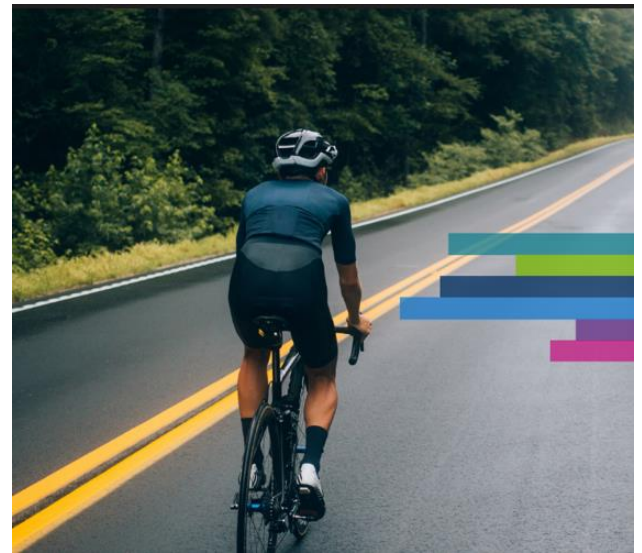


June 2024 | Bulletin

## Biking Edition

While some of us celebrate June as the official start to summer, others know it as Canada's official bike month. National Bike Month is intended to help promote the health benefits of biking, as well as its environmental benefits. The idea of celebrating a month of cycling started in the United States back in 1956. Communities across the country have been busy organizing various events and activities to encourage biking, including bike-to-work days, group rides and safety demonstrations. If you are in Toronto, perhaps you've already cycled the famous Martin Goodman Trail, which stretches along Lake Ontario's waterfront for 22 kilometers. As you pedal out of June with the wind at your back, and as the gears of the regulatory landscape continue to turn, let your friends at AUM Law guide you through these intricate pathways.



### In this bulletin:

1. A Balancing Act: New Time-Limited Expansion of Permitted EMD Activities
2. FSRA's Gearing up for Change: Consultation on Total Cost Reporting for Segregated Funds

**In Brief:** 2023 Annual Report of OSC's Investor Advisory Panel: Staying Safe ■ Watching for the Signals: CIRO Releases Results of First Investor Survey

**Important Reminders:** Rules of the Road: OM Update Requirements

### BLG Resource Corner

## 1. A Balancing Act: New Time-Limited Expansion of Permitted EMD Activities

On June 20, 2024, Canadian securities regulators from Ontario, Québec, British Columbia, Saskatchewan, Alberta and Nova Scotia announced an initiative to support capital-raising by early-stage businesses by allowing exempt market dealers (**EMDs**) to participate as selling group members in prospectus offerings. CSA Notice Regarding *Coordinated Blanket Order 31-930 Exemption to allow Exempt Market Dealer Participation in Selling Groups in Offerings of Securities under a Prospectus* describes the local blanket orders providing the temporary exemption from the restrictions set out in subsection 7.1(2)(d) of National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations (NI 31-103)*. Unless extended, the blanket orders will remain in effect until December 20, 2025.

Under NI 31-103, EMDs are not typically allowed to participate in prospectus offerings as they are restricted to only participate in trades under an exemption from the prospectus requirement. However, EMDs often play an important role in the growth of smaller issuers in the pre-IPO stage, by raising capital for them under prospectus exemptions. When these smaller to medium-sized issuers begin to raise additional capital through prospectus offerings, under the current regime, those same EMDs who may have been assisting those issuers since the start-up stage would be prohibited from assisting further in those public offerings. In many cases, this would either severely limit or effectively end their relationships with those issuers.

In recognition of the role and relationships EMDs build in assisting and growing small to medium-sized issuers by raising capital under prospectus exemptions, this initiative seeks to enable EMDs to maintain their relationships with those issuers. The exemption is intended to open additional capital-raising opportunities, by providing a time-limited exemption for EMDs to act as selling group members in prospectus offerings, allowing them to market the securities subject to the public offering. Investment dealers will continue to be involved in such offerings, including by acting as underwriter and signing the underwriter certificate in the prospectus.

The exemption is subject to several conditions, including the following:

- The EMD must act in accordance with the terms of the selling group agreement;
- The EMD may only act as a dealer for a person/company where an exemption from the prospectus requirement would otherwise be available;
- The EMD can not act as an underwriter, and must limit its interest to receiving the usual and customary seller's commission; and
- The total compensation to the EMD cannot exceed 50% of the lowest total compensation payable to any selling group member that is an investment dealer.

