

## Rio Grande

August was an exciting month, as the Rio Olympics took the world by storm. Canada demonstrated its national pride by cheering on medalists Penny Oleksiak and Andre De Grasse, and declaring the country “closed” for the final Tragically Hip concert...

The OSC also earned a gold medal this summer, setting a new record for number of new initiatives recently released to registrants! You will have read about these initiatives in our recent bulletins, and this month we look forward to updating you on other developments of note.



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#### 1. [OSC Publishes 2016 Annual Report](#)

The Ontario Securities Commission (OSC) has published its [2016 Annual Report](#) (the Report), in which it outlines its mandate, vision, and 2015-2016 goals, as well as the steps it is taking to achieve them.

In the Report, the OSC describes its mandate as the provision of protection to investors from unfair, improper or fraudulent practices and fostering of fair and efficient capital markets and confidence in same. The OSC also outlines its vision to be an effective and responsive securities regulator, fostering a culture of integrity and compliance. Finally, its five central goals for 2015-2016 are stated as follows:

1. Deliver strong investor protection
2. Deliver responsive regulation

### In Brief

The Minister of Finance and the Council of Ministers responsible for capital markets regulation in BC, Ontario, Saskatchewan, New Brunswick, Prince Edward Island and Yukon, have announced their initial board of directors for the Capital Markets Regulatory Authority (CMRA), among them former OSC chairman Howard Wetston. The national capital markets regulator initiative, which will include the enactment of a uniform provincial Capital Markets Act, was originally slated to be implemented in 2014. The Ministers have announced they now expect the CMRA to be fully operational by June 2018. In our view, this too will be a challenging deadline to meet.

3. Deliver effective compliance, supervision and enforcement
4. Promote financial stability through effective oversight
5. Be an innovative, accountable and efficient organization

Of particular interest, the OSC reiterates concerns initially expressed in the Compliance and Registrant Regulation (CRR) Branch's Annual Report regarding the challenges evolving technologies, online platforms and globalization pose to regulators, especially in effectively addressing these challenges while avoiding overregulation. As noted most recently in our [July bulletin](#), firms looking to adopt an online platform must be cognizant of this increased regulatory scrutiny and proceed accordingly.

The Report also highlights important initiatives including the OSC's mutual fund fee review, the introduction of derivatives rules and a review of the order protection rule framework. As well, the Report emphasizes the progress the OSC has made with more focused compliance reviews through its risk based approach.

The importance of strong investor protection is another central theme of the Report, with an emphasis on the protection of more vulnerable investors such as seniors, as well as the OSC's ongoing analysis of the best interest standard.

We know you're busy but we do recommend that you peruse this Report for better insight into the issues and expectations of Canada's most influential regulator.

If you have any questions regarding the Report, please contact [your usual lawyer at AUM Law](#).

## 2. 2016 OSC Compliance and Registrant Regulation Report – Continued...

In our [July bulletin](#) we provided an overview of the 2016 Annual CRR Report (CRR Report) as well as a [reference document](#) outlining key areas with corresponding page references. We will continue to highlight important issues arising from the CRR Report in this and future bulletins. This month, we would like to draw your attention to the following areas of deficiency commonly identified by the CRR:

1. **Corporate Governance:** The CRR Report (p. 36), emphasizes the importance of good corporate governance and establishing an appropriate "tone from the top". During compliance reviews, Staff will continue to seek evidence that a "culture of compliance" is being communicated frequently and consistently by the UDP and the firm.

A compliance assessment is a key indicator of a UDP and/or firm's commitment to a strong culture of compliance. Please contact a member of our [Regulatory Compliance Group](#) if you would like to discuss compliance assessments in greater detail.

2. **Referral Arrangements:** The CRR Report (p.41), reiterates the problem of inadequate disclosure or lack of agreements relating to referral arrangements previously noted in OSC Staff Notice 33-736 and OSC Staff Notice 33-742.

The question of when a referral constitutes a registerable activity continues to be a murky area, and one the CRR is currently focused on. Contact [your usual lawyer at AUM Law](#) if you have any questions regarding referral arrangements.

