

With ancient Celtic roots, Halloween originated as a harvest festival marking the beginning of winter, a time that the Celts believed opened the link between the living and the dead. The ancient ghouls, fairies and demons have persisted through time, to form part of the more light-hearted celebration we know today.

As we draw nearer to All Hallows' Eve, we have harvested the most significant developments from the fields of securities and regulatory law – some of these are tricky, none are a treat!

Please contact [your usual lawyer at AUM Law](#) if you would like to discuss any of these topics.

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1. [OSC Adopts Whistleblower Policy](#)

The Ontario Securities Commission (OSC) has formally released for public comment its [controversial policy](#) on whistleblowing, which is intended to encourage the reporting of serious misconduct to the OSC. The first of its kind in Canada, the program could award a whistleblower up to \$5 million upon the final resolution of an administrative enforcement matter that generates at least \$1 million in monetary penalties or voluntary payments to the OSC.

The program was initially proposed for public comment in [OSC Staff Consultation Paper 15-401](#) in February 2015. Staff at the OSC later held a public Whistleblower Roundtable on June 9, 2015. While commentators were largely supportive of the goals of the program, the comments showed considerable concern over its potential to undermine firms' internal compliance efforts and to create conflicting incentives for employees.

The \$1.5 million cap on financial incentives also received mixed reviews, with one commentator stating that it is inappropriate in the Canadian context given the relatively small size of the markets, while others noted that the cap is too low to provide sufficient incentive for whistleblowers to come forward.

In response to the comments, the proposed policy reflects changes to certain aspects of the program. For example, the proposed policy:

- contains provisions which are intended to encourage whistleblowers who are employees to report potential violations of Ontario securities law in accordance with their employer's internal compliance protocols (note, however, that internal reporting is not a prerequisite to collecting a whistleblower award)
- allows a greater category of individuals (including auditors, CCOs, officers, directors, in-house counsel and culpable whistleblowers) to collect a whistleblower award in certain limited circumstances
- allows whistleblowers to collect between 5% and 15% of the sanctions collected by the OSC, up to a limit of \$5 million

Comments on the proposed policy are due by January 12, 2016.

2. New Offering Memorandum Exemption

Over a decade after the “offering memorandum” prospectus exemption (the OM exemption) was first introduced elsewhere in Canada, the Canadian Securities Administrators (CSA) have announced that the OM exemption will be available (albeit in different forms) in all jurisdictions in Canada, as of January 2016.

On October 29, 2015, the securities regulatory authorities in Alberta, New Brunswick, Nova Scotia, Ontario, Quebec and Saskatchewan (the participating jurisdictions) published amendments (the final amendments) that will introduce an OM exemption in Ontario, and will modify the existing OM exemption in the rest of the participating jurisdictions to strengthen investor protection.

For background on the OM exemption and the related CSA review of the regulatory regime applicable to the Canadian exempt market more generally, please see our [July bulletin](#).

The following are some of the key investor protection measures included in the new OM exemption:

- **Investment funds.** Investment funds are excluded from being able to distribute securities in reliance on the OM exemption in Ontario, New Brunswick and Quebec.
- **Additional requirements for non-reporting issuers.** Non-reporting issuers will be required to provide investors with:
 - audited annual financial statements
 - an annual “use of proceeds” notice in prescribed Form 45-106F16 *Notice of Use of Proceeds*, describing how the proceeds raised under the OM exemption were used
- **Requirement to incorporate marketing materials by reference.** Any marketing materials will be required to be incorporated by reference in the offering memorandum so that they are subject to the same liability as the disclosure provided in the offering memorandum in the event of a misrepresentation.
- **Investment limits for individual investors.** Individual investors relying on the OM exemption (other than those that would qualify as accredited investors or investors that would qualify to invest under the family, friends and business associates exemption) will be subject to investment limits:
 - investment limits will be based on whether the individual investor qualifies as an eligible investor and whether the individual investor is receiving suitability advice from a registrant
 - investment limits will not apply to non-individuals, whether those non-individuals are eligible or non-eligible investors
- **Risk acknowledgement form.** All investors will be required to sign an existing risk acknowledgement form (Form 45-106F4), and individual investors will be required to complete two new schedules to the risk acknowledgement form:
 - a schedule asking an investor to confirm whether and how the investor meets the criteria of an eligible investor
 - a schedule asking an investor to confirm that the investor is investing within the appropriate investment limit or is not subject to an investment limit, as applicable

Other notable amendments include:

- **Notice of discontinuation of the issuer’s business, change of industry or change of control.** In New Brunswick, Nova Scotia and Ontario, non-reporting issuers will be required to provide notice to investors of a streamlined list of events within 10 days of the event occurring, as follows:
 - a discontinuation of the issuer’s business
 - a change in the issuer’s industry
 - a change in control of the issuer

As a result of the amendments, and provided all government approvals are obtained, the OM exemption will come into force in Ontario on January 13, 2016 and in Alberta, New Brunswick, Nova Scotia, Quebec and Saskatchewan on April 30, 2016.