Notably, prior to December 2017, EMDs were permitted to participate as selling group members in prospectus offerings, and the Ontario Capital Markets Modernization Taskforce 2021 Report had recommended that the Ontario Securities Commission revert to this position. The Taskforce Report discussed the important role of smaller intermediaries for early-stage capital raising activities, given the higher risk profile that smaller companies may exhibit.

The Financial and Consumer Services Commission (New Brunswick) is also expected to publish a similar local blanket order in the coming weeks.

EMDs that wish to rely on the blanket orders must report a change in business activity using Form 33-109F5 *Change of Registration Information* under National Instrument 33-109 *Registration Information* within 30 days of the change.

If you have any questions regarding this time-limited exemption, please reach out to a member of [our team](#).

## 2. FSRA's Gearing up for Change: Consultation on Total Cost Reporting for Segregated Funds

On May 27, 2024, the Financial Services Regulatory Authority of Ontario (**FSRA**) launched a public consultation on its new [proposed rules](#) that will affect all insurers that offer customers individual variable insurance contracts (also known as individual segregated funds contracts). The objective of this consultation is to obtain feedback from stakeholders, including customers, insurers and investors, as part of FSRA's ongoing commitment to transparency and protecting the interests of life insurance customers. FSRA invites stakeholders to review the proposed rule and provide feedback before **July 26, 2024**.

These proposed rules will make the expectations set out in the [Individual Variable Insurance Contract Ongoing Disclosure Guidance](#) published by the Canadian Council of Insurance Regulators and the Canadian Securities Administrators (**CSA**) in 2023 mandatory for Ontario segregated funds. Under the proposed rules, customers will get the first set of enhanced statements for the year ended December 31, 2026 in early 2027.

Although insurers are already required to provide annual statements to customers, the proposed rules will require insurers to increase the amount of information provided on those statements. The current requirements do not match the Insurance Guidance's enhanced requirements. It is noted in the consultation paper that absent the proposed rules, there are also no current requirements for insurers to provide ongoing, specific reporting to owners on the cost of owning segregated funds after the initial point of sale. The new statements will need to include information such as:

- the total cost of investing, including ongoing embedded fees such as management expenses and trading expenses;
- additional information on the segregated funds' investment performance;
- a customer's right to guarantees under their segregated fund contracts and how certain actions might affect their guarantees; and
- information to more easily allow customers to compare the cost of owning segregated funds with the cost of owning other investments.

In addition to seeking general comments on the proposed rule, FSRA notes it does not have statutory authority to provide exemptions and is thus seeking feedback on whether additional exceptions are appropriate for some of the new requirements where it would not be in a customer's best interest to require full compliance, such as if it would result in costs to customers that would exceed the benefits.

We note that a [recent study](#) released by the CSA that analyzed the effects of the earlier cost disclosure reforms of Phase 2 of the Client Relationship Model (**CRM2**) applicable to certain investments showed that the industry responded the way regulators had anticipated when they implemented the cost transparency measures (we wrote about the study in last month's bulletin [here](#)). The CSA had concluded that MERs and management fees decreased for both mutual funds and ETFs over the study period, although the CSA cautioned that the observed changes in industry behaviour could not be attributed directly to CRM2 because of other potential factors.

## In Brief

### 2023 Annual Report of OSC's Investor Advisory Panel: Staying Safe

Earlier this month, the Ontario Securities Commission's Investor Advisory Panel (the **Panel**) released its annual report. The Panel is an advisory committee to the OSC, that represents the views of retail investors on policy and rule-making initiatives. Among other topics, the Panel examined risks and opportunities for retail investors from the digitalization of financial services, digital engagement practices by trading platforms, and the use of AI by those wishing to commit fraud. Other topics looked at by the Panel include the expansion of alternative assets, such as crypto, being made available to retail investors, as well as privately placed alternative assets such as private equity and private debt.

The Panel had several suggestions for improving investor protection, including the following:

- evaluating the types of advice that could benefit DIY investors;
- compliance reviews of “finfluencers”;
- measuring the effect of the Client Focused Reforms (**CFRs**) on investors;
- strengthening oversight of crypto trading platforms and addressing ease of access to alternative assets which are considered speculative and high-risk;
- increasing investor awareness of fraud risks; and
- using the Designated Fund (funds from sanctions and settlements) so that it is seen to directly benefit investors.