3. **Trading in Recognized Options:** The CRR Report (p. 54-55), notes that certain individuals who are registered as ARs and PMs are advising clients in recognized options without completing the required courses administered by the Canadian Securities Institute.

Fulfilling the requisite course requirements is commonly overlooked and may lead to an issue with regulators, amongst other things. No options course is not an option!

If you have any questions regarding proficiency requirements, please contact [your usual lawyer at AUM Law](#).

### *In Brief cont'd*

The Investment Industry Regulatory Organization of Canada (IIROC) published a series of proposed rule changes to shorten settlement cycles from T+3 to T+2 in 2017. The move would align with the U.S. market's impending adoption of a T+2 settlement cycle in September 2017.

### 3. Are You in Compliance as a .ca Domain Holder?

If you are a .ca domain holder (meaning your website address ends in .ca) you have likely entered into a legal agreement with the Canadian Internet Registration Authority (CIRA). There are a number of compliance obligations associated with being a .ca domain holder. For example, all .ca domain names must be registered by individuals or companies with a connection to Canada. Persons or businesses that register a .ca domain name must meet CIRA's prescribed "Canadian Presence Requirements" and provide supporting documentation when requested by CIRA. CIRA regularly undertakes a validation process to ensure .ca domain holders are compliant. If CIRA determines that you are non-compliant and the validation process was unsuccessful, they may cancel your domain name. Unfortunately, we have seen this happen.

Please [contact us](#) if you would like to discuss CIRA's Canadian Presence Requirements further, or if CIRA reaches out to you as part of a compliance validation process or other audit.

### 4. Corporate Class Mutual Funds – Tax-Deferred Switches Near an End

In its spring budget, the federal government announced an end to the ability to switch between classes of a mutual fund corporation without triggering a disposition for tax purposes. Those provisions permitted taxable investors to defer recognition of any capital gain on their investment until they disposed of the mutual fund corporation shares altogether. The rules allowed switches between classes of a mutual fund corporation to be treated as tax deferred share exchanges. Under the proposed changes, any such class to class switch will now be treated, for tax purposes, like other fund to fund switches, or for that matter any other rebalancing of the securities in an investment portfolio.

On June 29, 2016, the Department of Finance released for consultation the [draft legislation](#) which will implement the new rules (the relevant provisions are helpfully titled "Taxation of Switch Fund Shares"). The draft legislation contains some exemptions, so that a switch between series of the same class will continue to be tax deferred. In addition, share exchanges taking place in the course of a reorganization or amalgamation will continue to be eligible for rollover treatment. Issuers will need to carefully consider the legislation with their tax counsel to ensure that any such exchange or disposition will meet the conditions for deferral.

Department officials have provided additional relief in terms of transition. When the budget announcement was made, a six month transition period was contemplated, with the new rules coming into force in October 2016. The draft legislation has extended this timeline, so that the new rules would not apply until after 2016. Comments must be submitted by September 27, 2016.

### 5. Automatic Switching Program – New Relief From Fund Fact Delivery Requirements

In December 2014, the Canadian Securities Administrators (CSA) published a [notice of amendments](#) (the Amendments) to National Instrument 81-101- *Mutual Fund Prospectus Disclosure* (NI 81-101) and its Companion Policy (81-101 CP). In doing so, it implemented Stage 3 of its point of sale disclosure framework, imposing the obligation to deliver Fund Facts to investors before they purchase mutual fund securities governed by NI 81-101 (the pre-sale delivery requirement). The Amendments became effective on May 30, 2016.

NI 81-101 provides certain regulatory exemptions from the pre-sale delivery of Fund Facts with the purchase of mutual fund securities, one of which applies to pre-authorized purchase plans. A pre-authorized purchase plan relates to an arrangement for the purchase of mutual fund securities by regular specified payments which can be terminated at any time. Each purchase of such securities would constitute a "distribution" triggering the delivery of Fund Facts were it not for the exemption.

