

2010 BCSECCOM 622

November 15, 2010

Headnote

Multilateral Instrument 11-102 - *Passport System* – Securities Act s. 48 Adviser – Exemption from s. 34(b) requirement to be registered as an adviser – A person who resides outside BC wants to advise BC residents – The person is hired under a written agreement with a BC registered dealer or adviser to provide advice to the BC registered dealer; the person is registered or qualified to provide the advice in the jurisdiction in which they reside; under a written agreement with its BC clients or the person, the BC registrant accepts responsibility for all losses resulting from inappropriate advice provided by the person.

Applicable British Columbia Provisions

Securities Act, R.S.B.C. 1996, c. 418, s. 34(b) and 48

In the Matter of
the Securities Legislation of
British Columbia
(the Jurisdiction)

and

In the Matter of
the Process for Exemptive Relief Applications in Multiple Jurisdictions

and

In the Matter of
UBS Investment Management Canada Inc.
(the Filer)

Decision

Background

- ¶ 1 The principal regulator in the Jurisdiction has received an application from the Filer for a decision under the securities legislation of the Jurisdiction of the principal regulator (the **Legislation**) that the requirement contained in the Legislation to be registered as an adviser (the **Adviser Registration Requirement**) does not apply to advisers carrying on business in Canada, the United States and elsewhere who provide portfolio management services to the Filer (consisting of the provision of model portfolios to the Filer) to be used by the Filer for the benefit of its clients in Canada (the **Exemption Sought**).

2010 BCSECCOM 622

Under the Process for Exemptive Relief Applications in Multiple Jurisdictions (for a passport application):

- (a) the British Columbia Securities Commission is the principal regulator for this application, and
- (b) the Filer has provided notice that section 4.7(1) of Multilateral Instrument 11-102 - *Passport System* (**MI 11-102**) is intended to be relied upon in Alberta, Saskatchewan, Manitoba, Nova Scotia, New Brunswick and Newfoundland and Labrador (the **Non-Principal Jurisdictions** and together with the Jurisdiction, the **Filing Jurisdictions**).

Interpretation

- ¶ 2 Terms defined in National Instrument 14-101 *Definitions* and MI 11-102 have the same meaning if used in this decision, unless otherwise defined.

Representations

- ¶ 3 This decision is based on the following facts represented by the Filer:
- 1. the Filer is registered in good standing in the Jurisdiction as an adviser in the category of portfolio manager; it is also registered in good standing as an adviser in each of the Non-Principal Jurisdictions, as a portfolio manager and an exempt market dealer in Ontario and as a portfolio manager in Québec; it is intended that the Filer become registered as an exempt market dealer in the Principal and Non-Principal Jurisdictions; the head office of the Filer is in Ontario; the Filer is not in default of securities legislation in any of the jurisdictions of Canada;
 - 2. ordinarily, the Ontario Securities Commission is the principal regulator for the Filer; however, since the Exemption Sought is not required in Ontario or Quebec, the British Columbia Securities Commission has been chosen as the principal regulator for this application on the basis that it is the jurisdiction where the relief is required and with which the Filer has the next most significant connection;
 - 3. the Filer wishes to offer a managed account program (the **MAP**) in which the Filer will use the services of a select group of third party asset managers (the **Third Party Advisors**) that will complement the Filer's own portfolio management expertise; Third Party Advisors will be selected by the Filer based on their investment management processes and competitive absolute and risk-adjusted performance; Third Party Advisors will be reviewed and monitored by the Filer on an on-going basis and may be replaced or supplemented in the discretion of the Filer from time to time;

