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AUM® LAW
Bulletin

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Ice Cream Edition

There is no shortage of potential themes for our July edition. However, as we soak up an unexpectedly busy month in the securities regulatory compliance world, we've decided to explore an unexpected holiday – National Ice Cream Day. Debate ensues, but it is thought that ice cream has been around since 700AD, as a frozen mix of dairy, salt and ice. Today, it is estimated that Canadians eat an average of 10.6 liters of ice cream per person per year, with chocolate being the most favoured. The third Sunday of July is the official celebration of National Ice Cream Day, although in 1984, the entire month of July was also deemed National Ice Cream Month in the U.S. by President Ronald Regan. An entire month would of course permit more time to sample additional flavours, without the accompanying painful brain freeze. Whether you prefer a cup or cone (or ice cream sandwiches), we hope you find these summaries helpful to avoid potential regulatory headaches.

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BLG Resource Corner

1. OSC's Annual Summary Report for Dealers, Advisers and Investment Fund Managers: A Layered Regulatory Sundae

The Registration, Inspections and Examinations Division of the Ontario Securities Commission (**OSC**) released its highly anticipated OSC Staff Notice 33-756*: Summary Report for Dealers, Advisers and Investment Fund Managers.* The report is always a must-read for registrants, as it describes the OSC's compliance and registration work and describes priorities of the division for the current fiscal year. The report also provides a deep dive into regulatory guidance and expectations, and registrants are expected by staff to use this report as a "self-assessment tool". Highlights of deficiencies noted by staff in various compliance reviews are described below.

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The report tries to hammer home the importance of full disclosure when completing the main set of registration forms, particularly with respect to criminal charges or solvency events in Form 33-109F4 *Registration of Individuals and Review of Permitted Individuals*. Additional time was granted in the report to the importance of clear content regarding the circumstances of an individual registrant leaving a sponsoring firm in Form 33-109F1 *Notice of End of Individual Registration or Permitted Individual Status*, which was noted as a point of regulatory interest.

With respect to service standards, the report repeated information provided previously by staff to the effect that if a registration submission is transitioned to the Registrant Conduct Team for further examination, the filings are **not** treated as standard **nor** are they subject to the OSC's service standards.

The report discussed deficiencies related to registerable activities conducted by unregistered firms, particularly those that entered into business arrangements with an unrelated firm for its investment fund manager (**IFM**) and/or portfolio manager (**PM**) services. Staff had concerns in instances where the PM, and not the IFM, was in fact the entity that directed the affairs of the investment fund. Staff identified certain clauses in business agreements as being problematic, such as those allowing the PM to change a fund's service providers or otherwise restrict an IFM from exercising its statutory standard of care.

Other deficiencies that were given much space in the report related to referral arrangements between PMs and unregistered firms. Staff was concerned that some registered firms improperly delegated portfolio management activities requiring registration to referral agents, including updating know-your-client (**KYC**) information and maintaining direct contact with clients to discuss account details or address concerns with their accounts. In addition, if the referral agent has a continuing relationship with the clients (the example given was financial planning services) all fees relating to portfolio management services must be paid directly to the registered firm.

According to the report, there still seems to be an issue with respect to the 2021 requirements to collect trusted contact person information; registered PMs and exempt market dealers (**EMD**s) must have processes that require the firm to take reasonable steps to obtain this information from the client while collecting the client's other KYC information.

Almost three full pages were devoted to issues found by staff in business continuity planning (**BCP**) requirements. Staff expects smaller firms (or firms with only few registered individuals) to have a BCP to address a significant business disruption, and such firms should consider designating a person to execute that BCP. Other considerations for the BCP include how the firm will communicate with clients, key personnel, 3rd party service providers and regulators in the event of a disruption, and what information clients need to know to ensure the BCP can be executed. If a BCP executor is appointed, the report includes a further list of considerations for the written agreement with the executor, including confidentiality provisions if the person will have access to confidential client information (with appropriate client authorization). A BCP and potentially a BCP executor will be expected at the time of applying for registration.

