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Headnote

Multilateral Instrument 11-102 *Passport System* - Securities Act s. 48 Adviser - Exemption from s.34(1)(c) 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 registrant 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, ss. 34(1)(c) and 48

March 30, 2009

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
Barclays Global Investors Canada Limited
(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 (the Legislation) that the requirements of the Legislation to be registered as an adviser (the Registration Requirements) do not apply to foreign portfolio managers (each, a Sub-Adviser and, collectively, the Sub-Advisers) who provide investment counselling and portfolio management services to the Filer in respect of clients of the Filer in the circumstances described below (the Exemption Sought).

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Under the Process for Exemptive Relief Applications in Multiple Jurisdiction (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.

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 amalgamated under the laws of the Province of Ontario;
 - 2. the Filer is registered under the Legislation as a portfolio manager (securities). The Filer is registered under the *Securities Act* (Alberta) as an investment counsel and portfolio manager in Alberta. The Filer is planning to request registration under the applicable legislation in the exchange contracts category in British Columbia and Alberta;
 - 3. the Filer provides, or will provide in the future, investment counselling and portfolio management services to institutional clients or other “accredited investors” within the meaning of National Instrument 45-106 *Prospectus and Registration Exemptions* (each, a Client and collectively, the Clients) resident in the Provinces of British Columbia and Alberta;
 - 4. the Filer has entered, or will enter, into investment management agreements (the Agreements) with the Clients. The Agreements provide that the Filer can engage a Sub-Adviser to provide portfolio management services, including on a discretionary basis, to the Filer in respect of the Clients or the Filer will obtain the Client’s prior written consent prior to retaining a Sub-Adviser;
 - 5. each Sub-Adviser will be an affiliated entity of the Filer. Each Sub-Adviser will be registered or otherwise qualified under applicable laws in the foreign jurisdiction in which its head office is located to provide investment counselling and portfolio management services in respect of

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securities and exchange-traded derivatives. The Sub-Advisers will not be residents of Canada;

6. the Filer will retain a Sub-Adviser who has the personnel and expertise to manage the assets of a Client in a manner that is consistent with the investment objectives and strategies of the Client;
7. the Filer will enter into a sub-advisory agreement with a Sub-Adviser which will set out the obligations and duties of the Sub-Adviser whereby the Sub-Adviser will be appointed as sub-adviser to exercise discretionary authority on behalf of the Filer in respect of purchases and sales of securities and exchange-traded derivatives (provided that the Filer is registered to advise in respect of exchange contracts in British Columbia or Alberta, as applicable) for a Client so long as such investments are consistent with the investment objectives and strategies of the Client (the Proposed Sub-Advisory Services);
8. as required under section 7.3 of Ontario Securities Commission Rule 35-502 *Non-Resident Advisers*:
 - (a) the obligations and duties of a Sub-Adviser in connection with the Proposed Sub-Advisory Services will be set out in a written agreement with the Filer;
 - (b) the Filer will contractually agree with the Client 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 the Client; or
 - (ii) to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances (together with (i), the Assumed Obligations); and
 - (c) the Filer will not be relieved by the Client from its responsibility for any loss that arises out of the failure of the Sub-Adviser to meet the Assumed Obligations;
9. if there is any direct contact between a Client and a Sub-Adviser, a representative of the Filer, duly registered to provide portfolio

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management and advisory services in the jurisdiction where the Client is resident, will be present at all times, either in person or by telephone;

10. the Filer has made or will make enquiries with respect to each Client to determine the investment objectives and strategies of the Client, and to the suitability of proposed transactions for the Client, and to otherwise comply with the “know your client” and “suitability” obligations under the Legislation. The Filer will provide this information to any Sub-Adviser who exercises discretionary authority over the assets of a Client;
11. the Filer will send to each Client all documents that are required to be sent to the Client under the Legislation or under the agreement between the Filer and the Client;
12. the Sub-Advisers that provide the Proposed Sub-Advisory Services to the Filer for the benefit of its Clients would be considered to be acting as an “adviser” under the securities legislation of the Jurisdiction, and in the absence of the relief requested by this application would be subject to the Registration Requirements;
13. there are no statutory exemptions under the Legislation that the Sub-Advisers may rely on to provide the Proposed Sub-Advisory Services to the Filer in respect of Clients;
14. the Filer is currently not in default of any of its obligations under the Legislation.

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.
- ¶ 5 The decision of the principal regulator under the Legislation is that the Exemption Sought is granted provided that:
1. the obligations and duties of each Sub-Adviser are set out in a written agreement with the Filer;
 2. the Filer contractually agrees with each Client that the Filer will be responsible for the Assumed Obligations;
 3. the Filer cannot be relieved of the Assumed Obligations by the Clients;

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4. each Sub-Adviser, if resident in a jurisdiction of Canada, is registered as an adviser in such jurisdiction;
5. each Sub-Adviser that is not resident in Canada will be licensed or otherwise legally permitted to provide investment advice and portfolio management services under the applicable laws of the jurisdiction in which it resides;
6. each Sub-Adviser does not have direct contact with the Clients unless a representative of the Filer, duly registered to provide investment counselling and portfolio management services for securities in the jurisdiction where the Client is resident, is present at all times, either in person or by telephone; and
7. the Filer maintains its good standing under the Legislation.

Sandra Jakab
Director, Capital Markets Regulation
British Columbia Securities Commission