2010 BCSECCOM 622

4. Third Party Advisors may be resident in or outside of Canada; for those Third Party Advisors resident in Canada, some may be registered as portfolio managers with the Ontario Securities Commission, such that no additional registrations would be required for those Ontario Third Party Advisors to provide services to the Filer in respect of the MAP; others may be registered as portfolio managers under the legislation of another jurisdiction in Canada where they are resident; the Third Party Advisors that are resident outside of Canada (**Non-Resident Third Party Advisors**) will be duly registered and legally qualified to provide portfolio management services under the applicable foreign jurisdiction in which they carry on business; most Non-Resident Third Party Advisors will not be registered as portfolio managers with any securities regulatory authority in Canada;
5. each Third Party Advisor will provide the Filer with its model portfolio (the **Model Portfolio**) with respect to a particular region, asset class or strategy, such as global high alpha equity, international growth equity, emerging markets equity, U.S. all cap core, U.S. mid cap growth or US small cap core; a Third Party Advisor will provide the Filer with an updated Model Portfolio as its recommendations in this regard change over time;
6. the Filer will establish for each of its clients participating in the MAP an appropriate strategic asset allocation portfolio based on the risk tolerances and return objectives of such client; investment decisions will be made exclusively by the Filer acting as a discretionary portfolio manager; UBS Bank (Canada), an affiliate of the Filer, will be the custodian for all client assets purchased under the MAP;
7. in any agreement whereby a Third Party Advisor is retained to provide a Model Portfolio to the Filer, the Third Party Advisor will be required to exercise the powers and discharge the duties of its office honestly, in good faith and in the best interests of the Filer and to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances (the **Standard of Care**);
8. the account documentation relating to the MAP (the **Account Contract**) will require the Filer in providing portfolio management services under the MAP to act in accordance with the Standard of Care, and will provide that the Filer will be responsible to its clients for any losses the clients may suffer as a result of any Third Party Advisor failing to act in accordance with the Standard of Care;

2010 BCSECCOM 622

9. under the Account Contract, clients of the Filer will pay the Filer a fee based on a percentage of the client's assets under management by the Filer under the MAP; the Filer shall be responsible for paying all fees of any Third Party Advisors from which it may choose to obtain Model Portfolios
10. the portfolio of securities purchased for a specific client will generally consist at least in part of securities in asset classes where the Filer will use the Model Portfolios provided by some or all of the Third Party Advisors to select individual client securities; where a client's portfolio is constructed using in part a Model Portfolio, such Model Portfolio may be customized by the Filer in light of the client's particular needs; that is, where it is determined that securities are to be selected for the client based on a Model Portfolio provided by a Third Party Advisor to the Filer, the Filer will not necessarily use that Model Portfolio in precisely the form developed by the Third Party Advisor in selecting securities for that client; because such Model Portfolios will have been developed by the Third Party Advisors without any information about, or any consideration of, the needs of the Filer's clients, the Filer may need to, and in appropriate circumstances will, deviate from the investment recommendations implicit in the Model Portfolio;
11. clients of the Filer will not meet with or have any individual one-on-one discussions with any Third Party Advisor as part of the MAP; occasionally, clients of the Filer may be permitted to listen in on conference telephone calls between the Filer and others and the Third Party Advisor during which the Third Party Advisor's general outlook and investment strategies are discussed;
12. Third Party Advisors not registered as portfolio managers in Ontario will not be required to register as advisers in Ontario as they will be able to rely on the exemption from the Adviser Registration Requirement provided by section 7.3 of Rule 35-502 Non-Resident Advisers of the Ontario Securities Commission; and
13. Third Party Advisors not registered in Québec will not be required to register as advisers in Québec as they will be able to rely on the general registration exemption order (Decision #2009-PDG-0191) issued by the Autorité des marchés financiers (Québec) for an exemption from the adviser registration.

Decision

- ¶ 4 The principal regulator is satisfied that the decision meets the test set out in the Legislation for the principal regulator to make the decision.

The decision of the principal regulator under the Legislation is that the Exemption Sought is granted, provided that:

2010 BCSECCOM 622

- (a) the Filer is registered as a portfolio manager under the Legislation or is otherwise registered in a category which permits the Filer to provide the portfolio management services contemplated by the MAP;
- (b) in obtaining a Model Portfolio from a Third Party Advisor, the Filer enters into a written agreement with that Third Party Advisor which sets out the Third Party Advisor's duties and responsibilities;
- (c) pursuant to the Account Contract, the Filer is fully responsible to its clients for any losses the clients may suffer as a result of a Third Party Advisor failing to act in accordance with the Standard of Care and the Filer cannot be relieved of such responsibility;
- (d) Third Party Advisors do not have any direct client contact with clients in the MAP except by telephone and then only if a representative of the Filer duly registered to provide portfolio management services in respect of securities in the Filing Jurisdiction where the client is resident is present at all times on such telephone call;
- (e) Third Party Advisors are licensed or otherwise legally permitted to provide investment advice and portfolio management services under the applicable laws of the jurisdiction or foreign jurisdiction in which they reside; and
- (f) for each Filing Jurisdiction, this decision will terminate 90 days after the coming into force of any rule, regulation or blanket order or ruling under the securities legislation of the Filing Jurisdiction that provides an equivalent exemption to the Filer.

Sandra Jakab
Director, Capital Markets Regulation