

## Canadian Securities Regulators Propose Registration Rules for Non-Resident Investment Fund Managers

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On February 10, 2012, the Ontario Securities Commission, together with securities regulators in New Brunswick, Québec and Newfoundland (the Exemption-Based Jurisdictions) published for comment proposed Multilateral Instrument 32-102 Registration Exemptions for Non-Resident Investment Fund Managers (Proposed MI 32-102) relating to proposed registration exemptions for non-resident investment fund managers.

Concurrently, securities regulators in British Columbia, Alberta, Saskatchewan, Manitoba, Prince Edward Island, Nova Scotia, Northwest Territories, Yukon and Nunavut (the Policy-Based Jurisdictions) published a separate proposed instrument, Multilateral Policy 31-202 Registration Requirements for Investment Fund Managers (Proposed MP 31-202).

Non-resident investment fund managers are either: (i) international investment fund managers without a head office in Canada; or (ii) domestic investment fund managers with a head office in one jurisdiction of Canada who also carry out investment fund manager activities in another jurisdiction of Canada.

The two proposals have been issued in response to proposed amendments to National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (NI 31-103) issued by the Canadian Securities Administrators on October 15, 2010 (the October 2010 Proposal), outlining the circumstances in which non-resident investment fund managers would be required to register in a Canadian jurisdiction, as discussed in an Osler Update dated November 1, 2010. NI 31-103 currently provides a temporary exemption from the requirement to register for non-resident investment fund managers, which expires on September 28, 2012.

The proposals from the Exemption-Based Jurisdictions and Policy-Based Jurisdictions take substantially different approaches to the issue of registration requirements for non-resident investment fund managers, as outlined below.

### **Exemption-Based Jurisdictions Proposal**

Proposed MI 32-102, which is based on the interpretation that non-resident investment fund managers are subject to the investment fund manager registration requirement, contains two exemptions from the requirement. Under the first exemption, Proposed MI 32-102 would not require registration as an investment fund manager in circumstances where the investment fund manager does not have a place of business in the local jurisdiction and either (i) has no security holders resident in the local jurisdiction or (ii) has not “actively solicited” residents in the local jurisdiction to purchase securities of a fund managed by the non-resident investment fund manager (the No Solicitation Exemption). Proposed MI 32-102 provides guidance on the meaning of “active solicitation”. In short, “active solicitation” refers to:

“[I]ntentional actions taken by the investment fund or the investment fund manager to encourage a purchase of the fund's securities, such as pro-active, targeted actions or communications that are initiated by an investment fund manager for the purpose of soliciting an investment. Actions that are undertaken by an investment fund manager at the request of, or in response to, an existing or prospective investor who initiates contact with the investment fund manager would not constitute active solicitation.”

Proposed MI 32-102 would also provide a second exemption where all securities of a fund managed by the non-resident investment fund manager are distributed in the jurisdiction only to “permitted clients” (substantially as defined under NI 31-103) (the Permitted Client Exemption). An investment fund manager relying on this exemption must also provide a prescribed disclosure statement to permitted clients and notify the local securities regulator of its reliance on the exemption.

The October 2010 Proposal initially proposed an asset threshold requirement for the Permitted Client Exemption, whereby a non-resident investment fund manager could only be exempt from the registration requirement in respect of any fund managed by it if, at the end of its most recently completed financial year, the fair value of the assets of the fund attributable to the securities owned by residents of Canada was not more than 10% of the fair value of all of the assets of the fund. Further, the exemption would only have been available if the fair value of the assets of all funds managed by that investment fund manager attributable to securities owned by residents of Canada was not more than C\$50 million. These requirements have been dropped from the currently proposed Permitted Client Exemption.

### **Policy-Based Jurisdictions Proposal**

Proposed MP 31-202 published by the Policy-Based Jurisdictions is based on a different interpretation of the investment fund manager registration requirement than that of Proposed MI 32-102. The Policy-Based Jurisdictions would only require an investment fund manager to register in a jurisdiction if it directs or manages the business, operations or affairs of the investment fund in that jurisdiction, in a way that establishes a substantial connection to that jurisdiction. The presence of security holders or the solicitation of investors in a jurisdiction would not by themselves be sufficient to require an investment fund manager to register in the jurisdiction.

In determining whether a non-resident investment fund manager would need to register in a Policy-Based Jurisdiction, no one factor would be determinative. Proposed MP 31-202 lists a number of functions and activities undertaken by an investment fund manager which, if carried out in the jurisdiction, would need to be considered in determining if registration in a jurisdiction is required. Such functions and activities include distribution, marketing and oversight of day-to-day administration of the fund; preparation of documents; identifying conflicts of interest; and calculating NAV.

### **Comments and Implications**

The Exemption-Based Jurisdictions take the position that a non-resident investment fund manager must register in a jurisdiction where there is any connection between the non-resident investment fund manager and the jurisdiction, including having or soliciting investors there, unless the manager is entitled to rely on the No Solicitation Exemption or the Permitted Client Exemption. The Policy-Based Jurisdictions, on the other hand, take the position that the mere presence of securityholders or solicitation of investors does not trigger the investment fund manager registration requirement; however, if the requirement is triggered they offer no exemptions from registration.

### **Implications for Canadian Investment Fund Managers**

A Canadian investment fund manager of one or more funds that has solicited, or proposes actively to solicit, investors across Canada would be required to register as an investment fund manager in Ontario, Québec, New Brunswick and Newfoundland. If the Canadian investment fund manager directs or manages the business, operations or affairs of an investment fund from within any other province or territory, it would also have to register in that province or territory.

### **Implications for Non-Canadian Investment Fund Managers**

A non-Canadian investment fund manager would not be required to register as an investment fund manager in any province or territory of Canada, even if it actively solicits investments from Canadian residents, so long as: (i) it does not direct or manage the business, operations or affairs of an investment fund from within Canada; (ii) it is not incorporated, formed or created under the laws of Canada or any province or territory of Canada; (iii) it does not have its head office or principal place of business in Canada; (iv) it is not a “reporting issuer” (public company) in Canada;

(v) all Canadian investors in the fund in the provinces of Ontario, Québec, New Brunswick and Newfoundland qualify as “permitted clients”; (vi) it appoints an agent for service of process, and makes certain other notice filings, with the securities regulatory authorities in Ontario, Québec, New Brunswick and Newfoundland (if it has or solicits investors there); and (vii) it gives a prescribed form of notice to any prospective investors in Ontario, Québec, New Brunswick and Newfoundland.

Alternatively, a non-Canadian investment fund manager would not be required to register as an investment fund manager so long as there has never been, and will not be, any active solicitation of investments from residents of Canada. However, given the difficulty of establishing factually whether or not any particular investment has been the result of active solicitation, we do not expect that many investment fund managers would chose to rely exclusively on this alternative exemption.

As currently proposed, a non-Canadian investment fund manager of any investment fund having existing investors in Ontario, Québec, New Brunswick or Newfoundland who do not qualify as “permitted clients” may need to redeem the investments of those investors prior to December 31, 2012 in order to avoid becoming subject to the registration requirements.

## Next Steps

The Exemption-Based Jurisdictions and the Policy-Based Jurisdictions have each requested comments on their respective proposals, due April 10, 2012. Comments on these proposals are encouraged, and we would be pleased to assist you in preparing a comment letter if you choose to submit one.

If you have any questions about the proposals, please contact one of the authors of this Update or any Osler lawyer.