

## INTERNATIONAL DEALERS

### What You Need To Know Under the New Rules

On July 17, 2009, the Canadian Securities Administrators (the **CSA**) published in final form their reforms to the registration regime in National Instrument 31-103 – *Registration Requirements and Exemptions (NI 31-103)*, along with certain consequential amendments to other securities laws (collectively, the **new rules**). Subject to ministerial approval requirements, NI 31-103 will come into force on September 28, 2009 (the **effective date**).

#### New Rules for Non-Canadian Dealers

NI 31-103 has significant implications for Canadian and non-Canadian dealers currently doing business on a registered or exempt basis in any jurisdiction in Canada, including: (i) non-Canadian dealers registered in Ontario and in Newfoundland and Labrador in the category of “international dealer”; and (ii) persons relying on the “accredited investor” exemption and other exemptions from the dealer registration requirement in other Canadian jurisdictions.

The most significant features of NI 31-103 for non-Canadian dealers are:

- discontinuation of the “international dealer” registration category in Ontario and in Newfoundland and Labrador;
- introduction of a national “international dealer” exemption that permits a non-Canadian dealer registered or operating under an exemption for registration under the securities legislation of its home jurisdiction to trade in “foreign securities” with “permitted clients” in Canada, subject to certain conditions;
- introduction of the “business trigger” for the dealer registration requirement;
- removal of the dealer registration exemptions contained in National Instrument 45-106 – *Prospectus and Registration Exemptions (NI 45-106)*, including for trades with “accredited investors”; and
- the requirement to register as an exempt market dealer (**EMD**) where the international dealer exemption and certain other limited dealer registration exemptions cannot be relied upon, as for example, trading with an accredited investor.

- *For a discussion of EMD registration and its requirements, please ask for our EMD Commentary.*

### Did you know?

- The new international dealer exemption changes the list of clients with whom an international dealer may trade.
- If you are currently registered in the category of international dealer, your registration will be automatically revoked on the effective date. If you intend to rely on the international dealer exemption, you must submit a completed Form 31-103F2 *Submission to Jurisdiction and Appointment of Agent for Service (Form 31-103F2)* to the relevant regulator within one month following the effective date.
- If you have been relying on the dealer registration exemptions under NI 45-106 before the effective date, and thereafter you want to continue to trade with the full list of accredited investors and without restriction as to the type of security, you may be required to register under the new EMD category of registration.

These and other changes in the regulation of international dealers under NI 31-103 are discussed below in this issue.

We can help you navigate your way.

### Current Regime for Non-Canadian Dealers

Currently, in Ontario and in Newfoundland and Labrador, registration as an international dealer permits a non-Canadian dealer to trade with “designated institutions” in “foreign securities” and certain Canadian debt securities (primarily in the secondary market). The list of designated institutions includes any person or entity (other than an individual) that qualifies as an “accredited investor” (as defined in NI 45-106).

In all other Canadian jurisdictions, provincial and territorial securities laws generally permit a non-Canadian dealer to trade in both Canadian and non-Canadian securities with an accredited investor on an exempt basis. This business model may require registration as an EMD under the new rules.

- *For a discussion of EMD registration and its requirements, please ask for our EMD Commentary.*

## International Dealer Exemption

### **(i) Qualification for the International Dealer Exemption**

To qualify for the international dealer exemption, an entity must:

- have its head office or principal place of business in a foreign jurisdiction;
- be registered 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 dealer to carry on the activities in that foreign jurisdiction, which, if carried on in Canada, would require registration in Canada as a dealer; and
- engage in the business of a dealer in the foreign jurisdiction in which its head office or principal place of business is located.

### **(ii) Pre-conditions for International Dealer Exemption**

To rely on the international dealer exemption and prior to conducting business, the international dealer must:

- submit to the relevant regulator a completed Form 31-103F2; and
- notify the client of all of the following: (1) the international dealer is not registered in Canada, (2) the international dealer's jurisdiction of residence, (3) the name and address of the agent for service of process appointed by the international dealer in the local jurisdiction, and (4) there may be difficulty enforcing legal rights against the international dealer because it is resident outside Canada and all or substantially all of its assets may be situated outside of Canada.

### **(iii) Permitted Clients for International Dealer Exemption**

The list of "permitted clients" for the purposes of the international dealer exemption includes the following categories of clients:

1. most Canadian institutional investors;
2. 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;

3. an investment fund if the fund is managed by a person or company registered as an investment fund manager or advised by a person or company authorized to act as an adviser in Canada;
4. an individual with net financial assets before taxes in excess of C\$5,000,000;
5. a person or company that distributes its own securities in Canada only to other permitted clients.

The list of permitted clients is not the same as the list of designated institutions. As a result, the client base for a dealer relying on the international dealer exemption is different than the client base for a dealer currently registered as an international dealer. The key differences between the list of permitted clients and the list of designated institutions are described below.

The list of permitted clients does not include the following clients that were on the list of designated institutions:

- a corporate entity with net assets of C\$5,000,000 (the permitted-client list includes a corporate entity with shareholder's equity of C\$25,000,000); and
- an investment fund that is advised by a person not registered in a jurisdiction in Canada as a portfolio manager or an investment fund manager (the permitted-client list includes an investment fund that is advised by a person registered in a jurisdiction in Canada as a portfolio manager or an investment fund manager).

