

AUM Law wishes you a fantastic start to summer!



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1. Are you Selling Securities into Canada?

We have received many inquiries lately about selling investment fund securities from outside the jurisdiction to residents in Ontario. Before speaking with potential investors, there are a number of potential issues to keep in mind.

Anyone who is in the business of trading in securities requires registration as a dealer in the appropriate category, or an exemption from the dealer registration requirement. National Instrument 31-103 - *Registration Requirements, Exemptions, Ongoing Registrant Obligations* (NI 31-103), does contain an exemption for international dealers. The exemption is available provided that trades are made in a “foreign security” with a “permitted client” – essentially, high net worth investors and institutions as defined in NI 31-103.

The international dealer exemption contains a number of conditions, including that the person or company involved in the activity must be registered as a dealer under the securities legislation of the foreign jurisdiction where its head office is located, and must submit the requisite form (Form 31-103F2 *Submission to Jurisdiction and Appointment of Agent for Service*) to the securities regulatory authorities in Canada. The permitted client must be provided with prescribed notices, and an agent for service of process in the local jurisdiction must be appointed. In Ontario, annual filings and fees are payable to the Ontario Securities Commission (OSC) under OSC Rule 13-502 – *Fees*.

AUM Law News

We continue to grow and evolve!

- > As previously announced, **Alan Sinclair** and **Jeff Scanlon** have each joined the firm in the role of Deputy Chief Regulatory Counsel. Alan comes to us from BMO Financial Group where he was Associate General Counsel and Managing Director.
- > Jeff joins us from the Ontario Securities Commission, where he spent the past six years working as Senior Legal Counsel in the Compliance and Registrant Regulation Branch.
- > We are pleased to announce that **Sandy Psarras** has joined us as Senior Counsel in the Investment Funds group. For the previous nine years Sandy was at a large national law firm in its Securities and Public Markets Group.
- > We are excited to announce that **Jennifer Cantwell** will soon be joining AUM Law in the

If advice is being provided regarding a managed account of a client located in a Canadian jurisdiction, the person or company in the business of giving advice on the purchase or sale of securities (i.e., the purchase of an investment fund for a managed account) would also require registration as an adviser in the appropriate category, or an exemption from the adviser registration requirement. NI 31-103 contains an exemption for international advisers. In addition to requirements similar to those noted above, in order to utilize this exemption, not more than 10% of the aggregate consolidated gross revenue of the adviser and certain related parties can be derived from its portfolio management activities in Canada.

In Ontario (and Québec and Newfoundland and Labrador), an exemption is also needed from the investment fund manager (IFM) registration requirement when investment fund securities are sold to residents in these jurisdictions. Multilateral Instrument 32-102 – *Registration Exemptions for Non-Resident Investment Fund Managers*, contains a few exemptions. One such exemption from the IFM registration requirement is available if, among other conditions:

- the investor is a permitted client
- the investment fund manager does not have its principal place of business in Canada and was formed outside of Canada
- none of the investment funds are reporting issuers (i.e., a public fund) in Canada

The IFM must submit the requisite form (Form 32-102F1 *Submission to Jurisdiction and Appointment of Agent for Service for International Investment Fund Manager*) to the securities regulatory authorities.

The permitted client must also receive certain prescribed notices. The securities regulatory authority must be notified, by December 1 each year, if the exemption has been relied upon during the preceding 12-month period.

In addition to registration concerns, there are a number of other considerations prior to selling securities into Canada. The investment fund securities must be distributed under an exemption from the prospectus requirements. Practically speaking, this usually means that the investor must be an accredited investor – investors that qualify as a permitted client will most likely also qualify as an accredited investor, even though the tests are not identical. As noted below in our piece below “Is Your OM Too Tightly Wrapped?” specific Canadian disclosure is generally required to be appended to the foreign offering document and subscription agreement. Sales of exempt securities, including investment fund securities sold on a private placement basis, must be reported as exempt trades to the applicable securities regulators within the specified timeframes, and in many jurisdictions the offering document must be filed with the regulators.

Carrying on business as a dealer or adviser in Ontario and other Canadian jurisdictions may require the filing of extra-provincial corporate registrations, potentially resulting in tax filing obligations. If the fund is a limited partnership, the fund itself may require registration under Ontario’s *Limited Partnerships Act*. In addition, international dealers and advisers are subject to Canada’s anti-money laundering legislation, which means that they must have Canadian anti-money laundering policies and procedures, as well as file monthly reports relating to the suppression of terrorism. We have helped many international clients, working with tax advisors, to navigate through these somewhat onerous obligations.

