

1.1.3 OSC Staff Notice 35-704 – (Commodity Futures Act) Non-Resident Advisers

OSC STAFF NOTICE 35-704 (COMMODITY FUTURES ACT) NON-RESIDENT ADVISERS

Introduction

This Notice sets out how staff of the Ontario Securities Commission (the **Commission**) interprets the application of the adviser registration requirement set out in paragraph 22(1)(b) of the *Commodity Futures Act* (Ontario) (the **CFA**) with respect to non-resident investment funds that are sold to Ontario-based investors.

Staff of the Commission are issuing this notice in response to enquiries we have received from counsel for certain non-resident investment funds on the continued relevance of the “flow-through” theory in determining the application of the adviser registration requirement set out in paragraph 22(1)(b) of the *Commodity Futures Act* (Ontario) (the **CFA**). The elimination of the “flow-through” theory for adviser registration has been confirmed in the context of the *Securities Act* (Ontario) (the **OSA**).

The “flow-through” theory in Ontario held that advice to an investment fund “flowed through” to the investors in the fund. The effect of this interpretation was that the adviser to the fund was required to register as an adviser in Ontario, or be exempted from such registration, if any units of the fund were sold here. This applied even if the adviser was located outside Ontario and the fund was established outside Ontario.

Background

The “flow-through” theory for adviser registration in Ontario was originally articulated in the blanket orders and policies that preceded OSC Rule 35-502 *Non-Resident Advisers* (**Rule 35-502**). The “flow-through” theory was continued and explained in detail in the October 2, 1998 and June 23, 2000 Notices to proposed Rule 35-502 (collectively, the **35-502 Notice**). In the 35-502 Notice, the Commission stated that it considered a person or company to be acting as an adviser in Ontario if it, directly or through a third party, acted as an adviser for a mutual fund or a non-redeemable investment fund that distributed its securities in Ontario, notwithstanding that the advice to the fund may have been given to, and received by, the fund outside of Ontario. In these circumstances, the 35-502 Notice stated, the Commission considered that the Ontario investors in the fund were acquiring the advisory services of the adviser of the fund and that the securities of the fund were distributed in Ontario for the purpose of providing these advisory services in Ontario. Therefore, the adviser of the fund was considered to be acting as an adviser to Ontario purchasers of the fund, and hence acting as an adviser in Ontario, by virtue of the distribution of securities of the fund to those purchasers.

In the July 17, 2009 notice that accompanied the publication of the final version of National Instrument 31-103 *Registration Requirements and Exemptions* (as it was then called) (**NI 31-103**) (such Notice, the **NI 31-103 Notice**), the Canadian Securities Administrators (the **CSA**) announced the discontinuation of the “flow-through” theory for adviser registration under NI 31-103. As a result, unless it is exempt, the adviser to a fund must register as a portfolio manager in the jurisdiction where the fund is established, regardless of where the fund’s investors are located. This is because the fund is the client receiving advice, so advice is given in the jurisdiction where the advice is received and where the adviser is located.

If the fund is established outside a jurisdiction where units are sold and the adviser is also located outside the jurisdiction, the advice to the fund is not given in that jurisdiction. In this case, the adviser to the fund does not have to register in that jurisdiction.

Purpose of Notice

Paragraph 22(1)(b) of the CFA requires that a person or company engaging in or holding himself, herself or itself out as engaging in the business of advising others as to trading in commodity futures contracts or commodity futures options be registered as an adviser in the appropriate category under the CFA.

Staff has received enquiries about the status of the “flow-through” theory under the CFA, following the decision to discontinue this theory under the OSA.

We wish to confirm that we take the same view under the CFA with respect to the “flow-through” theory for adviser registration as we confirmed for the OSA in the NI 31-103 Notice.

Questions

If you have questions regarding this notice, please direct them to:

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