

In the spirit of the holiday season, we present you with the following gifts for discussion with [your usual lawyer at AUM Law](#).

1. Robo-Advising: How Easy is it to Add an Online Advice Platform to Your Existing Services?
2. CSA Conflicts of Interest Notice
3. More CASL Fines
4. Cayman Islands Financial Account Reporting for Investment Funds
5. Final Form of Crowdfunding Regime in Ontario and Other Participating Jurisdictions
6. Report of Exempt Distribution Filing Deadline
7. FATCA Registration Now Available for Sponsored Entities
8. OSC Participation Fee Payment and Annual Registration Fees
9. Help Us, Help You

Recent Events • Stay Tuned



### 1. Robo-Advising: How Easy is it to Add an Online Advice Platform to Your Existing Services?

Providing advice through an online portal is a developing area of the Canadian financial industry. The ability for Canadian clients to input their know-your-client (KYC) information into a website, and for that website to return customized financial advice or allow the client to invest in a specific fund (typically an ETF), seems like a great e-commerce solution for registrants. However, firms should be cognizant that adding this online portal service offering represents a significant change in your business model that requires notice to the regulators in advance of implementation.

Regulators have released guidance on this topic in the form of CSA Staff Notice 31-342 *Guidance for Portfolio Managers Regarding Online Advice* (the Guidance). In the Guidance, regulators set out that registrant obligations are intended to be “technology neutral”, in that the rules should be the same for registrable activities being conducted in person or online. However, firms that are considering adding an online portal should be aware of the following:

- In Canada, there is no such thing as a pure online advisory or dealer model. Canadian regulators have adopted a “hybrid model” when it comes to online portals and KYC/suitability obligations. This means that regulators will allow firms to collect KYC information through a website or portal, but an appropriately registered individual must (still) be responsible for determining suitability after reviewing the collected information. The suitability determination will often require that the registered individual directly communicate with the client after the information collection stage, to review the provided KYC information together.
- In advance of CSA staff approving an online portal, they will often require a detailed explanation of the proposed online model, including website mockups and proposed KYC/suitability forms. Firms should be prepared for a potentially lengthy review.

We have registered and continue to work with a number of firms that use online platforms. Please contact a member of our [Regulatory Compliance Group](#) if you would like to discuss online platforms in greater detail.

## 2. CSA Conflicts of Interest Notice

Earlier this month staff of the Canadian Securities Administrators (CSA) released a [Notice](#) discussing “serious concerns” in the area of managing conflicts of interest that arise when firms registered solely as exempt market dealers, distribute securities of related or connected issuers with common mind and management (described as “captive dealers”). The Notice sets out:

- staff’s views for addressing the conflicts of interest that arise from the captive dealer business model, including commentary on when to avoid, disclose or control the conflict(s)
- “acceptable” and “unacceptable” practices for addressing conflicts of interest
- what firms proposing to be captive dealers can expect when applying for registration
- what captive dealers can expect when staff perform compliance reviews

Interestingly, staff states that “[a]lthough we intend this notice... to provide guidance to captive dealers, it may be useful for other registrants too.” Accordingly, portfolio managers that distribute their own pooled funds would also be wise to review the commentary in the Notice.

Please contact [your usual lawyer at AUM Law](#) for more information on this topic.

## 3. More CASL Fines

Since coming into force, Canada’s Anti-Spam Legislation (CASL) has made true on its promise with several successful enforcement actions (see our [March](#) and [July](#) bulletins for more details). Rogers Media Inc. is the latest to be disciplined, and has agreed to pay a \$200,000 fine to the Canadian Radio-television and Telecommunications Commission (CRTC). The CRTC alleged that for a one-year period, the company had sent promotional emails without a properly functioning “unsubscribe” option, and also failed to honour unsubscribe requests within ten business days.

This is yet another reminder that CASL is not toothless and that the price of non-compliance can be high. If you need assistance with CASL compliance, please contact [your usual lawyer at AUM Law](#).

## 4. Cayman Islands to Implement OECD Common Reporting Standard on Automatic Exchange of Information

The Organization for Economic Co-operation and Development (OECD) common reporting standard (CRS) is a standard that provides for the automatic exchange of financial account information between participating governments. The requirements under this standard are in addition to any Foreign Account Tax Compliance Act (FATCA) requirements. The Cayman Islands has recently enacted regulations to implement the CRS into domestic law, effective January 1, 2016. The CRS may be of interest to fund managers that manage a Cayman Islands investment fund, which is generally a “Reporting Financial Institution” under the standard (as is an investment manager/adviser itself).

The CRS Regulations will require Cayman Islands Reporting Financial Institutions to report information on the holders of “Reportable Accounts” which are resident in “Reportable Jurisdictions” to the Cayman Islands Department of International Tax Co-Operation. Once reported, that information will be sent to the tax jurisdiction of the account holders.

As a result of the implementation of the CRS, Reporting Financial Institutions should consider whether they are currently collecting the information required to identify a subscriber’s tax residency and report it, and that the Reporting Financial Institution has registered as required with the DITC on its online portal.

