for the requirement to deliver a Form 31-103F1 *Calculation of Excess Working Capital*. The FAQ states that where the firm relies on section 16.11, it must also deliver the capital calculations required under the former requirements (which continue to apply during the one-year transition period), if any.

Despite their being no transitional relief to deliver Form 31-103F1, the FAQ provides that in Ontario, the regulator does not expect a firm that calculates its working capital based on consolidated financial statements in reliance on the transitional relief in section 16.11 to deliver a Form 31-103F1.

Failing to meet requirement under 31-103 before end of transition period

The FAQ suggests that where a firm fails to meet a requirement under 31-103 before the end of the applicable transition period it should immediately contact the regulator. According to the FAQ, a registrant in this situation might be required to cease registerable activity until the firm complies with the requirement, or a temporary exemption might be granted, depending on the circumstances.

Requirement to file Form 33-109F6 by September 30, 2010

All firms registered prior to the Effective Date that continue to be registered, are required under section 6.1 of NI 33-109 to file a Form 33-109F6 with its principal regulator by no later than September 30, 2010. The FAQ indicates that supporting documents and audited financial statements do not have to be provided with the form. When completing the form, the firm should not check off any of the boxes for section 1.3 as the reason for submitting the form and should make a note in its cover letter or e-mail that it is submitting the form further to section 6.1 of NI 33-109.

Requirement that foreign firm be registered in foreign jurisdiction where based

The CSA staff note that foreign firms applying for registration are normally expected to be registered in the relevant category in their home jurisdiction. This is stated to be part of the fit and proper assessment to be registered in a Canadian jurisdiction and is also relevant to the CSA’s compliance oversight capabilities.

AMF issues foreign sub-adviser exemption in Quebec

Historically, foreign advisers relied on the registration exemption in section 194.2 of the *Regulation Respecting Securities* (Quebec) (the 194.2 Exemption) to enter into sub-advisory arrangements with Quebec registered dealers and advisers. As previously noted, in connection with the coming into force of National Instrument 31-103 *Registration Requirements and Exemptions* (31-103) the 194.2 Exemption was repealed effective December 28, 2009. 31-103 does not provide for a sub-adviser exemption from the adviser registration requirement, although, it was included in previous proposals for 31-103. The CSA have indicated that they plan to consider further a sub-adviser exemption for inclusion in 31-103. To accommodate this regulatory gap, the Autorité des marchés financiers (AMF) issued a decision, effective December 28, 2009, which exempts foreign sub-advisers from the requirement to register, provided certain conditions are met.

Under the decision, any person not ordinarily resident in Quebec that acts as an adviser (the adviser) to a registered portfolio manager or to a registered dealer that acts as a portfolio manager under the exemption provided for under section 8.24 of 31-103 (the registrant), is exempt from the requirement to register, provided the adviser and the registrant meet the following conditions by no later than March 28, 2010:

1. the obligations and duties of the adviser are set out in a written agreement with the registrant;

2. the registrant contractually agrees with its clients on whose behalf the investment advice or portfolio management services are to be provided to be responsible for any loss that arises out of the failure of the person or company so acting as an adviser to comply with the following obligations:
 - (a) to exercise its powers and functions honestly, in good faith and in the best interests of the registrant and each client of the registrant for whose benefit the advice is or portfolio management services are provided;
 - (b) to act with the degree of care, diligence and skill that a reasonably prudent person would exercise in similar circumstances;
3. the registrant cannot be relieved by its clients from its responsibilities for loss under paragraph 2;
4. the person so acting as an adviser, if resident of a jurisdiction, is registered as an adviser in that jurisdiction.

In Ontario the sub-adviser exemption under section 7.3 of OSC Rule 35-502 *Non-Resident Advisers* remains available and the CSA have stated that discretionary relief on a similar basis will be granted in other jurisdictions.

For further information, please contact your Stikeman Elliott representative or any member of our Corporate Finance and Securities Group or Investment Funds Group listed at www.stikeman.com