

# Blakes Bulletin

## Securities Regulation

### Canada Fine Tunes Its International Dealer and International Adviser Exemptions

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The Canadian Securities Administrators (CSA) have published for comment proposed amendments to National Instrument 31-103 *Registration Requirements and Exemptions* (NI 31-103), based upon their experience to date since the new rules were introduced in September 2009. Several of these changes would directly affect international firms dealings with Canadian clients through the international dealer or international adviser exemption or trading cross-border on a "jitney" basis.

#### CHANGES TO TRADING POWERS

The CSA propose to repeal two of the current powers for international dealers that specifically permit (i) a trade in a foreign security with an investment dealer or (ii) a trade in any security (including Canadian securities) with an investment dealer acting as principal. This change is being proposed on the basis of the CSA's belief that these are redundant with other powers for trading with permitted clients, since an investment dealer is also a permitted client.

The proposed amendments to the powers of international dealers would treat Canadian investment dealers the same as any other permitted clients in Canada but also make them subject to the same restrictions on the types of trades that can be entered into with permitted clients.

The trading powers remaining to international dealers would now be restricted to the following:

- a trade in a foreign security with a permitted client in Canada but not if the trade is made during distribution under a Canadian prospectus;
- a trade in a foreign debt security with a permitted client in Canada but not during that security's distribution (this permits secondary market trading in foreign debt securities);
- a trade in a debt security (whether Canadian or foreign) with a permitted client in Canada during the security's distribution but only if the debt security is offered primarily in a foreign jurisdiction and no Canadian prospectus has been filed for the distribution.

International dealers are also permitted to conduct activities in Canada, other than a sale of a security, that is reasonably necessary to facilitate a distribution of securities that are offered primarily in a foreign jurisdiction.

This change emphasizes the importance of the existing exemption in section 8.5 of NI 31-103 for trading with a dealer. Section 8.5 already provides for a dealer registration exemption for trades by a person or company that are made either solely through an agent who is a registered dealer or to a registered dealer who is purchasing as principal, in each case if the dealer is registered in a category that permits the trade.

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#### Highlights

- International dealer powers to trade with investment dealers in Canada to be eliminated as redundant.
- International dealers given "incidental advice" exemption for connected advisory activities.
- Technical amendments to form of client notices, renewal process and international adviser's revenue measurement.

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The Section 8.5 exemption does not permit foreign dealers to have contact with any Canadian purchasers or clients other than the dealer in Canada. The exemption is primarily intended to permit cross-border "jitney" trading, where a Canadian client of a Canadian dealer wishes to access a foreign market or where a foreign client of a foreign dealer wishes to trade a security on a Canadian market.

The Section 8.5 exemption is automatic, so a foreign dealer intending to rely only on Section 8.5 does not need to qualify as an exempt international dealer.

International dealers should carefully consider the proposed changes to their powers and whether these powers, combined with the Section 8.5 exemption, are sufficient to cover the elimination of the specific powers to trade with investment dealers.

### INCIDENTAL ADVICE EXEMPTION

The CSA have also proposed to expressly confirm that the adviser registration requirement does not apply to exempt international dealers who provide advice in connection with their activities (the so-called "incidental advice" exemption). This exemption would not be available in the case of a managed account of the client, where an international dealer would need to qualify as an exempt international adviser as well.

The CSA have also sought in amended Companion Policy 31-103CP to clarify their views on the extent to which an exempt international adviser may provide incidental advice on Canadian securities. The advice of international advisers is restricted to foreign securities, but it may advise in Canada on securities of Canadian issuers if providing the advice is incidental to its providing advice on a foreign security. However, the CSA say that this is not a carve-out that allows some portion of a permitted client's portfolio to be made up of Canadian securities chosen by the international adviser without restriction. The intention is that any advice with respect to Canadian securities must be directly related to the activity of advising on foreign securities.

### ANNUAL RENEWAL TIMING

Another proposed change will simplify annual renewals of the international dealer and international adviser exemptions. Previously, with the exception of Ontario, international firms were to notify the regulator on the

anniversary of their initial exemption as international dealer or international adviser that they continue to rely upon those exemptions. Now, those notifications would be due by December 1 of each year.

### INTERNATIONAL ADVISER REVENUE

The international adviser exemption is subject to a condition that not more than 10% of the aggregate consolidated gross revenue of the adviser, its affiliates and its affiliated partnerships is derived from their portfolio management activities in Canada. Previously, this had to be monitored during a financial year. The test would now be measured only as at the end of its most recently completed financial year.

### CLIENT NOTICES

The CSA have proposed some minor wording changes to the notice to be sent to clients of international dealers and international advisers before trading or advising with them, as the case may be. There is no guidance yet as to whether clients who had already received notices would have to be sent a fresh notice with the revised wording.

### NO OVERLAP WITH REGISTERED ACTIVITY

The amended Companion Policy 31-103CP would clarify that a dealer relying upon the international dealer exemption may also be registered to conduct other activities in Canada. In that case, the Canadian regulatory requirements applicable to its registerable activities would not apply to its activities under the exemption. For example, an international dealer might also register as an exempt market dealer in order to conduct certain trading in Canada that is not permitted for international dealers. However, the sales persons who only conduct trading under the international dealer exemption would not need to be registered individually, unlike the sales persons who conduct the exempt market dealer trading activities.

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In the notice requesting comments, the CSA indicated that they continue to work on separate matters, including the exemption for sub-advisers. For the time being, Ontario's automatic exemption for sub-advisers continues, and the CSA say that discretionary relief on a similar basis will continue to be granted in other jurisdictions.

The regulators are seeking comments on these proposed amendments, along with other technical amendments being made to NI 31-103 that apply to domestic registrants. Written comments may be submitted by September 30, 2010. For further details, or if you have any questions concerning this bulletin, please contact Ross McKee at 416-863-3277 or [ross.mckee@blakes.com](mailto:ross.mckee@blakes.com) or any other member of our Securities Group.

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