Note that the final amendments do not modify the OM exemption that exists in any CSA jurisdiction other than the participating jurisdictions.

If you have any questions on the proposed amendments to the OM exemption please contact [your usual lawyer at AUM Law](#).

3. Annual Participation Fees Due December 1

We would like to remind you that registered firms and unregistered capital markets participants must calculate their annual participation fee by December 1 every year, as prescribed by OSC Rule 13-502 Fees (Rule 13-502).

How to pay. Firms must complete and file Form 13-502F4 *Capital Markets Participation Fee Calculation* by December 1 through the OSC filing portal. Annual registration fees in other jurisdictions, if applicable to your firm, are automatically calculated on the National Registration Database (NRD) on December 1.

How much to pay. Participation fee revenue will be based on the portion of total revenue that can be attributed to Ontario for your firm's fiscal year. For your firm's 2015 calculation, you should calculate fees based on the firm's financial year ending in 2015. The participation fee as calculated in Form 13-502F4 will be withdrawn from the firm's NRD account on December 31. Ensure your NRD account has the necessary funds on December 31 to allow this withdrawal.

If you do not pay. Failure to pay the annual participation fee will result in automatic suspension of the firm and its individuals. Yes, you read that right – *automatic suspension* (if you are keen, see section 29 of the Ontario Securities Act).

Recent Changes

During a recent OSC Registrant Outreach seminar, OSC staff highlighted changes to OSC Rule 13-502 Fees, which came into effect earlier this year.

These changes include:

- Removal of the use of the reference "fiscal year" (for 2015, all registrants and unregistered capital markets participants should calculate fees based on the firm's financial year ending in 2015)
- Change in the definition of "capital markets activities" (meant to address the common error made by firms that deduct all non-Ontario revenues even if they are considered capital markets activities, and to reflect that investment fund managers (IFMs) are required to be registered)
- Change in the definition of "Ontario percentage" (meant to simplify and clarify the term by removing references to various tax legislation tied to its previous definition)
- Amendments to filing and payment deadline for unregistered IFMs (meant to align the fee calculation and payment time with registrants and exempt international firms)
- Requirement for the CCO (or person acting in a similar capacity, in the case of unregistered capital markets participants) to attest to completeness and accuracy of the Form 13-502F4 calculation
- Late fee amendments (including increase in late fee cap for all forms or documents to be filed from \$5,000 to \$10,000, for the three largest categories of registrants with Ontario revenues over \$500M)
- No refunds (clarifies that, absent exceptional circumstances, the OSC will not issue a refund if the request is made later than 90 days after the fee was required to be paid)
- Indirect avoidance of Rule (clarifies the OSC's views with respect to fee avoidance)
- Participation fee rates (will be kept at the 2014 level until 2016)

Please contact [Gordana Beric](#), Senior Securities Clerk, if you have any questions relating to the above, or the calculation of fees in general.

4. Registration Deadline for FATCA Extended

As noted in [our previous updates](#) on the Foreign Account Tax Compliance Act (FATCA) and the related intergovernmental agreement between Canada and the United States for the enhanced exchange of tax information (the IGA), many Canadian financial institutions such as IFMs, portfolio managers, exempt market dealers and investment funds were required to register with the IRS for a global intermediary identification number (GIIN) by January 1, 2015.

On September 18, 2015, the IRS issued Notice 2015-66 (the Notice) which states that it intends to amend the FATCA regulations to grant a one-year extension to the deadline by which certain “sponsored entities” must register and obtain a GIIN, in order to provide sufficient time for sponsored entity registration and for withholding agents to collect the GIIN of the sponsored entity. The revised deadline is now December 31, 2016.

In order to streamline FATCA compliance obligations, an IFM can register with the IRS as a “sponsoring entity” of one or more funds that it manages. As a sponsoring entity, the manager agrees to perform all due diligence, withholding, reporting and other FATCA requirements on behalf of each of its sponsored entities. Under the original transitional rule, a sponsored entity would have been required to register for its own GIIN by December 31, 2015. Until such time, sponsored entities could provide the GIIN of their sponsoring entity to withholding agents and when reporting any information to the IRS. In fact, the IRS FATCA online registration system does not yet contain a mechanism to facilitate the registration of sponsored entities.

According to the Notice, the IRS is developing a streamlined process for sponsoring entities to register their sponsored entities on the FATCA registration website, and anticipates that the registration process will be available in the coming months.

As of January 1, 2017, sponsoring entities must use the GIIN of the sponsored entity when reporting with respect to the sponsored entity and must provide the GIIN of the sponsored entity to withholding agents making payments to the sponsored entity. Please note that sponsored entities are required to have a GIIN by the later of December 31, 2016, and the date that is 90 days after a U.S. reportable account is first identified.

Please contact [Stacey Long](#), Senior Legal Counsel, or your usual lawyer if you would like more information on this deadline extension, or more generally on FATCA regulations.

