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Headnote

Relief from the requirement to be registered to advise for foreign sub-advisers retained by a BC registrant to provide advice directly to a BC mutual fund. Relief also granted from the requirement to be registered to trade for trades by foreign futures commission merchants on behalf of the fund.

Exemption Order

First Horizon Capital Corporation and Horizons Tactical Hedge Fund

Section 48 of the *Securities Act*, R.S.B.C. 1996, c. 418

Background

- ¶ 1 First Horizon Capital Corporation (FHCC) has applied for an exemption from the requirements
- (a) to be registered to act as an adviser in section 34(1)(c) of the Act that would otherwise apply to sub-advisers (Sub-Advisers) providing investment counselling and portfolio management services to the Horizons Tactical Hedge Fund (the Fund); and
 - (b) to be registered as a dealer and/or a salesperson, partner, director or officer of a registered dealer in section 34(1)(a) of the Act that would otherwise apply to futures commission merchants (FCMs) making trades by or on behalf of the Fund in derivatives which are securities or exchange contracts.

Representations

- ¶ 2 FHCC represents that:
1. it is the trustee and manager of the Fund and is not a reporting issuer in any jurisdiction;
 2. the Fund is an open-end mutual fund trust established under the law of British Columbia;
 3. the Fund is a “mutual fund” as defined in section 1(1) of the Act and a “commodity pool” as defined in section 1.1 of proposed Multilateral Instrument 81-104 *Commodity Pools*, in that the Fund will invest in

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derivatives other than as permitted under National Instrument 81-102 *Mutual Funds*;

4. the Fund is not currently a reporting issuer in any jurisdiction;
5. FHCC filed a preliminary prospectus for the Fund (the Preliminary Prospectus) on October 15, 2002 in all provinces and territories of Canada, except Québec;
6. the investment objective of the Fund is to provide investors with superior returns through investment in a diversified portfolio of securities and derivatives;
7. the Fund will also invest in debt securities guaranteed or issued by the Government of Canada, the Government of a Province of Canada, the Government of the United States of America or the government of a State of the United States of America (Government Securities);
8. the Fund's investment in Government Securities will be used to support the Fund's leveraged derivatives positions;
9. in conjunction with filing the Preliminary Prospectus, FHCC intends to enter into a written agreement with Toron Capital Markets Inc. (the Adviser);
10. under the agreement, the Adviser will provide all necessary portfolio management services to the Fund, will have complete discretionary authority to purchase and sell securities on behalf of the Fund, and will be authorized and required to delegate its discretionary authority over all or a portion of the Fund's assets to one or more Sub-Advisers;
11. the Adviser is an Ontario corporation and is registered with the Ontario Securities Commission as an adviser (investment counsel and portfolio manager), limited market dealer and commodity trading manager and with the British Columbia Securities Commission as an adviser (investment counsel and portfolio manager);
12. the Adviser will engage one or more Sub-Advisers and will allocate the Fund's assets among the Sub-Advisers;
13. each Sub-Adviser will be responsible for making and executing investment decisions for that portion of the Fund's assets allocated to it;

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14. the Adviser will enter into a written agreement with each of the Sub-Advisers setting out the obligations and duties of the Sub-Advisers;
15. the Adviser will monitor the performance of the Sub-Advisers on a daily basis and will allocate and re-allocate the Fund's assets among the Sub-Advisers based on their performance;
16. the Adviser will agree in a written agreement with FHCC and the Fund to be responsible for any loss that arises out of the failure of any Sub-Adviser to:
 - (a) exercise its powers and discharge its duties honestly, in good faith and in the best interests of the Fund; or
 - (b) exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances;
17. the Adviser will only retain Sub-Advisers that are registered with, and/or a member of, the U.S. Commodity Futures Trading Commission and the National Futures Association in the United States or similar regulatory bodies in the home jurisdictions of the Sub-Advisers;
18. the Fund will pay the Sub-Advisers retained by the Adviser to provide advice to the Fund a fixed portfolio management fee and/or an incentive fee as will be described in the Preliminary Prospectus;
19. each prospectus in respect of the Fund, including the Preliminary Prospectus, will disclose that the Adviser remains liable for all portfolio advice provided by any Sub-Advisers, and that it may be difficult to enforce legal rights against any Sub-Adviser located outside Canada;
20. the Fund will open and maintain accounts with FCMs who are not registered under the Act;
21. the Sub-Advisers will directly instruct the FCMs to execute trades in derivatives for the Fund; and
22. the FCMs will conduct trade execution activities in accordance with applicable laws.

Order

- ¶ 3 Because it is not prejudicial to the public interest, the Executive Director orders under section 48 of the Act that

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- (a) the Sub-Advisers are exempt from the requirements of section 34(1)(c) of the Act in connection with their providing investment counselling and portfolio management services to the Fund provided that:
 - (i) the obligations and duties of each Sub-Adviser are set out in a written agreement with the Adviser;
 - (ii) the investment management agreement between the Adviser and the Fund provides that the Adviser will be responsible for any loss that arises out of the failure of the Sub-Advisers to
 - (A) exercise their powers and discharge their duties honestly, in good faith and in the best interests of the Fund, or
 - (B) exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances,
 - (iii) the Adviser cannot be relieved by the Fund from its responsibility for loss such loss; and
 - (iv) the Sub-Advisers will be registered as advisers or be licensed or otherwise legally qualified to provide investment counselling or portfolio management services in the jurisdictions in which they reside; and
- (b) the FCMs are exempt from the requirements of section 34(1)(a) of the Act in connection with their execution of trades for the Fund as instructed by the Sub-Advisers, provided that the FCMs will be registered or be licensed or be otherwise legally qualified to trade in derivatives which are securities or exchange contracts in the jurisdiction in which they reside.

¶ 4 November 19, 2002

L.E. Evans, C.A.
Director