



ORBIS INVESTMENT MANAGEMENT LIMITED

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Licensed to conduct investment business by the Bermuda Monetary Authority

10 April 2012

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Ontario Securities Commission
Autorité des marchés financiers
New Brunswick Securities Commission
Financial Services Regulation Division, Service NL, Government of Newfoundland and Labrador

c/o

John Stevenson, Secretary
Ontario Securities Commission
20 Queen Street West
Suite 1903, Box 55
Toronto, Ontario M5H 3S8

Anne-Marie Beaudoin, Corporate Secretary
Autorité des marchés financiers
800, square Victoria, 22e étage
C.P. 246, tour de la Bourse
Montréal (Québec) H4Z 1G3

AND

British Columbia Securities Commission
Alberta Securities Commission
Saskatchewan Financial Services Commission
The Manitoba Securities Commission
Registrar of Securities, Prince Edward Island
Nova Scotia Securities Commission
Registrar of Securities, Northwest Territories
Superintendent of Securities, Yukon
Registrar of Securities, Nunavut

c/o

Lindy Bremner, Senior Legal Counsel, Capital Markets Regulation
British Columbia Securities Commission
701 West Georgia Street
P.O. Box 10142, Pacific Centre
Vancouver, British Columbia V7Y 1L2

Dear Sirs/Mesdames:

Re: Proposed Multilateral Instrument 32-102 *Registration Exemptions for Non-Resident Investment Fund Managers* and Proposed Multilateral Policy 31-202 *Registration Requirement for Investment Fund Managers* – Response to Requests for Comments

Further to your requests for comments dated 10 February 2012 on proposed Multilateral Instrument 32-102 *Registration Exemptions for Non-Resident Investment Fund Managers* (“**MI 32-102**”) and proposed Multilateral Policy 31-202 *Registration Requirement for Investment Fund Managers* (“**MP 31-202**”) and their respective companion policies (together, the “**Proposed Rules**”), we are pleased to provide the following comments on behalf of Orbis Investment Management Limited (“**Orbis**”) and the other members of the Orbis group of companies (collectively, the “**Orbis Group**”).

BACKGROUND

Orbis is a Bermuda-based investment manager of “captive” investment funds (the “**Orbis Funds**”). Orbis was established in 1990 and has over US\$26 billion under management as at the date hereof. The Orbis Funds are investment funds organized as investment companies, limited partnerships or unit trusts in various non-Canadian jurisdictions around the world. The head offices or principal places of business of the Orbis Funds are located in various jurisdictions located outside of Canada.

The securities of the Orbis Funds are distributed primarily to investors resident outside of Canada, either in compliance with applicable registration and prospectus (or equivalent) requirements in the applicable jurisdictions or in some cases in reliance on exemptions from those requirements. At present, approximately 99% (by number) of the investors in the Orbis Funds are resident outside of Canada. Among the Canadian-resident investors, the asset distribution of the Orbis Funds is principally limited to “permitted clients”, as defined in National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (“**permitted clients**”). In addition, a very small portion of the securities of the Orbis Funds have been distributed to non-permitted clients resident in various Canadian jurisdictions in reliance on exemptions from the applicable prospectus (and, where applicable, dealer registration) requirements, including the “accredited investor” and “minimum amount investment” exemptions contained in National Instrument 45-106 *Prospectus and Registration Exemptions*. None of the Orbis Funds is a “reporting issuer” in any Canadian jurisdiction.

Orbis conducts its management and administrative responsibilities for the Orbis Funds from its head office in Bermuda. Orbis does not currently have an office or physical place of business in Canada. A member of the Orbis Group provides certain fund operations and information technology support services for Orbis from an office in British Columbia. In addition, to facilitate the distribution of the securities of the Orbis Funds directly to investors resident in Canada, another member of the Orbis Group, Orbis Canadian Client Services Limited, is currently registered as an exempt market dealer in British Columbia, Alberta, Ontario and Québec. Orbis Canadian Client Services Limited carries on its activities from an office in British Columbia and is a member of the Investment Funds Institute of Canada.

COMMENTS

1. General

As a general comment, we believe that it is regrettable that the Canadian Securities Administrators (the “**CSA**”) have been unable to propose a uniform national regime for the registration of non-resident investment fund managers. It is difficult to see any clear policy basis for having two different registration regimes – an approach which we expect will increase compliance costs to investment fund managers with little or no measurable benefit to firms or the investing public.

2. Proposed Multilateral Instrument 32-102 *Registration Exemptions for Non-Resident Investment Fund Managers*

We have concerns with the proposal that an investment fund manager must be registered in a jurisdiction simply because securities of investment funds managed by such manager are distributed in the jurisdiction. It is not clear how this approach is consistent with a reasonable interpretation of the legislative provisions that give rise to the investment fund manager registration requirement, or that the application of this approach will result in benefits that exceed the costs of the regulatory burden that will be imposed on investment fund managers.

Nevertheless, given the nature of our current activities in Canada, our comments will focus on the terms of the proposed exemptions from investment fund manager registration.