Please contact a member of our [Investment Funds Group](#) if you would like more information on this topic. We would be pleased to work with your local Cayman Islands legal counsel to determine whether any additional steps are required.

## 5. Final Form of Crowdfunding Regime in Ontario and Other Participating Jurisdictions

On November 5, 2015, securities regulators in Manitoba, Ontario, Quebec, New Brunswick and Nova Scotia (the participating jurisdictions) published the final form of the much anticipated Multilateral Instrument 45-108 - *Crowdfunding* (MI 45-108 or the crowdfunding regime) which introduces a crowdfunding prospectus exemption for reporting and non-reporting issuers, as well as a registration regime for funding portals. Provided all necessary Ministerial approvals are obtained, MI 45-108 will come into force in the participating jurisdictions on January 25, 2016.

For recent background on the crowdfunding regime and exempt market review, see our [July bulletin](#).

The crowdfunding regime will allow businesses to benefit from greater access to capital from a large number of investors online, including retail investors, through a funding portal operated by a registered dealer.

The following is a summary of some of the key aspects of the crowdfunding regime:

**Type of securities and distribution period.** Issuers are limited to distributing non-complex “plain vanilla” securities, and the distribution period must end no more than 90 days after the securities are first offered to investors.

**Amount of offering and investment limits.** The total offering cannot exceed \$1.5 million within a 12-month period. Investors are subject to investment limits based on the investor’s income and financial resources.

**Offering document, investor rights and delivery requirement.** The issuer must file a prescribed form of crowdfunding offering document that, among other things, is certified and provides purchasers with a right of action in the case of a misrepresentation (for a reporting issuer) or untrue statement of a material fact (non-reporting issuer). The offering document and additional offering materials, such as a term sheet or other materials summarizing the offering, must be filed with the regulator within 10 days after the closing of the distribution. The issuer may also be required to deliver to the regulators a video that the issuer made available to purchasers through the funding portal.

**Dealer framework.** Securities distributed pursuant to the crowdfunding prospectus exemption are required to be distributed through a single funding portal that is registered as an investment dealer, exempt market dealer or restricted dealer.

### Registration Categories

- **Restricted dealer funding portal.** The crowdfunding regime provides for a “restricted dealer funding portal” category of registration. The restricted dealer funding portal and a registered individual of that portal are not required to comply with certain dealer obligations under National Instrument 31-103 *Registration Requirements, Exemptions, and Ongoing Registrant Obligations* (NI 31-103), including certain KYC and suitability obligations. However, restricted dealer funding portals and registered individuals of those portals are not permitted to provide a recommendation or advice to an investor.

Within Ontario, a restricted dealer funding portal may only act as an intermediary in connection with a distribution of securities made in reliance on the crowdfunding prospectus exemption (outside of Ontario, the funding portal may also act as an intermediary in connection with a distribution of securities made in reliance on a start-up crowdfunding registration and prospectus exemptive relief order, provided that the funding portal is in compliance with the terms and conditions of MI 45-108). In other words, a restricted dealer is not permitted to rely on any other prospectus exemptions, including the offering memorandum exemption and the accredited investor exemption. A restricted dealer funding portal will not be able to register in any other registration category, and, in Ontario, is not permitted to be affiliated with another registered firm.

- **Registered dealer funding portal.** The participating jurisdictions have amended the crowdfunding regime to permit investment dealers and exempt market dealers to use the crowdfunding prospectus exemption, in addition to other prospectus exemptions, such as the accredited investor or offering memorandum exemptions. Exempt market dealers and investment dealers using the crowdfunding prospectus exemption are required to comply with certain funding portal registration requirements that apply to all funding portals in addition to all of the requirements applicable to their registration category, including KYC and suitability obligations under NI 31-103.
- **Funding portal obligations applicable to all registration categories.** Funding portals will be required to fulfill certain gatekeeper functions that include:
  - Reviewing the issuer's disclosure for completeness, accuracy and any misleading statements, and requiring corrections to disclosure, if necessary
  - Obtaining background checks on the issuer and its directors, executive officers and promoters and obtaining personal information forms from any of the foregoing who are individuals, and denying an issuer access to the funding portal in certain circumstances
  - Monitoring online communications from the issuer on the funding portal

The funding portal is not permitted to advertise a distribution or solicit investors under the crowdfunding prospectus exemption and may only make available to prospective investors the crowdfunding offering document and other offering materials including a term sheet, video and other summary materials. A funding portal is not permitted to act as an intermediary in connection with a distribution of, or trade in, securities of an eligible crowdfunding issuer that is a related issuer of the funding portal.

**Ongoing disclosure requirements.** Additional disclosure requirements are required for non-reporting issuers, including delivery of comparative annual financial statements, with an accompanying use of proceeds from the crowdfunding distribution. In Ontario, New Brunswick and Nova Scotia, non-reporting issuers must provide notice to securityholders of key specified events, including a discontinuation of the issuer's business, a change in the issuer's industry and a change of control of the issuer.

