The Good, the Bad, and the Non-Compliant

Did you know….Clint Eastwood was born on this day in 1930? Though Eastwood's recent career has been characterized by "get off my lawn" rants, in the 60's he was the break-out star of Sergio Leone's spaghetti westerns, particularly the cult classic The Good, The Bad and the Ugly.

The Good, the Bad and the Ugly could also characterize the results of recent regulatory compliance sweeps, as demonstrated by the CSA's recent Staff Notice 31-350 and the ASC's recent EMD review. We will discuss this and much more in this month's AUM Bulletin. We hope it makes your day.

In this bulletin

In Brief: Common Reporting Standard ● T+2 Is Upon Us ● AML Alert ● Attention Cayman Master-Feeder Fund Structures!

1. Compliance Sweeps Reveal Room for Improvement

The Canadian Securities Administrators (CSA) and the Alberta Securities Commission (ASC) both conducted compliance sweeps recently, with the CSA reviewing small IFM, PM and EMD firms registered with the CSA, and the ASC reviewing EMD firms only.

The results of both sweeps were quite similar though, revealing a pattern of non-compliance in several key areas. Both the CSA Staff Notice 31-350 and ASC Notice 33-705 are useful reads as they identify common deficiencies that continue to plague all registrant categories and provide guidance for best practices.

The CSA provides a general formula for regulatory compliance at the outset, namely i) a comprehensive plan to address significant business interruptions and

In Brief

Common Reporting Standard

Further to our October 2016 Bulletin, the Canadian government recently passed legislation implementing the Common Reporting Standard (CRS), an international standard that close to 100 countries (though not the United States) have signed on to. Under the CRS, cooperating tax authorities in participating countries will automatically exchange financial account information. The FATCA regime continues to govern the exchange of relevant financial account information between Canada and the U.S.

In Canada, the responsibility of enforcing CRS will fall to

succession issues; ii) monitoring systems that are likely to identify non-compliance early; and iii) supervisory systems that allow a firm to correct non-compliance. As well, the CSA emphasizes the importance of succession planning, especially with small firms. We will discuss succession planning further in next month's Bulletin.

At a more granular level, both the CSA and ASC found that many firms were deficient in their collection of KYC and KYP information; their relationship disclosure information; reporting to clients; and sales and marketing materials, amongst other things. The CSA also focused on the inadequacy of firm policies and procedures and inadequate or missing CCO Annual Reports.

The above is only a selection of highlights from the Notices, both of which are worth reading in their entirety to assist firms in strengthening their compliance with their relevant securities laws. Regulators are stepping up their scrutiny of these areas, and after taking the time to provide detailed guidance on how to meet with these requirements, firms will have little excuse for non-compliance.

If you would like to discuss these Notices, or any particular areas of deficiency identified therein, please contact our Regulatory Compliance Group.

2. No Love for BIS

The verdict is in – after more than a year of consultations, the Best Interest Standard (BIS) is about as popular as Donald Trump at a NATO Summit (and that's after he shoved the Prime Minister of Montenegro). The CSA has confirmed that to date, only the Ontario Securities Commission (OSC) and New Brunswick's Financial and Consumer Services Commission (FCNB) are open to proceeding with the BIS.

The CSA released a recent Notice in which it acknowledged that agreement has not been reached across the provinces with respect to the BIS, and stated that common concerns from industry participants include a fear of legal and regulatory uncertainty and a lack of clarity surrounding how the BIS would be applied.

In response to these results, the CSA will focus primarily on its targeted reforms for 2017-2018, including conflicts of interest; suitability; KYC and KYP; relationship disclosure; and titles and designations. As well, the CSA has signaled that proficiency reforms may require a longer-term project and this will form a separate CSA project.

Though the BIS consultations will continue on a "parallel path", it seems to have taken a back seat at least for now. Stay tuned…

3. Border Patrol – Privacy Edition

At a time when travelers on both sides of the Canada/U.S. border are gearing up for summer vacation, Canada's federal privacy commissioner has opened an investigation in response to a complaint regarding the Canada Border Services Agency's (CBSA) practice of searching the electronic devices of travelers at the Canadian border. Though such searches are permitted without a warrant under the Canada *Customs Act*, CBSA policy states such searches should not be conducted as a matter of routine.

