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May 20, 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 and its BC clients; 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; the BC client will obtain advice from and give all instructions through the BC registrant.

Applicable Legislative Provisions

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

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

and

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

and

In the Matter of
Dundee Securities Corporation (the Filer)

Decision

Background

- ¶ 1 The principal regulator in the Jurisdiction has received an application from the Filer for a decision under securities legislation of the Jurisdiction of the principal regulator for an exemption from the adviser registration requirement (the Legislation) applicable to an adviser/portfolio manager who provides a model portfolio or model portfolios to the Filer (Sub-Adviser or Sub-Advisers), for the benefit of the Filer's clients (the Clients) participating in the Client's Vintages managed account program who are resident in the Jurisdiction (the Exemption Sought).

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Under the Process for Exemptive Relief Applications in Multiple Jurisdictions (for a Passport Application):

- (a) the British Columbia Securities Commission (BCSC) has been chosen by the Filer as the principal regulator for the purpose of this application pursuant to Section 4.5(b)(iii) of National Policy 11-102, and
- (b) the Filer has provided notice that section 4.7(1)(c) of Multilateral Instrument 11-102 *Passport System* (MI 11-102) is intended to be relied upon in Alberta, Saskatchewan, Manitoba, Nova Scotia, New Brunswick, Prince Edward Island, Newfoundland and Labrador, Yukon, Northwest Territories and Nunavut.

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 a corporation under the *Business Corporations Act* (Ontario) with its head office located in Toronto, Ontario.
 - 2. As the Filer's head office is Ontario, the Ontario Securities Commission would ordinarily be the principal regulator for this Passport Application. However, the Registration Relief is not being sought in Ontario due to the availability of the exemption from registration requirements provided in section 7.3 of Ontario Securities Commission Rule 35-502 *Non-Resident Advisers*.
 - 3. Also, the Registration Relief is not being sought in Quebec as a result of a decision issued by the Autorité des marchés financiers, effective December 28, 2009, which effectively provides an exemption for foreign Sub-Advisers from registration requirements in Quebec.
 - 4. Pursuant to Section 4.5(b)(iii) of National Policy 11-102, the Filer has chosen British Columbia as the principal regulator for the purpose of this Passport Application, as British Columbia is the jurisdiction, apart from Ontario and Quebec, where the Filer has the most significant connection in relation to the exemptive relief sought.

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5. The Filer is registered in good standing under the Legislation in a category that permits it to provide investment counselling and portfolio management services.
6. The Filer is a registered investment dealer in all provinces and territories in Canada, is a derivatives dealer in Quebec and is a dealer member of the Investment Industry Regulatory Organization of Canada (IIROC).
7. The Filer or a dealing representative of the Filer is authorized to act as an adviser pursuant to the exemption from the adviser registration requirements provided in section 8.24 of National Instrument 31-103 that is available to investment dealers who are members of IIROC provided the advising activities are conducted in accordance with the rules of IIROC.
8. The Filer offers its Clients two different discretionary managed account programs (described below). Both managed account programs offered by the Filer are subject to IIROC Regulation 1300 – Supervision of Accounts. The Filer seeks exemptive relief in relation to its Vintage Program only:
 - (a) The PM Program – discretionary managed accounts are fully managed by a portfolio manager of the Filer; and
 - (b) The Vintage Program – discretionary managed accounts are invested by the Filer based on the Client's selection of one or more model portfolios, each established and maintained by a Sub-Adviser who has entered into a Sub-Advisory Agreement with the Filer.
9. To participate in the Filer's Vintage Program, a Client enters into a written Investment Management Agreement (IMA) with the Filer, establishing a managed account and setting out the terms and conditions and the respective rights, duties and obligations of the Client and the Filer.
10. Under the IMA:
 - (a) the Client grants full discretionary trading authority to the Filer to invest the Client's managed account, in accordance with the Client's Investment Policy Statement, in certain model portfolios selected by the Client that are managed by Sub-Advisers, without having to obtain the specific consent of the Client for individual trades;