The list of permitted clients does include the following clients that were not on the list of designated institutions:

- individuals who beneficially own, directly or indirectly, financial assets having an aggregate realizable value that, before taxes but net of any related liabilities, exceeds C\$5,000,000;
- a person or company that is entirely owned, legally and beneficially, by such an individual or individuals; and
- the pension fund category has been expanded to include a wholly-owned subsidiary of a registered pension fund.

Depending on the business model of the international dealer the list of permitted clients may be an expansion or a contraction of its book of business.

#### **(iv) Foreign Securities**

Currently, registered international dealers are restricted to the type of security in which they can trade. Under the international dealer exemption, dealers will continue to be restricted to trading in foreign securities and certain Canadian debt securities. The term “foreign security” means a security issued by an issuer incorporated, formed or created under the laws of a foreign jurisdiction and a security issued by a foreign government.

The CSA have confirmed in the Notice to NI 31-103 that international dealers are not permitted to trade in securities of Canadian issuers inter-listed on non-Canadian markets.

#### **(v) Holding Client Assets**

Non-resident firms that hold client assets are subject to restrictions to ensure assets are held appropriately.

### **Business Trigger for Dealer Registration**

A fundamental change under NI 31-103 is the introduction of the “business trigger” for dealer registration. Currently, the requirement to be registered as a dealer is triggered by a person engaging in a “trade” of securities. Under the new rules, the traditional “trade trigger” is replaced by the narrower “business trigger”, so the dealer registration requirement will only apply to those whose trading in securities amounts to carrying on the business of trading in securities.

This isn’t news for non-Canadian dealers operating in Ontario and Newfoundland and Labrador. The new business trigger in effect replicates the approach already taken in those jurisdictions in relation to a “market intermediary” – that is, a person engaging or holding themselves out as engaging in the business of trading in securities. This definition has been difficult to interpret in the past. While the Companion Policy NI 31-103CP provides more guidance than had been available previously, there will continue to be questions about this threshold test under the new rules.

### **Blanket Exemption in Certain Jurisdictions**

Alberta, British Columbia, Manitoba, the Northwest Territories, Nunavut and the Yukon Territory will each pass a blanket order (**Blanket Order**) as of the effective date exempting individuals and firms from the dealer registration requirement. The Blanket Order will provide an exemption where a firm or person trades in securities under the accredited investor exemption and other specified exemptions from the prospectus requirements under NI 45-106. However, the Blanket Order will not be available to non-

Canadian dealers who are registered in their home jurisdictions or in any Canadian jurisdiction.

- *For a discussion of the Blanket Order, please ask for our EMD Commentary.*

### **Registration as Exempt Market Dealer**

Under NI 31-103, a non-resident dealer can register as an EMD to trade with the full range of accredited investors in Canadian and non-Canadian securities. EMD registration is significantly more onerous than the current international dealer registration in Ontario and Newfoundland and Labrador. EMD registration will require a non-Canadian dealer to satisfy a number of Canadian requirements.

- *For a discussion of EMD registration and its requirements, please ask for our EMD Commentary.*

### **Participation Fees**

A person or company relying on the international dealer 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. Annual fees may be applicable in other jurisdictions.

### **Annual Notice**

Except in Ontario, a person or company relying on the international dealer exemption must notify the regulator 12 months after it first submits a Form 31-103F2 and each year thereafter if it continues to rely on the exemption. In Ontario, complying with the filing requirements and the payment of participation fees will provide notice to the regulator that the international dealer is continuing to rely on the exemption.

### **Transition to International Dealer Exemption**

A firm's registration as an international dealer in Ontario and in Newfoundland and Labrador will be automatically revoked on the effective date. The firm can continue to do business in these jurisdictions pursuant to the international dealer exemption in NI 31-103. The firm will have one month (on or before October 28, 2009) to submit a completed Form 31-103F2 if it wishes to rely on the international dealer exemption.

All non-Canadian dealers who have previously been active in the exempt market in a Canadian jurisdiction prior to the effective date will have 12 months (on or before September 28, 2010) to apply for registration in that jurisdiction and comply with applicable requirements.

New entrants, not active in a Canadian jurisdiction prior to the effective date, will have no transition relief and will have to comply with the conditions of the international dealer exemption or apply for registration as an EMD.

### Other Registration Reforms

NI 31-103 and the new rules include other significant changes to registration requirements for dealers, advisers and investment fund managers in Canada.

\* \* \* \* \*

*The Registration & Compliance Alliance has the legal, regulatory, financial and operational experience and expertise to assist you with all aspects of registration and compliance under NI 31-103. Getting the right people for the job will produce the best results.*

*We will be issuing further bulletins on other aspects of NI 31-103 in the weeks to come.*

*For further details, or if you have any questions concerning NI 31-103, please contact:*

Peter Dunne  
Leader, Registration & Compliance Practice  
Cassels Brock & Blackwell LLP

416-869-5342  
pdunne@casselsbrock.com

David Gilkes  
Vice President  
Sutton Boyce Gilkes Regulatory  
Consulting Group Inc.

416- 644-6590  
dgilkes@sbgregulatory.com

\* \* \* \* \*

*This bulletin is published by the Registration & Compliance Alliance to keep our clients and friends informed of new and important legal, regulatory and compliance issues. It is not intended to provide legal advice as individual situations will differ and should be discussed with counsel.*