Please contact a member of our [Regulatory Compliance Group](#) if you have any questions or comments.

## 6. FATCA Registration Now Available for Sponsored Entities

In our [October bulletin](#), we announced that the IRS plans to amend the FATCA regulations to grant sponsoring entities a one-year extension to obtain a Global Intermediary Identification Number (GIIN) for their sponsored entities. The revised deadline is December 31, 2016. Until January 1, 2017, sponsored entities can provide the GIIN of their sponsoring entity to withholding agents and when reporting any information to the IRS. The [FATCA Registration System](#) has recently been updated to permit sponsoring entities to add, edit and delete sponsored entities. Information for multiple sponsored entities can be added at once using a file upload. The [FATCA User Guide](#) has also been updated to include instructions for adding and managing sponsored entities. Fund managers registered as sponsoring entities may now access the FATCA Registration System to obtain a GIIN for their sponsored entities.

Please contact [Stacey Long](#), Senior Legal Counsel, or your usual lawyer if you would like more information on this update, or more generally on FATCA regulations.

## 7. Report of Exempt Distribution Filing Deadline

Investment funds with a financial year-end of December 31, must file Form 45-106F1 – *Report of Exempt Distribution* (45-106F1) by January 30, 2016, with each applicable provincial securities regulator for distributions under certain exemptions, including:

- Accredited investor exemption
- Minimum amount exemption of \$150,000
- Additional investment in investment fund units

Any distributions made by an investment fund that rely on other prospectus exemptions, such as the offering memorandum exemption currently in effect outside of Ontario, may need to be reported to the relevant securities authorities within 10 days of the distribution.

Should you require assistance with the filing of Form 45-106F1, please [contact us](#) well in advance of your filing deadline, and in any event, before the first week of January.

**8. OSC Participation Fee Payment and Annual Registration Fees**

Please keep in mind that annual registration fees are due on December 31, 2015, as payment for the following year. On December 1, 2015, the National Registration Database (NRD) generates a Preliminary Annual Fee Summary, which indicates the OSC participation fee (based on the information provided in Form 13-502F4 *Capital Markets Participation Fee Calculation*) and the fees for the remaining applicable jurisdictions where the firm and its individuals are registered, as well as the NRD system fees. The Preliminary Annual Fee Summary will show an estimate of fees that will be withdrawn from the firm’s NRD-linked bank account on December 31, 2015, if the number of individuals with the registrant firm remains the same. If you have any individuals who are leaving the firm or are surrendering their registrations, you may exclude them from the fee calculation by using the Annual Fee Exclusion submission available on NRD.

We would be happy to provide a copy of the Preliminary Annual Fee Summary for those clients for which AUM Law is an Authorized Firm Representative.

Please contact [Gordana Beric](#), Senior Securities Clerk, if you have any questions relating to the above.

**9. Help Us, Help You**

As we have previously discussed (many times!), registered firms have ongoing obligations under securities legislation to inform the OSC of the following changes to a firm or a registered individual’s information. Failure to notify the OSC within 10 calendar days of most of these changes may lead to a \$100 late fee per day, up-to a maximum of \$5,000 per year (and in some instances \$10,000 per year):

Changes to Firm	Changes to Registered and Permitted Individuals	Changes to Operations
<ul style="list-style-type: none"> <li>• Operations (e.g., organizational structure, officers and directors)</li> <li>• Ownership or anticipated acquisition of securities of another entity</li> <li>• Insurance, auditors and constating documents (e.g., articles of amendment)</li> </ul>	<ul style="list-style-type: none"> <li>• Individual Forms 33-109F4</li> <li>• Outside activities*</li> </ul>	<ul style="list-style-type: none"> <li>• Offering of new products/business lines</li> </ul>

\*The OSC has been imposing late filing fees for failure to disclose all outside activities of individuals (e.g., directors, officers, trustees, shareholders and other roles).

An ounce of prevention is worth a pound of cure. Contact a member of our [Regulatory Compliance Group](#) to ensure that you are compliant.

## Recent Events

We were proud sponsors of the Portfolio Management Association of Canada's Conference and AGM held November 24 at the Royal York.



This year's theme was "Strategic Leadership in Investor Focused Times", and featured presentations by Andrew Coyne (National Post), Jonathan Golub (RBC) and Jack Mintz, among others.

## Stay Tuned

For the release later this week of our In a Nutshell piece on **mortgage investment corporations**.

Please note that we will not be releasing our usual monthly bulletin this December—see you in the New Year!

AUM Law primarily serves the asset management sector, with specific expertise in the regulatory and investment fund space. We strive to provide the most practical, forward-thinking advice and services, using a business model geared to efficiency, responsiveness and client service excellence. We are pleased to send you this summary of recent developments that may affect your business.



This bulletin is an overview only and it does not constitute legal advice. It is not intended to be a complete statement of the law or an opinion on any matter. No one should act upon the information in this bulletin without a thorough examination of the law as applied to the facts of a specific situation.