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- (b) the Client agrees to pay an annual fee calculated on the basis of the value of the assets in the Client's account, but that is not based on the volume or value of transactions effected in the Client's account;
 - (c) unless otherwise requested, the Client waives receipt of trade confirmations;
 - (d) in accordance with IIROC Regulation 200.1(c), the Filer will send a monthly portfolio account statement if there has been a transaction or transactions in the Client's account in that month, and a quarterly portfolio review statement to each Client whether or not there have been any transactions in the account in that quarter; and
 - (e) information not contained in the monthly portfolio account statement that would otherwise be contained on a trade confirmation pursuant to IIROC Regulation 200.1(h) is maintained by the Filer in its books and records and will be provided to the Client upon request.
11. Each model portfolio within the Vintage Program has its own investment focus and suitability criteria, and is managed and maintained by a Sub-Adviser.
 12. The Client, with the assistance of an adviser or dealing representative of the Filer, completes an Investment Policy Statement with the Client outlining, among other things, the Client's investment objectives, level of risk tolerance and any investment constraints applicable to the account. Based on the Investment Policy Statement, the Client, with the assistance of the adviser or dealing representative of the Filer, selects one or more model portfolios within the Vintage Program to invest in.
 13. The selection and proportionate weighting of the model portfolios selected by the Client cannot be changed by the Filer or the dealing representative of the Filer without the Client's prior approval.
 14. The Filer is responsible for investing the Clients' account based on the model portfolio(s) selected by the Client. Any subsequent trades, rebalancing transactions or other changes to the model portfolios by the Sub-Advisers are communicated to the Filer and the Filer executes corresponding transactions and changes in the Clients' accounts.
 15. In retaining Sub-Advisers within the Vintage Program, the Filer complies with the requirements of Section 7.3 of Ontario Securities Commission

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Rule 35-502 *Non-Resident Advisers* and with the decision of the Autorité des marchés financiers, effective December 28, 2009, relating to foreign Sub-Advisers in Quebec, respectively, as follows:

- (a) the obligations and duties of each Sub-Adviser are set out in a written agreement (the Sub-Advisory Agreement) between the Sub-Adviser and the Filer;
 - (b) a condition of the Sub-Advisory Agreement requires each Sub-Adviser that is resident in a province or territory of Canada to be registered as an adviser and/or portfolio manager under the securities legislation of that province or territory, and each Sub-Adviser that is not resident in Canada to be licensed or otherwise legally permitted to provide investment counselling and portfolio management services under the applicable laws of the jurisdiction where the Sub-Adviser's head office is located;
 - (c) the Sub-Advisory Agreement also requires that Sub-Advisers provide information in relation to the model portfolio(s) to the Filer so as to enable the Filer to be able to exercise an appropriate degree of supervision and control over the activities that the Sub-Advisers provide for the benefit of the Filer's clients;
 - (d) the Filer contractually agrees with each Client within the Vintage Program, to be responsible for any loss that arises out of the failure of the Sub-Adviser
 - (i) to exercise the powers and discharge the duties of its office honestly, in good faith and in the best interests of the Filer and each Client of the Filer in the Vintage Program for whose benefit the advice or portfolio management services are to be provided;
 - (ii) to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances; and
 - (iii) the Filer will not be relieved by its Clients from its responsibility for such loss;
16. Sub-Advisers have no direct contact with the Filer's Clients participating in the Vintage Program in connection with the provision of portfolio management services unless a portfolio manager or dealing

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representative of the Filer, duly registered to in the jurisdiction where the Client is resident, is present at all times, either in person or by telephone.

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 in respect of the Sub-Advisers provided that:

- (a) the Filer is registered in good standing under the Legislation in a category that permits it to provide investment counselling and portfolio management services;
- (b) the obligations and duties of each Sub-Adviser are set out in a written agreement entered into between the Sub-Adviser and the Filer;
- (c) the Filer contractually agrees with each Client to be responsible for any loss that arises out of a Sub-Adviser's failure:
 - (i) to exercise the powers and discharge the duties of its office honestly, in good faith and in the best interest of the Filer and each Client for whose benefit the investment advice is, or portfolio management services are, to be provided; or
 - (ii) to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances,

and that the Filer cannot be relieved by the Client from the responsibilities for such loss;

- (d) each Sub-Adviser will not have any direct contact with a Client in connection with the provision of portfolio management services unless a representative of the Filer, duly registered as an adviser or a dealing representative in the jurisdiction where the Client is resident, is present at all times, either in person or by telephone;
- (e) each Sub-Adviser will be licensed or otherwise legally permitted to provide investment advice and portfolio management services under the applicable laws of the jurisdiction in which the Sub-Adviser's head office is located; and

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- (f) for each 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 jurisdiction that provides an equivalent exemption.

Sandra Jakab
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British Columbia Securities Commission