Many deficiencies were noted with respect to the calculation of capital markets participation fees, as required by OSC Rule 13-502 *Fees*. Firms incorrectly deducted revenue relating to activities that require

registration or exemptions from registration, or on the basis that they were earned outside of Ontario. Firms also engaged in incorrect calculations for the "Ontario percentage" used to calculate fees, which is dependent on whether the firm has a permanent establishment in Ontario (as defined by the Canada Revenue Agency). Other issues related to incorrect reporting of total gross revenues for the designated financial year, and using the incorrect exchange rate if a firm's annual financial statements are not denominated in Canadian currency.

The report describes the OSC's enhanced process for firms that are late in delivering annual or interim financial filings, or experiencing unresolved capital deficiencies, as both maintaining adequate working capital and delivering financial statements on time are considered fundamental requirements of registration.

As an example of responding to emerging issues, the report noted that because of the higher interest rate environment, some real estate/ mortgage issuers halted or suspended redemptions last year. Staff contacted these market participants to better understand the terms of such halts, the type of disclosure provided to investors, the impact on distributions and the plan to manage liquidity and resuming redemptions going forward. Staff intends to investigate the roles and responsibilities of EMDs in the distribution of real estate and mortgage products more closely this year. EMDs are also reminded by staff that if they are distributing securities on the basis of the offering memorandum exemption, they should implement reasonable procedures to ensure that the offering memorandum contains the required disclosure, including in particular the additional disclosure required for issuers engaged in "real estate activities" or issuers that are "collective investment vehicles".

In addition, while staff remain focused on the "registration as the first compliance review" program, they also intend to conduct reviews of high-risk firms (based on the responses in the latest Risk Assessment Questionnaire), high-impact firms and specialized dealers/derivative dealers.

Please reach out to us if you have any questions about the report, or need another pair of eyes on your compliance policies and procedures to ensure evolving regulatory expectations are considered and remediated.

2. CSA's Cool Recap of the Year in Review

Earlier this month, the Canadian Securities Administrators (**CSA**) released the 2023-2024 Year in Review, which among other things discusses achievements against the six strategic goals set out in its 2022-2025 Business Plan.

The review runs through a variety of CSA activities, outreach and publications released throughout the year, including with respect to enforcement proceedings. There were over 46 publications describing final adoption of rule changes, consultations, blanket orders and guidance on CSA policy developments. In addition, 64 individuals and 39 companies were banned from participating in the capital markets through enforcement proceedings.

The report also describes the CSA's Systemic Risk Committee's report on capital markets, which outlined key trends and vulnerabilities of Canada's financial system (read more about that report here). The year in

review also highlighted efforts to educate investors, including by the CSA's Investor Education Committee regarding the importance of using reliable sources of investment information, including a "check registration" campaign (which had an impressive 10.8+million impressions) that was run through various unconventional sources such as Reddit.

With respect to investment funds, the report discusses a previous consultation which would allow investment funds in continuous distribution to file a new prospectus every two years instead of annually and which would repeal the requirement to file a final prospectus no more than 90 days after the issuance of a receipt for a preliminary prospectus. The report confirms that the CSA is finalizing these amendments. The CSA is also preparing rule amendments to modernize and improve investment fund continuous disclosure documents.

For minority security holders in special transactions, the CSA is going to publish for comment proposed amendments to Multilateral Instrument 61-101 *Protection of Minority Security Holders in Special Transactions* to clarify the role of boards of directors and/or special committees of independent directors and enhance disclosure obligations. It is also currently preparing to publish for comment proposed targeted amendments to National Instrument 62-104 *Take-Over Bids and Issuer Bids* with a view to enhancing the early warning reporting regime.

Of particular interest to registrants, the report notes that the CSA continues to work on filing and search experience enhancements for SEDAR+ and is exploring opportunities to further integrate securities filings and information systems. The CSA is also continuing to consider client-facing titles used by registered individuals in order to formulate recommendations to better align the use of client-facing registrant titles with the services and products investors expect to receive. The latter initiative stems from the misleading titles prohibition that came into effect with the client-focused reforms in 2021. In addition, the CSA is reviewing the proficiency regime with the objective of addressing "inherent structural limitations in the current registrant proficiency framework".

To discuss the implications of any of the CSA's regulatory priorities, feel free to contact your usual lawyer at AUM Law.