Permitted Client Exemption

We agree that non-resident investment fund managers without a place of business in Canada should be exempt from registration if the Canadian distribution of their securities is restricted to permitted clients (the “**permitted client exemption**”). Further to our comments with respect to the proposed amendments to National Instrument 31-103 *Registration Requirements and Exemptions* and its companion policy, dated 13 January 2011, we believe that it is reasonable to distinguish permitted clients from other investors on the basis that permitted clients are sufficiently sophisticated and/or have sufficient resources to obtain appropriate advice with respect to potential investments without the benefit of certain disclosure and other protections which are mandatory for all other investors.

Grandfathering of Existing Non-Permitted Clients

Although we are generally supportive of the proposed terms of the permitted client exemption, we submit that a non-resident investment fund manager should not be prevented from relying on the exemption simply as a result of the existence of non-permitted clients in the local jurisdiction to whom the fund’s securities were distributed *prior to* the implementation of MI 32-102. We believe that the terms of the permitted client exemption should be amended to clarify that the restriction on distributions to permitted clients applies only to securities of the investment fund distributed *after* the effective date of MI 32-102.

As stated, Orbis principally limits the distribution of the Orbis Funds in Canada to permitted clients, however, our client base is also comprised of a number of non-permitted clients resident in various Canadian jurisdictions. These sophisticated investors identified and engaged Orbis on an unsolicited basis, in many instances over a decade ago, upon reliance on exemptions from the applicable prospectus (and, where applicable, dealer registration) requirements, including the “accredited investor” and “minimum amount investment” exemptions.

As drafted, the permitted client exemption would precipitate the need for non-resident investment fund managers with no other significant connecting factor to a local jurisdiction, and for whom it may therefore not otherwise be necessary, practical and/or desirable to register, to cause the mandatory redemption of pre-existing non-permitted clients in order to avoid triggering the registration requirements. We do not believe this outcome to be in the best interest of our clients or the investing public at large.

Accordingly, we submit that the terms of the permitted client exemption should be amended to clarify that the restriction on distributions to permitted clients applies only to securities of the investment fund distributed after the effective date of MI 32-102, and that the existence of non-permitted clients to whom the investment fund’s securities were distributed prior to the implementation of MI 32-102 would not prohibit a non-resident investment fund manager from relying on the permitted client exemption.

3. Proposed Multilateral Policy 31-202 *Registration Requirement for Investment Fund Managers*

Listed “Functions and Activities” of an Investment Fund Manager

Although we are generally supportive of the approach underlying MP 31-202, we believe that further guidance is necessary with respect to whether an entity will be considered to be carrying on the functions and activities of an investment fund manager in a jurisdiction.

First, the guidance indicates that the regulators “*do not expect that any single function or activity would be determinative*”. One may reasonably interpret this statement to imply that an entity may carry out either a principal portion of a few, or an auxiliary portion of many, of the listed functions and activities from within a jurisdiction without triggering the registration requirement. We believe that further guidance is necessary to clarify the extent and nature of the listed functions and activities that the regulators would consider sufficiently material to trigger the registration requirement.

Second, we believe that further guidance is necessary with respect to non-resident investment fund managers who outsource portions of the listed functions and activities to service providers in a local jurisdiction, whether such service providers are arm's length or not.

We understand and agree with the rationale underlying the following statements (from the present request for comments):

“We agree that the delegation of certain functions by an investment fund manager, on its own, would not require the investment fund manager to register in the jurisdiction where the service provider is located. However, the investment fund manager is responsible for these functions and must supervise the service provider. Further, if an entity delegates or outsources activities to a service provider to such a level that the service provider is directing or managing the business, operations or affairs of an investment fund in the jurisdiction, then the service provider must also register as an investment fund manager.” (emphasis added)

“We interpret directing or managing the business, operations or affairs of an investment fund to encompass oversight and direction of the fund, which establish a real and substantial connection to the jurisdiction.” (emphasis added)

Specifically, we interpret the present guidance to suggest that the registration requirements under MP 31-202 would be triggered only if the local service provider was carrying out a portion of the functions and activities to an extent so material to the investment fund that these would, at least in aggregate, constitute the directing mind, management and substance of the investment fund management role.

Accordingly, we submit that in circumstances where the directing mind, management and substance of the investment fund management role is clearly resident outside of a local jurisdiction, the presence of local service providers which support, or fulfill even a material portion of, the listed functions and activities under the direction and at the discretion of a non-resident investment fund manager should not cause either party to trigger the registration requirements under MP 31-202.

4. In Closing

We are concerned that the number of responses received by the CSA from non-resident investment fund managers is neither an accurate gauge of how the Proposed Rules may be viewed by the international investment community nor an accurate reflection of the potential effect that they may have on non-resident investment fund managers. Many such managers may be unaware of these pending reforms and, if implemented as proposed, will elect to avoid triggering the proposed registration requirements (i) under MI 32-102, by unilaterally redeeming all non-permitted clients, and (ii) under MP 31-202, by curtailing or terminating important business relationships with Canadian investment fund service providers, such as fund administrators.

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We would like to thank the CSA for providing the opportunity to comment on the Proposed Rules. If you have any questions or would like to discuss any issues related to these comments, please do not hesitate to contact Ali Ziai at ali.ziai@orbis.com.

Yours truly,



Ali Ziai
Legal Counsel