However, as the Amendments do not provide an exemption from the delivery of Fund Facts for automatic switching programs, a number of IFMs ([Sentry Investments Inc.](#), [Fidelity Canada Investments ULC](#) and [Mackenzie Financial Corporation](#)) have sought and received relief orders from the OSC, acting under the passport program.

These relief orders contain a number of conditions similar to the regulatory exemption for pre-authorized purchase plans discussed above, but also include the fund manufacturer's obligation before the first purchase of the new series of securities to deliver to holders:

- Prospectus and Fund Facts disclosure of:
  - the timing of the automatic switches
  - the eligibility requirements for the holders to the various new series and the consequences of the failure to continue to meet them
  - the characteristics of the new series' lower management and administrative fees or tiered management fee reductions
- An annual reminder notice to the holders targeted by the automatic switches that they will not receive the Fund Facts upon an automatic switch unless they request it, and directions on how to access it.

In particular, the Mackenzie Financial Corporation relief order is interesting in that it specifies further notification requirements by the fund manufacturer to its principal regulator, and between the fund manufacturer and the fund's distributing dealers notifications, disclosures and acknowledgements, prior to the dealers being able to rely on the relief order.

Please contact a member of our [Investment Funds Group](#) for more information.

## 6. Investment Fund Manager Registration in Ontario, Québec and Newfoundland

It is important to remember that if a firm has security holders in Ontario, Québec or Newfoundland (the Jurisdictions), it is required to register as an investment fund manager (IFM) in those applicable Jurisdiction(s), unless it can rely on an exemption from that requirement. Though it is easy for firms who conduct very little IFM-related activities in the Jurisdictions to forget this important step, the omission of IFM registration can result in issues with the regulators.

Please contact a member of our [Regulatory Compliance Group](#) if you would like to discuss the IFM registration process.

### Frequently Asked Questions

#### > What is the difference between a referral agent and a finder?

In questions 10 and 11 of the General Section of the [Risk Assessment Questionnaire](#), the OSC references referral arrangements and finder arrangements. We have received a number of enquiries regarding the difference, if any, between these two arrangements. There is, in fact, a subtle yet important distinction between referral and finder arrangements. While referral and finder arrangements refer to similar activities, that is "referring" an investor to a registrant or issuer and "finding" an investor for a registrant or issuer, the distinction lies in how active a role the referral agent and finder play, and how close each comes to registerable activity. While a referral agent could simply provide the name of a potential client or clients to an issuer or registrant, a finder is generally seen as playing a more active role in soliciting clients, and thus more often viewed as engaging in registerable activity as a dealer.

## News & Events

### World Alternative Investment Summit (Canada)

Erez Blumberger has joined the lineup of speakers for this year's WAISC in Niagara Falls. He will present on Thursday, September 8 on "Hot Regulation Topics" affecting PMS, IFMs and EMDs. For more information or to register for this event, click [here](#).

### Osgoode Intensive Course in Securities Law

Kimberly Poster and Erez Blumberger will once again be presenting the "Registration and Investment Funds" section of Osgoode Professional Development's *Intensive Course in Canadian Securities Law and Practice*, designed to teach the fundamentals of Canadian securities law in four evenings. Their session, which will be held on October 19 at 6:30 pm, will cover the following topics:

- Requirement to register and exemptions
- Process for getting registered
- Ongoing requirements for registrants
- When do you need exempt market dealer registration
- What are investment funds
- Developments in investment fund regulation

The course is eligible for CPD hours. More information and registration are available via the [course website](#).

### Best Mutual Fund Lawyers

Pierre-Yves Châtillon, the head of our Montreal practice, has been named as a top mutual funds lawyer in The Best Lawyers in Canada 2017. This is the 5<sup>th</sup> year that Pierre-Yves has been recognized in this category.



### TD Securities Summit

Erez Blumberger will also be speaking at the 2<sup>nd</sup> Annual TDSI Canadian Hedge Fund COO Summit. The event is taking place on October 19 at the Shangri-La Hotel in Toronto.

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.