3. CIRO's Serving up Proposals for Proficiency

Earlier this month, the Canadian Investment Regulatory Organization (**CIRO**) released for comment proposed amendments to its proficiency rules, which would apply to Approved Persons of investment dealers. CIRO's proposed model would shift from a course centric model (with exams tied to courses), to an assessment centric model and mandatory education and training.

Under the proposed model, there would be no mandatory courses as prerequisites to exams, but exams would still be required for each Approved Person category based on the competency profiles, including for some categories, a general exam. Once approved, there would be mandatory conduct training, and well as continuing education training on mandated topics each year. To become registered in the category of Registered Representative, individuals would need to demonstrate baseline education requirements, which

would include a diploma or degree from an accredited post-secondary institution or four years of relevant work experience (an increase from the two years proposed in the previous consultation last year).

While CIRO is not mandating any particular diploma or degree, the consultation paper notes that a diploma or degree that would demonstrate a baseline level of analytical and communication skills which allows a person to understand and apply the relevant proficiency competencies could satisfy the baseline education requirements. CIRO will also release guidance to dealers on what would be relevant experience for Registered Representatives in advance of the implementation of the new proficiency program. For Executive personnel, CIRO proposes that each Executive, including the UDP, should have a minimum two years of relevant experience based on the category of approval, the responsibilities of the Executive, and the firm’s type of business.

In response to comments on the previous consultation, CIRO has proposed to provide exam blueprints and sample exams for each of the eight exam categories and has dropped the requirement to have firm sponsorship prior to writing the exams. The general exam, the Canadian Investment Regulatory Exam, will be based on common proficiency competencies between Registered Representatives and Investment Representatives. While a separate managed account exam was originally proposed for Associate Portfolio Managers and Portfolio Managers, CIRO is now proposing to keep its requirements in alignment with those of the Canadian Securities Administrators for its Associate Advising Representative and Advising Representative proficiency requirements.

CIRO is proposing specific Approved Person exams for the following categories:

- RR - Securities- Retail
- RR - Securities- Institutional
- RR and IR- Derivatives
- Supervisor
- Trader
- Directors, Executives, Ultimate Designated Person (**UDP**)
- Chief Compliance Officer (**CCO**); and
- Chief Financial Officer (**CFO**)

CIRO has proposed to require mandatory conduct training by CIRO, to be completed by all new Approved Persons within 30 days of approval, where failure to complete it will result in an automatic suspension. In addition, all **existing** Approved Persons must complete the conduct training by December 31, 2026. For training by the dealer firm itself, the proposed amendments will allow the training for Registered Representatives and Investment Representatives dealing with retail clients (and newly proposed for institutional clients) to be provided within 90 days of approval, rather than as a pre-approval requirement. Instead of prescriptive criteria, training would need to address the published competencies and sub-competencies applicable to the business model, and the role of the Registered Representatives and Investment Representative at the applicable dealer firm.

Several provisions are proposed that would allow for the continued reliance on certain existing criteria, including that existing Approved Persons will not be subject to the new proficiency requirements provided they continue in the same role (i.e. provided they did not cease to be approved for longer than 90 days).

Comments on the draft rule amendments are due by **September 17, 2024**. CIRO is aiming to publish the final rules for implementation by the second half of 2025, for a launch of **January 1, 2026**.

4. ASC's 2024 Annual Report Scoop

In its recently released annual report, the Alberta Securities Commission (**ASC**) discusses the completion of the first fiscal year under its new three-year strategic plan. The three pillars of the strategic plan remain intelligent regulation aimed at fostering a thriving capital market, protection of investors and market integrity through effective compliance oversight, enforcement and education, and fostering a culture of engagement.

The report runs through many of the CSA initiatives and regulatory changes over the last year and is a good reminder of all the updates and new requirements for securities market participants. Under the first pillar, (intelligent regulation aimed at fostering a thriving capital market), the report discusses the importance of decision-useful disclosure, and that the ASC is continuing to co-lead efforts to bring transparency to both climate-related and diversity-related disclosure in Canada. In 2023, the ASC created a new Sustainability and ESG Disclosure department. With respect to CSA Staff Notice 21-334 *Next Steps to Facilitate Access to Real-Time Market Data*, it is noted that the ASC expects to consider whether to pursue a similar approach to that of the CSA's for the TSX Venture Exchange.

