April Showers

Bulletin

AUM LAW

April 30, 2015

In keeping with the season, there has been more than a drizzle of new developments this month. Please contact your usual lawyer at AUM Law if you would like to discuss any of the topics in this bulletin:

1. Amendments to OSC Fee Rules Now in Force
2. OSC Whistleblower Program Contemplated
3. British Columbia, New Brunswick and Saskatchewan Propose Suitability Prospectus Exemption
4. Continuous Disclosure Prospectus Exemptions
5. Federal Budget Proposes Allowing Investment in Limited Partnerships by Registered Charities
6. Don't Forget About FATCA

1. Amendments to OSC Fee Rules Now in Force

On April 6, 2015, amendments to OSC Rule 13-502 – *Fees* and OSC Rule 13-503 – *(Commodity Futures Act) Fees* came into force, bringing changes to how registered and unregistered advisers, dealers and investment fund managers should calculate the participation fees and activity fees payable to the OSC going forward.

In addition to an increase of 6% to 8% to the amount of most activity fees, the following changes are now in effect:

1. The calculation of the annual participation fee owing on Form 13-502F4 (to be filed by December 1 each calendar year) is now based solely on the revenue earned by the firm during the fiscal year that falls during that calendar year.

   (In other words, the 2015 participation fee is based on the firm's revenue earned in the fiscal year ending in 2015.) For the past few years, many firms' fee calculation used a reference year that was not necessarily their most recent fiscal year.

2. The OSC now charges a fee of $100 for each permitted individual application it reviews initially (generally, for directors, officers and shareholders) if they are not also applying as a registered individual (e.g., as an Advising Representative, Dealing Representative, Chief Compliance Officer, etc.).

3. Firms relying on the international investment fund manager registration exemption (National Instrument 32-102) must now complete and file Form 13-502F4 by December 1 and pay their participation fee by December 31, which is identical to firms relying on the international adviser or international dealer exemptions. Previously, international investment fund managers had 90 days after their financial year end to file the form and make the payment.

2. OSC Whistleblower Program Contemplated

The Ontario Securities Commission is publicly mulling over the merits of a whistleblower program, set out in OSC Staff Consultation Paper 15-401. The central idea of the program is to offer a financial incentive for individuals to bring to the regulator's attention information they may have about serious breaches of securities law. The program is another initiative forming part of the Commission's stated goal of pursuing "fair, vigorous and timely enforcement".

The paper asks for industry and public input in a number of areas. One question that will be of particular interest is: Should compliance professionals be eligible for the cash awards? The OSC proposes that Chief Compliance Officers (CCOs) and those holding equivalent positions should be excluded with respect to information that these individuals acquired through internal reporting or investigation processes. However, compliance staff could be eligible, particularly if they observe the CCO and senior management engaging in misconduct, which would include failure to make appropriate reports to the regulator. Do awards like this incentivize compliance staff to report to the regulator in the hope of getting a payout, to the detriment of internal reporting processes? If the payout is large enough, this may well be something for the regulators to consider. A similar program operated by the United States' Securities Exchange Commission has seen individual payouts to compliance officers run to over $1 million.

A roundtable discussion on the topic, announced on April 14, will take place June 9, 2015 at the OSC's offices in Toronto. While the comment period closes May 4, 2015, those who wish to participate in the roundtable can contact Heidi Franken at hfranken@osc.gov.on.ca.

3. British Columbia, New Brunswick and Saskatchewan Propose Suitability Prospectus Exemption

The securities regulators in British Columbia, New Brunswick and Saskatchewan have proposed a new prospectus exemption to allow retail investors greater access to the exempt market and provide additional means for issuers to raise capital.

The new exemption would allow issuers listed on a Canadian exchange to distribute securities to any investor who has obtained advice from a registered investment dealer regarding the suitability of the investment. The rationale for the exemption is that the investor would be in a comparable position to a retail investor purchasing securities over the exchange in the secondary market, which is often done through an investment dealer. As proposed, advice from an exempt market dealer would not satisfy the conditions of the exemption.