With respect to DIY investors, the Panel is concerned that investors who may not be sophisticated can too easily access leverage-based or other complex investments on order execution only (**OEO**) channels, and thus investors may not receive the information needed to offer them increased protection. Suggestions include requiring OEO firms to publish risk warning pop-ups or product disclaimers immediately prior to the placing of trade orders by clients. In connection with the CFRs, the Panel believes it is important to review whether they have resulted in unintended consequences, such as a reduced product shelf or additional compliance fees being passed along to investors.

The Panel also mentioned dispute resolution in its report, supporting the CSA's binding authority proposal for the Ombudsman for Banking Services and Investments (**OBSI**).

### Watching for the Signals: CIRO Releases Results of First Investor Survey

Early this month, the Office of the Investor at the Canadian Investment Regulatory Organization (**CIRO**) released the results of its [first investor survey](#) (together with the Innovative Research Group), which was intended to provide insights into trends and financial concerns impacting investors in Canada. The report is very robust and includes data relating to several themes, including financial goals and challenges, investment decision making and risk, the investor-advisor relationship, familiarity with complaint-handling procedures, and familiarity with fraud/scam attempts.

Perhaps unsurprisingly, investor confidence in achieving personal financial goals is being affected significantly by the rising cost of living, and thus only 21% of Canadians surveyed said that they felt “very confident” about meeting financial objectives. Similarly worrying, 28% of Canadians (and as high as 40% of 18–34-year-olds) indicated they needed to borrow money to cover daily expenses. Of note, 30% of investors surveyed held or hold cryptocurrency assets, even though 60% of Canadians think the investments are extremely or very risky.

In our article above relating to the Investor Advisory Panel to the OSC, we noted the panel’s concerns about influencers. The concern appears to be backed up by findings of the survey, where approximately 28% of Canadians surveyed look to financial influencers, forums and social media for guidance on financial matters. Of these individuals, 44% indicated that the information received from these types of sources is “equally as valuable” as the information they would get from a traditional advisor. For respondents that used social media, 59% received information and advice from YouTube videos.

Of the DIY investors surveyed, approximately 40% said they would utilize tools or features relating to asset allocation or portfolio construction if those were made available.

With respect to questions relating to investor redress and complaint handling, investors were asked about the organizations that regulate investment advice in their home province, and 73% of investors indicated they didn’t know, while 13% indicated there was no such organization.

The report is a very interesting read and provides a snapshot of current investor sentiment in Canada.

## Important Reminders

### Rules of the Road: OM Update Requirements

As you may recall reading in our [earlier bulletin articles](#), amendments to National Instrument 45-106 *Prospectus Exemptions (NI 45-106)* that took effect on March 8, 2023 (the **Amendments**) require issuers that rely on the offering memorandum (**OM**) prospectus exemption in Ontario to consider whether their OM needs to be updated. Updates may be necessary to include interim financials for the most recently completed six-month period where a distribution is ongoing, if more than 60 days have elapsed since the end of the second interim period. For issuers with a December 31 year end, this means considering whether the issuer’s June 30 financial statements trigger the need to update the OM by August 29. Amending an OM to include the semi-annual financials may necessitate updates to other disclosure in the OM to ensure that it continues to meet the OM form requirements as of the date the OM is amended. An exemption is available if the issuer appends an additional certificate to the OM certifying that:

- the OM does not include a misrepresentation when read as of the date of the additional certificate;
- there has been no material change in relation to the issuer that is not disclosed in the OM; and
- the OM, when read as of the date of the additional certificate, provides a reasonable purchaser with sufficient information to make an informed investment decision.

In either case, the updated OM must be filed with the OSC and any other applicable regulators within 10 days of a distribution. If you have any questions about the application of this requirement to your offering memorandum, please [contact us](#).

## BLG Resource Corner

Our colleagues at BLG have provided a variety of insights we thought might interest our readers:

- [Thought Starters 2.0: Focused advice on tomorrow's trending legal topics](#)
- [Freeland to taxpayers: Talk to the hand](#)
- [Court opens the door to a finding of fiduciary duty in relation to non-managed accounts](#)

For more information, please visit the BLG [website](#).

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### ***Practical advice. Efficient service. Fixed-Fee plans. Singular focus.***

AUM Law focuses on serving the investment management sector with legal and consultancy services related to regulatory compliance. AUM Law provides its registrant clients with annual fixed-fee regulatory compliance support plans and related offerings. It provides registrants with an efficient, innovative approach to help manage their legal and regulatory compliance obligations.

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.

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