Regarding capital markets statistics, the report indicates that there was over $10.2 billion raised by Alberta based issuers in the exempt market, with 55% of the amount raised being in the form of debt.

Under the second pillar (protect investors and market integrity through effective compliance oversight, enforcement and education), the report discusses key enforcement decisions and orders in the ASC's last fiscal year. It is noted that these key cases included two insider trading related cases where the ASC concluded settlement agreements, ASC panels which issued decisions in two cases involving fraud, and a number of sanctions (including penalties and bans) after various respondents breached registration requirements and engaged in illegal distributions. The ASC's Joint Serious Offences Team was also involved in a number of investigations, resulting in jail sentences.

Under the third pillar (fostering a culture of engagement), the report discusses the ASC's eight advisory committees, which keep ASC staff updated on industry and other professional expert views and current business practices. In its most recent fiscal year, the ASC formed the Technology and Innovation Advisory Committee. Important community initiatives were also highlighted, and activities included the first recipient of the ASC Capital Market Scholarship with the University of Calgary's Haskayne School of Business, which will, over time, support five full-time Indigenous students achieve a Bachelor of Commerce degree.

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In Brief

The Assorted Flavours of CIRO's 2024 Priorities

The Canadian Investment Regulatory Organization (**CIRO**) recently released a bulletin setting out its priority report, describing CIRO's focus for the 2025 fiscal year (running from April 2024 – March 2025).

For this fiscal year, CIRO is focused on three key areas: Integration, Regulatory Delivery and Operations, and Strategic Objectives.

The first key area, integration, includes continued work on the integrated dealer fee model, with implementation expected in fiscal 2026, as well as implementation of a new integrated risk model, which is intended to assess risk consistently across investment dealers and mutual fund dealers. Other actions include developing a proposal to harmonize the two continuing education regimes and developing rule amendments with respect to directed commissions. This year, we can expect publication of the proposed Phase 4 of the Rule Consolidation project. CIRO also intends to launch examinations of mutual fund dealers with activities in Québec.

With respect to the second key area of regulatory delivery and operations, CIRO's activities will include completing the client-focused reforms phase 2 sweep testing, implementing the first phase of a public analytics data portal (with access to aggregate trade information), and developing surveillance tools to review over-the-counter trading activity of crypto assets.

Amongst many other strategic objectives, CIRO intends to streamline and harmonize its registration framework and proficiency standards, and will complete the selection of exam design and delivery service provider(s), propose amendments for an assessment-based proficiency model (see our related article in this **July 2024 bulletin**), and create a framework for registration of mutual fund dealers in Québec to implement delegation of powers. In fiscal year 2025, CIRO will also propose amendments to reflect the structure of ETFs, implement interest rate derivatives monitoring and monitor for potential CORRA manipulation.

Cone of Conduct: Exemptions from Derivatives Business Conduct Rule

On July 25, the Canadian Securities Administrators (**CSA**) announced specific temporary exemptions from various obligations in National Instrument 93-101 *Derivatives: Business Conduct* (**NI 93-101**) which comes into force on **September 28, 2024**. As a reminder, the new rule sets out robust requirements for the business conduct of advisers and dealers who advise or deal in over-the-counter (**OTC**) derivatives. The rule establishes fundamental obligations that include requirements related to fair dealing, conflicts of interest, suitability, reporting non-compliance, and record-keeping. We remind registrants, including advisers registered under NI 31-103 that advise others on derivatives, that they may require revisions to their policies and procedures, client disclosure and client onboarding documentation prior to **September 28, 2024**, regardless of the partial exemption available to such advisers.

Co-ordinated Blanket Order 93-930 exempts **(i)** derivatives firms from certain obligations when transacting with certain investment funds with foreign managers or advisers; and **(ii)** senior derivatives managers from certain reporting obligations. In Ontario, the blanket order expires on March 28, 2026.