4. Amended Continuous Disclosure Requirements for Venture Issuers

Effective June 30, 2015, the Canadian Securities Administrators (CSA) are adopting regulatory amendments to National Instrument 51-102 *Continuous Disclosure Obligations*, National Instrument 41-101 *General Prospectus Requirements* and National Instrument 52-110 *Audit Committees* to reduce the continuous disclosure burden of venture issuers.

Key Changes Flowing from the Amendments

- **Quarterly highlights.** For financial years beginning on or after July 1, 2015, venture issuers will have the option of providing a shorter "quarterly highlights" report instead of preparing a full interim MD&A.
- **Significance threshold increased.** When a venture issuer enters into a significant acquisition, it is required to file a business acquisition report (BAR). The threshold at which a BAR is required for venture issuers will be increased from 40% to 100%, thereby reducing the number of circumstances in which a venture issuer will be required to file a BAR. In addition, the requirement to include pro forma financial statements will be eliminated.

- **Scaled-down executive compensation disclosure.** For financial years beginning on or after July 1, 2015, venture issuers will have the option of completing a scaled down form of executive compensation disclosure, using Form 51-102F6V *Statement of Executive Compensation – Venture Issuers*.
- **Audit committees.** For financial years beginning on or after July 1, 2016, venture issuers will need to have an audit committee composed of at least three members, a majority of whom will need to be independent (i.e., individuals who are not executive officers, employees or control persons of the issuer). Since the TSXV has an equivalent requirement, this change will have no effect on TSXV-listed issuers.
- **Less financial disclosure in IPO prospectus.** Venture issuers doing an initial public offering (IPO) will only need to include two years of historical audited financial statements (as opposed to three years for non-venture issuers). The required description of the business and operating history has also been reduced to capture only the last two completed financial years.

5. Federal Budget Proposes Allowing Investment in Limited Partnerships by Registered Charities

Currently, charitable organizations and foundations have generally been unwilling to invest in investment funds that are structured as limited partnerships because it may cause a registered charity to be deemed to be carrying on the business of the partnership contrary to the *Income Tax Act*. This has meant that investment fund managers have had to assume additional time and cost to set up an alternative structure that would be a permitted investment for a charitable foundation (i.e., a trust on top of partnership for multiple investors or a single-purpose trust for a particular investor).

In a positive move for both registered charities and fund managers, the new federal budget proposes changes to subsection 253.1 of the *Income Tax Act* to provide that a registered charity shall not solely, because of the acquisition or holding of an interest in a partnership, be considered to carry on any business of the partnership if the following conditions are met:

- the charity – together with all non-arm's length entities – holds 20% or less of the interests in the limited partnership
- the liability of the members is limited (i.e., it is a limited partnership)
- the charity deals at arm's length with each general partner of the limited partnership

6. Don't Forget About FATCA

Canadian financial institutions with reportable accounts opened on or after July 1, 2014 must file the Canada Revenue Agency's Part XVIII Information Return on May 1, 2015.

The following is a list of key dates to help you stay on top of FATCA reporting and compliance:

Reporting

- Reporting for new accounts is due on May 1, 2015.
- For future years, Part XVIII reporting is due on May 1.

Review for U.S. Indicia

- The review of preexisting individual accounts that are high-value accounts (over $1 million) as of June 30, 2014 must be completed by June 30, 2015.
- The review of a preexisting entity account with an account balance or value that exceeds US$250,000 as of June 30, 2014 must be completed by June 30, 2016.

New Versus Pre-existing Accounts

- A new individual account is an account opened on or after July 1, 2014.
- A preexisting individual account is an account opened on or before June 30, 2014.
- A preexisting entity account is an account held by an entity on June 30, 2014.
- A new entity account is an account opened by an entity after June 30, 2014.

You may wish to review our recent bulletins on FATCA:

- What the FATCA? (December 2014)
- The Skinny on FATCA (May 2014)

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.