We would be pleased to answer any questions you may have on any proposed sale of investment fund products into Canada. Please [contact us](#) for assistance.

2. Is Your OM Too Tightly Wrapped?

As originally noted in our [June, 2015 bulletin](#), the Canadian Securities Administrators (CSA) have reduced the disclosure requirements typically required in a Canadian “wrapper” to a foreign offering document that is used for private placements made to permitted clients. Non-Canadian issuers unaware of these amendments may be wrapping their offering memorandums a little “too tightly” by including statutory rights of

new position of Head of Knowledge Management and Privacy. Jennifer, a lawyer by training, most recently held the role of Director, Global Anti-Money Laundering (AML) Governance and Assessments with the Royal Bank of Canada.

As with our legal team, our management team continues to strengthen. We are pleased to announce that **Rayo Golwala** has joined the firm as Chief Operating Officer; that **Kimberly Poster** will now serve as AUM Law’s Chief Legal Counsel and Senior Vice President; and that **Erez Blumberger** will now serve as President of the firm. **Kevin Cohen** will continue as Chief Executive Officer.

action and underwriter conflicts of interest language that could otherwise be thinned or waived entirely, as well as not making listing representations that they may now be able to make. AUM Law can review and prepare Canadian wrappers on a fixed-fee basis to ensure that these and other legislative changes have been properly considered and incorporated into foreign offering documents. Please [contact us](#) for assistance.

3. New AML Guidelines

On June 20, 2016, The Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) released new Guidelines relating to methods to ascertain the identity of individual clients. These guidelines are in force as of June 17, 2016, and result from changes to the Proceeds of Crime (Money Laundering) and Terrorist Financing Act (PCMLTFA) and Regulations. These amendments were pre-published last July; you can read about them [here](#).

Reporting entities will have one year to adopt the new client identification measures. There is no requirement to perform client identification of existing clients under the new rules if identity was ascertained under the regulations in force at the time.

4. Competition Bureau to Study FinTech Market

On May 19, 2016, the Competition Bureau launched a market study that will look at technological innovation in the Canadian financial services industry, otherwise known as the “FinTech” industry. The study will look at robo-advisors, crowdfunding, e-wallets, mobile wallets, mobile payments, and peer-to-peer banking. FinTech has the potential to disrupt the financial services sector, spurring innovation and leading to increased choice and lower prices for and consumers. The topics that the study will explore include the competitive impact of FinTech on incumbent financial services providers, and barriers to entry or innovation and potential regulatory reform. The results of the study will be published in the spring of 2017.

5. Broadened Insider Trading Definition

As previously [reported](#), the CSA announced amendments to the report of exempt distribution requirements and a new form and related requirements will come into force on June 30, 2016 (the Amendments).

As of June 30, 2016, the report of exempt distribution will require non-investment fund issuers to provide whether or not a purchaser is considered an insider of the issuer completing the form, and will also require disclosure of whether a purchaser is a registrant with a securities regulatory authority in Canada.

Please remember to update your KYC collection forms and subscription agreements to capture all of the information to ensure you are collecting information to support your report of exempt distributions.

We would be pleased to help. Please [contact us](#) for assistance.

Frequently Asked Questions

- > What are some considerations when converting a non-prospectus qualified fund into a prospectus qualified fund?

To begin the process, unitholder approval may be required, which will necessitate a meeting and the accompany costs.

Once approval is obtained, lawyers will need to prepare the simplified prospectus, fund facts and annual information form. Other fund documentation will need to be amended so that it complies with the sales, redemption, suspension and operational requirements of National Instrument 81-102 – Investment Funds (NI 81-102). Prospectus filing fees will need to be paid. Once the fund is prospectus qualified, there will be costs to prepare management reports of fund performance on an annual and interim basis. Unitholders will need to be contacted annually in order to inquire if they wish to receive financial statements. Additionally, some web site development costs will arise. For example, a firm with a prospectus qualified fund has to

host their proxy voting records on the site, as well as quarterly reports of portfolio investments. The fund will likely incur extra expenses on fund compliance in order to ensure that it is on side at all times with NI 81-102. An independent review committee will need to be established.

Additional costs to consider:

- Translation costs, if an offering is made in Québec
- Incremental premiums for directors and officers and errors and omissions insurance
- Possible increase in audit fees (and if the fund has existing auditors, they will need to consent to being named auditors of a public fund)
- At least initially, the fund will incur additional expenses on marketing compliance because the rules surrounding disclaimers and performance reporting are prescriptive

There are other considerations involved and the above constitutes a high level overview. Please contact a member of our [Investment Funds Group](#).

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.