The first exemption is intended to ensure that investment funds that are managed by the equivalent of a registered or authorized investment fund manager under the securities legislation or under the commodities futures legislation of a foreign jurisdiction, or advised by the equivalent of a registered or authorized adviser under the securities legislation or under the commodities futures legislation of a foreign jurisdiction, are afforded the same treatment as those funds would be in Canada under NI 93-101 (i.e. would usually be treated as an eligible derivatives party under NI 93-101, transactions with whom are subject to fewer obligations). The exemption does not apply to all obligations; for instance, general obligations toward all derivative parties and segregation of derivatives party assets will still apply.

Under NI 93-101, senior derivatives managers of derivatives dealers must submit an annual compliance report to their board of directors. The deadline for senior derivative managers of derivatives dealers to prepare and submit a compliance report to their board for 2024 has been extended to 2025, provided the firm follows all other applicable provisions of NI 93-101.

If you require amendments to your policies and procedures to reflect the obligations of NI 93-101 or have any questions about how they apply to your business, please contact us.

Frozen Assets: CIRO Enforcement Report

In the most recent 2023-2024 Enforcement Report, the Canadian Investment Regulatory Organization (**CIRO**) describes recent changes to enforcement policies as well as notable case highlights. The report begins with a description of the new harmonized Sanction Guidelines and Enforcement Staff Policy Statements, as well as CIRO's new centralized intake process for all public complaints and inquiries. Enforcement decision-making has been harmonized across investment dealer and mutual fund rule cases, which is intended to promote consistency from the investigation stage through to formal proceedings. It is also noted that CIRO intends to focus its finite resources on cases with the greatest deterrent impact and send the strongest regulatory message.

Highlighted cases included:

- prohibited recommendations for contracts for differences by an order-execution-only dealer;
- failure by a dealer to implement a proper supervisory system regarding high-risk trading strategies of a registered representative; and
- fines issued to a representative of a mutual fund dealer, who was also permanently banned from conducting securities related business, for a number of rule breaches, including soliciting investments in an outside business activity and failure to disclose conflicts of interest.

In 2024, cases resulted in over $14 million in fines, disgorgement and costs, and hearing panels ordered suspensions and permanent bans in a significant proportion of proceedings involving individuals.

The report notes that CIRO is also beginning its work on harmonizing key enforcement systems and technologies of its predecessor organizations, the Investment Industry Regulatory Organization of Canada and the Mutual Fund Dealers Association of Canada.

Important Reminders

More Than Just Sprinkles: FINTRAC's New Suspicious Transaction Reporting Requirements

As all registrants know, reporting entities including advisers and dealers are required to report suspicious transactions for money laundering or terrorist financing to the Financial Transactions and Reports Centre of Canada (**FINTRAC**). As of **August 19, 2024**, suspicious transactions will also be required if there are reasonable grounds to believe that a transaction is related to sanctions evasion. FINTRAC has said that all information that helps identify the transaction as suspected sanctions evasion activity should be included in the report, including information on the products or services involved. Reports should also include information on the ownership, control, and structure of entities involved in transactions, as well as information about related persons or entities involved, and all available identifying information and descriptions of any legal entities or arrangements involved or associated with the financial transactions. FINTRAC released a special bulletin with additional information in June, and registrants (or other reporting entities) should consider amending their policies and procedures to incorporate these new requirements. Additional information can also be found in BLG's article linked in our **July 2024 bulletin below**.

Total Cost Reporting: I Scream…

Many registrants received a reminder earlier this month from the securities regulatory authorities that the enhanced cost disclosure reporting requirements for investment funds (and new cost and performance reporting guidance for segregated funds) will be in force on **January 1, 2026**. The changes to National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* increase obligations relating to the existing annual report on charges and other compensation, which are provided to clients, in order to include costs related to investment funds (known as the **total cost reporting, or TCR, requirements**). As a result, the first annual reports with the new required information will be due for the year ended December 31, 2026. While the deadline is not imminent, much work is required by the industry to ensure that the requisite information is available, and the regulators have stated they do not intend to grant any extensions. If you are a registered adviser, dealer or investment fund manager with questions or looking for more information on these requirements, please contact your usual lawyer at AUM Law.

BLG Resource Corner

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

- The CSA has competition: The Competition Act introduces new prohibitions on misleading environmental claims

- Employee ownership trusts: Business succession alternative for private businesses in Canada
- Sanctions evasion reporting under Canada's anti-money laundering and anti-terrorist financing regime

For more information, please visit the BLG website.

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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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