Concerns also continue to mount with respect to the activities of U.S. Customs and Border Protection officers, including concerns that these officers are not only demanding the passwords for travelers' electronic devices and searching said devices, but copying the contents for further inspection.

In Brief cont'd

the Canada Revenue Agency (CRA). The CRS framework requires reporting Canadian financial institutions to request the tax residency status of their account holders and to report annually on financial accounts maintained by individuals and entities controlled by individuals resident in participating jurisdictions outside of Canada and the U.S. to the CRA. While the first annual reporting deadline under CRS is not until May 2018, reporting institutions will need to have procedures in place to identify the relevant accounts by July 1, 2017.

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T+2 Is Upon Us

We discussed in our August 2016 Bulletin that IIROC had published a series of proposed rule changes to shorten settlement cycles from T+3 to T+2 in order to align with the U.S. market's impending adoption of a T+2 settlement cycle in September 2017.

As Canada officially moves to a T+2 settlement cycle on September 5th, 2017, firms will need to review their policies and procedures, including those around trade matching and service provider oversight, to ensure they reflect this change.

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AML Alert

As we have discussed in many previous AUM Bulletins, on June 17, 2017, reporting entities must adopt the new measures and requirements set out in the

Though Canadian courts have acknowledged for some time that there are reduced expectations of privacy at border points, the increased frequency and depth of electronic device inspections, particularly from U.S. border officers, is concerning from a privacy perspective, especially for those individuals who may have confidential information on their work devices. We will continue to keep you apprised of developments in this area.

If you have any questions regarding this or any other privacy-related issues, contact us and we can help.

4. Canada's Anti-Spam Legislation (CASL): Crystalize Your Consent

As mentioned in our April Bulletin, a private right of action for persons alleging they have been affected by a CASL contravention comes into effect on July 1, 2017. Of particular concern is the anticipated groundswell of class actions that are expected to begin shortly after July 1st. As remedies for contravention include compensation for losses incurred, and as well as specific amounts for specific CASL violations, a class action could have a devastating impact on a firm, as well as the officers and directors personally.

As CASL prohibits the sending of commercial electronic messages (CEMs) without consent (including messages to email accounts, social networking platforms, and even text messages to mobile phones), one way to counter this risk is to crystalize your implied client consent into express consent as soon as possible. In particular, it is important that your organization has the infrastructure in place to convert any implied consent, including through the acceptance or click of an email, or some other opt-in mechanism. The ability to obtain express consent and properly document and retain proof of such consent will assist in insulating your firm from any potential liability arising out of the private right of action claims under CASL.

Please contact us if you would like to discuss ways to obtain express client consent or would like to explore the sufficiency of your CASL Compliance Program in light of the private right of action coming into effect on July 1st.

5. Are Key Changes to Ontario's Employment Law Regime Coming Down the Pipe?

The Ontario government recently released its much anticipated final report, *The Changing Workplaces Review: An Agenda for Workplace Rights* (the "Report"), after over two years of review and consultation on employment and labour legislation in Canada. The review was initiated to assess the impact of globalization and other factors on employees in Ontario, particularly vulnerable employees. However, the 173 recommendations contained in the Report, if implemented, will significantly impact *all* employers and employees in Canada. We have summarized some of the key *Employment Standards Act* (ESA) recommendations for you below.

Culture of Compliance and Increased Enforcement

One of the Report's overarching themes is the need for a culture of compliance in Ontario workplaces. The Report suggests that this culture be achieved by 1) increasing enforcement powers and accompanying monetary penalties for violations of the ESA; and 2) consolidating employment, labour and occupational health and safety legislation into one "Workplace Rights Act", with accompanying training and education.

The Report also recommends that the ESA and *Ontario Business Corporations Act* be revised to extend director liability and remove any restrictions to an employee's ability to recover up to 6 months' wages and 12 months' accrued vacation pay directly from the directors of a corporation if necessary.

In Brief cont'd

amended Regulations under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act.*

It is now vital that reporting entities that have procrastinated on this task update their AML Compliance Programs immediately to ensure timely compliance. If you have any questions or would like assistance with implementing these amendments, please contact our Regulatory Compliance Group as soon as possible.

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Attention Cayman Master-Feeder Fund Structures!

