

NAVIGATING PRIVATE PLACEMENT REGIMES AROUND THE WORLD - CANADA

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Moderator:

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Topics:

1. Overview of Canadian securities regulation
2. Canadian investors in non-Canadian funds
3. Registration requirements and exemptions for international firms
 - Dealer - IDE
 - Adviser - IAE
 - Investment Fund Manager – IIFM exemptions
4. Annual fees
5. Prospectus filing requirements and exemptions
 - Canadian offering memorandum / wrapper
 - Post-trade filings
 - Filing fees
6. Limited partnership registration requirement
7. Other Considerations

1. Overview of Canadian Securities Regulation

- No national or federal securities commission
 - Separate securities laws and regulator for 10 provinces + 3 territories
 - Cooperative Capital Markets Regulatory System
- Harmonized rules called
 - National Instruments (NIs)
 - Multilateral Instruments (MIs) and Multilateral Policies
- Key private placement rules:
 - NI 31-103
 - NI 45-106
 - MI 32-102
 - MP 31-202
- Provincial regulation:
 - Commodity futures
 - Derivatives

2. Canadian Investors in Non-Canadian Funds

- Sales to “permitted clients”: easily facilitated
- Type of fund
 - Is it an “investment fund” or
 - Private equity, venture capital, real estate or infrastructure fund?
- Technical requirements to address:
 - Registration and exemptions
 - Dealer
 - Adviser
 - Investment Fund Manager
 - Prospectus filing requirements and exemptions
 - Canadian disclosure requirements
 - Post trade filing requirements
 - Ongoing filing and fee requirements

Permitted Client Definition

- Under NI 31-103 a “permitted client” includes:
 - Canadian financial institutions and Canadian registered banks
 - Canadian registered advisers or dealers
 - Pension funds
 - Foreign entities analogous to above entities
 - Canadian and foreign governments and governmental entities
 - Canadian municipality, public board, commission, metropolitan community or school board
 - Registered trust companies acting on behalf of managed accounts they manage
 - Persons authorized to act as advisers in Canada acting on behalf of managed accounts

Permitted Client Definition

- Under NI 31-103 a “permitted client” includes:
 - Investment funds:
 - Managed by a person registered as an investment fund manager in Canada; or
 - Advised by a person authorized to act as an adviser in Canada
 - Registered charities advised by an “eligibility adviser”
 - Individuals who beneficially own at least CAD\$5 million in financial assets
 - Persons or companies (other than individuals or investment funds), with at least CAD\$25 million of net assets on its most recently prepared financial statements
 - A person or company that distributes securities of its own issue in Canada only to persons or companies referred to above

3. Registration Requirements and Exemptions

Dealer Registration Requirement

- Business trigger
 - Engaging in the business of “trading” in securities
 - Includes merely holding oneself out, directly or indirectly, as being willing to engage in the business of trading in securities
- Indicative Factors
 - Engaging in activities similar to a registrant
 - Intermediating trades or acting as a market maker
 - Carrying on dealing activities with repetition, regularity or continuity
 - Being, or expecting to be, remunerated or compensated
 - Soliciting others in connection with the dealing activities
 - Producing or intending to produce profit from trading in securities

Dealer Registration Considerations

- Register as a dealer
 - Time consuming and expensive
 - Proficiency requirements
 - Regulatory risk
 - Cost and burden of ongoing reporting and compliance
- Rely on international dealer exemption (**IDE**)
- Engage a dealer
 - Investment dealer
 - Exempt market dealer
 - International dealer relying on IDE
- Reverse solicitation
 - Not a dealer exemption

International Dealer Exemption

- International dealer exemption (**IDE**)
- Permits a trade in a foreign security with a permitted client
 - Unless the trade is made during the security's distribution under a prospectus that has been filed with a Canadian securities regulatory authority
- Foreign security
 - A security issued by an issuer incorporated, formed or created under the laws of a foreign jurisdiction

International Dealer Exemption

- The IDE is not available unless a person or company:
 - Has a head office or principal place of business in a foreign jurisdiction (home jurisdiction)
 - Is registered as a dealer or to act in similar capacity under the securities legislation of its home jurisdiction
 - Engages in the business of a dealer in its home jurisdiction
 - Is acting as principal or as agent for:
 - the issuer of the securities
 - a permitted client, or
 - a person or company that is not a resident of Canada
 - Dealer submits a “Submission to Jurisdiction and Appointment of Agent for Service”
 - Before advising a permitted client, the dealer notifies the client of the prescribed information

Adviser Registration Requirement

- Not relevant for non-Canadian investment fund offering
- CSA take the view that advising occurs in the jurisdiction where the fund is located
- Relevant if advising a fund in Canada or advising accounts in Canada

Adviser Registration Requirement

- Advisers are required to be registered as a “portfolio manager”
 - Permitted to advise with respect to any securities
- Portfolio managers are required to have
 - Ultimate designated person (**UDP**)
 - Chief compliance officer (**CCO**)
- Proficiency requirements
 - Formal education requirements
 - Relevant securities industry experience
- Capital and insurance requirements

International Adviser Exemption

- International Adviser Exemption (**IAE**)
- IAE allows firm to
 - Advise permitted clients
 - Advise in Canada on securities of Canadian issuers only when incidental to providing advice on a foreign security