5. Information is a Key Asset: How Are You Protecting It?

Pursuant to section 11.1 of National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations*, registered firms are required to establish, maintain and apply policies and procedures that create a system of controls and supervision sufficient to provide reasonable assurance that the firm and each individual acting on its behalf complies with securities legislation, and manage the risks associated with their businesses in accordance with prudent business practices. Cybersecurity is becoming an area of increasing focus for securities regulators, so to help registrants (and other entities) meet their internal control obligations and stay ahead of cybersecurity risks, we offer a fixed-fee cybersecurity service, which includes a review of the following:

- Governance structure and risk management
- Risk assessment
- Technical controls
- Incident response planning
- Vendor management
- Staff training
- Cyber intelligence and information sharing
- Cyber insurance
- Continuous assessment

We would be pleased to set up a preliminary assessment to evaluate your needs. Please [contact your usual lawyer at AUM Law](#).

6. CSA Publishes Report on Mutual Fund Fees

In 2013, the CSA commissioned independent third party research into potential investor protection and fairness issues that may arise from Canada’s current mutual fund fee structure.

One area of interest for the CSA was the extent to which sales and trailing commissions influence mutual fund sales. The findings were recently published in “A Dissection of Mutual Funds Fees, Flows, and Performance”.

Some highlights of the report:

- Funds that outperform their peers attract more sales; however, trailer fees and deferred sales charges interfere with the relationship between increased performance and increased sales.
- Funds with trailers see increased sales regardless of performance. Generally, the greater the trailer fee, the greater the level of net flows that has no relationship to past performance.
- An increase in trailer fees is associated with a decrease in future outperformance. A decrease in trailers corresponds to an increase in performance.
- Funds whose sales are more sensitive to past performance tend to have better future performance.
- Funds that sell more through affiliated dealers tend to perform worse.

If you would like to discuss this topic, please contact a member of our [Investment Funds Group](#).

7. Update on Reports of Exempt Distribution

On August 13, 2015, the CSA proposed amendments to to National Instrument 45-106 *Prospectus Exemptions* (NI 45-106) that would create a new single harmonized report of exempt distribution (the Proposed Report) for issuers and underwriters across Canada.

The Proposed Report streamlines the process for reporting exempt distributions, which will be a welcome change for issuers and underwriters. However, the information required under the Proposed Report may lead to a greater compliance burden and may therefore be less well received by some issuers and underwriters. For more on the Proposed Report, please see our [August bulletin](#).

The comment period on the proposed amendments closed on October 13, 2015. Submitted comment letters are available on the [OSC website](#). We will keep you updated if and when final amendments are published.

If you require more information about the Proposed Report, please contact a lawyer in our [Regulatory Compliance Group](#).

8. Are You Pre-Clearing Your Employees' Social Media Activity?

One of your employees has just tweeted: "I love 'ABC Co.' and I think it will double in value over the next two years!"

- Have you ever set out (in writing) your firm's expectations on what an employee can and cannot say on social media?
- Do you have policies and procedures to oversee social media communication?

If you do not have good answers to the above questions, you may be exposed, particularly during a compliance audit.

Your employees are likely using social media every day. Some employees may use social media for personal reasons while some may also use it to speak with clients. If the communication constitutes registrable activity, or if a reasonable person could interpret that communication as coming from a registrant firm, then regulators may take the view that the communication is subject to securities laws. More specifically, regulators may expect each communication to be "compliant" with CSA Staff Notice 31-325 *Marketing Practices of Portfolio Managers*.

Keep in mind that an oversight program may be different from registrant to registrant depending on how a firm decides to leverage social media.

We would be happy to assist you in developing a social media policy that fits your business model. Please contact a member of our [Regulatory Compliance Group](#).

Recent Speaking Engagements

Kimberly Poster and Erez Blumberger presented a high-level overview of registration and investment funds at Osgoode Professional Development's *Intensive Course in Canadian Securities Law and Practice* on October 21, receiving many interesting questions from the audience.

Erez also presented on "Preparing for a Compliance Audit" at this year's *NBCN Annual Conference* on October 23, and participated as a moderator in a roundtable session for the *TDSI Canadian Hedge Fund COO Summit* held October 28.

Feel free to [connect with us](#) if you would like information about these presentations.

Upcoming Events

We are once again proud sponsors of the Portfolio Management Association of Canada's (PMAC) National Conference and Annual Meeting. We look forward to seeing familiar (and new) faces on November 24.

For more information and to register for the conference, please visit [PMAC's website](#).



AUM Law primarily serves the asset management sector, with specific expertise in the regulatory and investment fund space. We strive to provide the most practical, forward-thinking advice and services, using a business model geared to efficiency, responsiveness and client service excellence. We are pleased to send you this summary of recent developments that may affect your business.



This bulletin is an overview only and it does not constitute legal advice. It is not intended to be a complete statement of the law or an opinion on any matter. No one should act upon the information in this bulletin without a thorough examination of the law as applied to the facts of a specific situation.