As you likely know, effective July 1, 2017, all companies registered in the Cayman Islands will be required to maintain a new register to track beneficial ownership information (The Beneficial Ownership Register). Entries from the Beneficial Ownership Register will have to be periodically uploaded to a centralized search platform maintained by the Cayman Islands government and accessible under certain conditions.

Employment Standards Act Recommendations

The Report also contains a number of recommendations regarding the ESA, including:

- Narrowing the overtime exemption for managers and supervisors by including a minimum salary/duties test;
- Removing any wage distinction between part-time, casual, temporary and seasonal employees as compared to their full-time employee equivalents (unless the difference in pay is objectively supported);
- Increasing vacation entitlement to 3 weeks per year after 5 consecutive years of service with the same employer; and
- Integrating the term "dependent contractor" into the definition of "employee" under the ESA.

In response to this Report, the Ontario government has just indicated its intention to introduce *The Fair Workplace, Better Jobs Act, 2017*. This proposed legislation would include major amendments to the ESA, many of which reflect the Report recommendations noted above, as well as a staggered increase in the minimum wage.

Many of the proposed amendments, if implemented, could have a significant impact on employers in Ontario, whether it be in the form of increased enforcement, fines and personal exposure, or the need for revised workplace policies and procedures as well as employment contracts. The Ontario government will be engaging in consultations on the proposed legislation in the coming months, so continue to watch this space.

We are here to help you with your employment law matters. Please contact us if you would like to discuss your current obligations under the ESA or would like to obtain assistance or advice with respect to your employment contracts.

Frequently Asked Questions

> What should an investment fund do when it discovers a Portfolio Net Asset Value (NAV) Error?

The Investment Fund Manager (IFM) must first determine if the NAV error meets their materiality threshold. If an IFM does not have a materiality threshold in place, the Companion Policy to NI 31-103 suggests that the use of IFIC Bulletin Number 22: Guidelines for Correction of Portfolio NAV Errors (IFIC Bulletin) or a more stringent policy might be appropriate. The IFIC Bulletin defines a NAV "error" as "a NAV differential that arises from a breach of the standard of care that exceeds the materiality threshold." Under the IFIC Bulletin, the materiality threshold is 50 basis points and the *de minimis* amount for the purposes of repayments to investors is $25 (down from $50).

It is important to note that IFMs adopting the IFIC Bulletin thresholds must monitor IFIC updates and refresh their own compliance manuals accordingly. The IFIC Bulletin was last updated in July 2015. Further, in the July 2014 Investment Funds Practitioner, the OSC noted that the IFIC Bulletin is for guidance only and that IFMs are expected to use their own judgement to determine whether the threshold is appropriate in the particular situation. Reliance on the IFIC Bulletin for a materiality threshold does not obviate IFMs of their statutory duties under s.116 of the *Securities Act*.

If the materiality threshold has been met, s.12.14 of NI 31-103 requires that a Form 31-103F4 Net Asset Value Adjustments be filed quarterly and annually for any NAV adjustments. It is important to note, however, that an IFM should consult with legal counsel immediately if and when a NAV error is detected. Given the $156 million no-contest settlement reached with the OSC in 2016 stemming from a failure to detect and correct NAV errors, a failure to handle the situation promptly may have expensive and reputationally damaging consequences.

News & Events

Team Announcement

We are pleased to announce that **Jason Streicher** has joined our Regulatory Compliance Group as Senior Legal Counsel. Jason's practice is focused on securities compliance and registration matters for portfolio managers, investment fund managers, exempt market dealers and other financial services providers. Jason is also experienced in the conduct of Canadian and cross-border private placements.

Prior to joining AUM Law, Jason spent 17 years with Stikeman Elliott LLP, with the past nine years focusing on advising clients about all aspects of the securities regulatory regime involving NI 31-103 and NI 33-109, among other areas. In his first years at Stikeman, Jason assisted on multiple public securities offerings and M&A transactions, and assisted reporting issuers with their ongoing compliance requirements.

Welcome, Jason!

AUM Law Spring Symposium

Thank you to all those who attended our inaugural **AUM Law Spring Symposium** on May 9, 2017 and contributed to making the event such a success.

If you wish to obtain any materials from the Conference presentations, please contact Jennifer Cantwell for more information.