International Adviser Exemption

- The IAE is not available unless all of the following applies:
 - Head office or principal place of business is in foreign jurisdiction (home jurisdiction)
 - Adviser is registered or exempt from adviser registration in home jurisdiction
 - Adviser engages in the business of an adviser in its home jurisdiction
 - Not more than 10% of the aggregate consolidated gross revenue of adviser, its affiliates and its affiliated partnerships derived from portfolio management activities in Canada
 - Before advising a client, the adviser notifies the client of the prescribed information
 - Adviser submits a “Submission to Jurisdiction and Appointment of Agent for Service”

IFM Registration Requirement and Exemptions

- Any person or company acting as an “investment fund manager” (**IFM**) in Canada is required to register
- IFM refers to a person or company that directs the business, operations and affairs of an investment fund

IIFM Registration Requirement —Two Solitudes

- Multilateral Instrument 32-102 *Registration Exemptions for Non-Resident Investment Fund Managers*
 - Ontario, Québec and Newfoundland and Labrador
- Registration required if investment fund or IFM distributes, or has distributed, investment fund securities in the jurisdiction
- Two exceptions:
 - The “no security holders or active solicitation” exception
 - The “permitted client” exception – certain conditions must be met:
 - Form 31-102F1 Submission to Jurisdiction and Appointment of Agent for Service for International Investment Fund Manager
 - Form 32-102F2 Notice of Regulatory Action
 - Prior notice to permitted clients
 - Annual report of total AUM attributable to securities beneficially owned by local residents
 - Notice of changes (within 10 days)

IIFM Registration Requirement —Two Solitudes

- Multilateral Policy 31-202 *Registration Requirement for Investment Fund Managers*
 - Applies in other jurisdictions
- IFM only required to register if it directs or manages the business, operations or affairs of the investment fund in that jurisdiction

4. Annual Fees for Exempt Firms

- In Ontario and Alberta annual fees may apply
- OSC Rule 13-502 *Fees*
 - Capital markets participation fee
 - Applies to firms relying on IDE, IAE or “permitted client” IIFM exemption
 - Due annually by December 31 based on revenue attributable to “capital markets activities” in Ontario
 - Form 13-502F4 *Capital Markets Participation Fee Calculation*
 - There is a minimum fee of Cdn \$835 regardless of revenue
- ASC Rule 13-501 *Fees*
 - Annual fee for firms relying on IDE and IAE
 - Currently flat fee of Cdn \$1,400
- AMF (Québec Securities Regulator)
 - No annual fee

5. Prospectus Filing Requirements and Exemptions

Prospectus filing requirements

- “Distribution” of securities subject to prospectus filing requirement unless exemption available

Exemptions from the Prospectus Requirement

- National Instrument 45-106 *Prospectus Exemptions*
 - “accredited investor” exemption
 - Cdn \$150,000 “minimum investment amount”

Canadian Wrapper

- Delivery of offering document under certain prospectus exemptions (including accredited investor exemption) triggers:
 - Required Canadian disclosures
 - Purchasers' rights of action for rescission or damages
 - Related and connected issuer disclosure
 - Filing requirements
- Canadian “wrapper” (unless the “wrapper exemption” is available)
- Canadian addendum to the subscription documentation
- Offering memorandum and wrapper to be filed within 10 days of distribution
 - Saskatchewan, Ontario, Québec, New Brunswick and Nova Scotia

Post Trade Filing Requirements

- Post-trade report on Form 45-106F1 to be filed
 - Within 10 days of certain distributions including distributions and purchases made in reliance on the “accredited investor” exemption under NI 45-106
 - Report is now publicly available on SEDAR outside of Ontario and British Columbia; must be certified by an officer or director of the issuer or dealer
 - Investment funds can elect to file once annually within 30 days of calendar year-end
- Disclosures include details of the distribution and dealer compensation
- Investment fund reports require disclosure of
 - Identity and address of the IFM
 - Fund particulars: Formation date, year-end, public listing status, NAV and “net proceeds” realized by the Fund in each Canadian jurisdiction

Post Trade Filing Requirements—Filing Fees

- In most jurisdictions, filing fee is a de minimis, fixed fee
- Ontario: Cdn \$500 per report
- British Columbia, Alberta and Québec
 - Filing fee is based on the size of the distribution
 - Up to 0.025% or 0.03% of the gross proceeds realized in the applicable Canadian jurisdiction

6. Limited Partnership Registration Requirements

- Registration requirements for limited partnerships vary by province
- Under *Limited Partnerships Act* (Ontario)
 - A limited partnership is deemed to be “carrying on business” in Ontario if it effects a distribution of securities in Ontario
 - Must register with the *Companies and Personal Property Security Branch* of the Ministry of Government Services
- General partner (GP) must also register in order to register the limited partnership
 - Corporate GPs extra-provincially register as a corporation (can take up to two weeks)
 - An LLC GP will be required to reserve a business name

7. Other Considerations

- Canadian Anti-Spam Legislation
- Anti-Money Laundering Legislation
 - *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*
 - United Nations Suppression of Terrorism and United Nations Act Sanctions Reporting Requirements
 - Canadian Criminal Code
 - FINTRAC
- National Policy 47-201 *Trading in Securities using the Internet and Other Electronic Means*
- National Policy Statement 42 *Advertising Securities on Radio and Television*

FOR FURTHER INFORMATION

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