

FINTRAC RELEASES POLICY INTERPRETATIONS CONTAINING GUIDANCE FOR INTERNATIONAL DEALERS

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In December 2014, as a result of a recent request^[1] made under the *Access to Information Act* ^[2], the Financial Transactions and Reports Analysis Centre of Canada ("**FINTRAC**") released its policy interpretations regarding the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*^[3] (the "**Act**") and its accompanying regulations^[4] (the "**Regulations**").

Since 2008, FINTRAC has been providing policy interpretations in the form of responses to questions from persons and entities with obligations under the Act and the Regulations. Last month, FINTRAC released several hundred of these responses on its website. While they do not constitute legal advice, a number of these responses provide helpful guidance on FINTRAC's interpretation of the obligations of persons dealing in securities in Canada in reliance on the international dealer exemption (described below) ("**IDE Persons**").

Obligations of IDE Persons under the Act

Foreign securities dealers operating in Canada are exempt from the requirement to register as a dealer in Canada if they meet the "international dealer" exemption criteria^[5] in section 8.18 of National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registration Obligations* (the "**National Instrument**").^[6] In the past, there has been some confusion regarding how this exemption interacts with the obligations for securities dealers under the Act, and whether this exemption effectively relieves IDE Persons from compliance requirements under the Act. McMillan has consistently advised its international dealer clients about their obligations under the Act, which have now been confirmed by FINTRAC in published policy interpretations.

FINTRAC notes in its published responses to policy interpretation questions that the Act applies to "securities dealers", which are defined under the Act and the Regulations as "persons and entities authorized under provincial legislation to engage in the business of dealing in securities or any other financial instruments or to provide portfolio management or investment advising services."⁷ With regard to this definition, a passage from one of FINTRAC's responses from 2012 clearly summarizes its position on exemptions from registration:

The definition of a securities dealer does not refer to registration but rather to being "authorized" to provide [dealing or advising services]. Therefore, the fact that one is exempted assumes that a provincial

authority "authorizes" the entity to operate without being registered. Therefore, exempted entities, such as ... entities that are exempted from registration, are covered under our Act.^[8]

FINTRAC has expressed this same position in a number of other published responses.^[9] These responses confirm FINTRAC's position that there is a definitive obligation on IDE Persons to comply with the Act. This means that IDE Persons must observe the entire suite of responsibilities under the Act, including those with respect to reporting,^[10] record keeping, ascertaining identity, politically exposed foreign persons and third party determination. In addition, as part of their compliance regimes, IDE Persons must develop and apply written compliance policies and procedures.^[11]

The policy interpretation responses from FINTRAC serve as an important reminder that foreign dealers should turn their mind to their obligations under the Act when initially seeking to become IDE Persons, including creating written policies and procedures for compliance.

Compliance Policies and Procedures for IDE Persons

In its responses to policy interpretation questions, FINTRAC also provides guidance on how IDE Persons should prepare their written compliance policies and procedures. FINTRAC clarifies that foreign securities dealers need only comply with obligations under the Act with respect to their Canadian activities:

[If] the foreign securities dealer is authorized by the province to be engaged in the activities described under subsection 1(2) of the [Regulations], under an International Dealer Exemption[,], [c]onsequently, the foreign securities dealer is subject to the [Act] for its Canadian activities, and has to develop and apply policies and procedures consistent with record keeping, client identification and compliance regime requirements *for its Canadian activities only*.^[12] [emphasis added]

In addition, FINTRAC makes it clear that if a non-Canadian client of an IDE Person is listed under Canadian laws relating to terrorist financing or United Nation sanctions, FINTRAC would expect to receive a report in respect of that non-Canadian client.^[13] This is consistent with the views of the Canadian Securities Administrators about the reporting responsibilities of IDE Persons as set out in CSA Staff Notice 31-317 (Revised) *Reporting Obligations Related to Terrorist Financing*.^[14]

More specific information about compliance obligations for securities dealers can be found in FINTRAC's Guideline 6E: Record Keeping and Client Identification for Securities Dealers.^[15]

Conclusion

Foreign securities dealers operating in Canada in reliance on the international dealer exemption are considered by FINTRAC to be securities dealers for the purposes of the Act. As a result, they are required to

develop and apply written policies and procedures relating to their record keeping, client identification and transaction reporting requirements under the Act for their Canadian activities.

McMillan is able to assist foreign securities dealers to better understand their obligations under the Act and to prepare written compliance policies and procedures as part of the process of becoming eligible to deal with Canadian clients in reliance on the international dealer exemption.

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1 On September 22, 2014, Outlier Solutions Inc., a consulting company offering anti-money laundering and counter terrorist financing services, made a request to FINTRAC to disclose FINTRAC's policy positions related to the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (PCMLTFA) from 2008 to the present.

2 RSC 1985, c A-1.

3 SC 2000, c 17 [PCMLTFA].

4 *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations*, SOR/2002-184 [PCMLTFR].

5 The "international dealer" exemption is available to non-resident persons or companies that are registered to carry on the business of dealing in securities or engage in the business of a dealer in their home jurisdiction. The exemption applies only to trades with "permitted clients" (defined in the National Instrument) and generally only to trades that involve "foreign securities" (defined in the National Instrument).

6 Available online at:

http://www.osc.gov.on.ca/documents/en/Securities-Category3/ni_20150111_31-103_unofficial-consolidated.pdf.

7 PCMLTFA, s. 5(g); PCMLTFR, s. 1(2).

8 FINTRAC Policy Interpretations, "Other", response 48, available online at:

<<http://www.fintrac-canafe.gc.ca/publications/fins/2-eng.asp?s=2>>.

9 See the following responses: FINTRAC Policy Interpretations, "Other", responses 2, 35 and 51, available online at: <<http://www.fintrac-canafe.gc.ca/publications/fins/2-eng.asp?s=2>>; FINTRAC Policy Interpretations, "Compliance Regime", response 44, available online at

<<http://www.fintrac-canafe.gc.ca/publications/FINS/2-eng.asp?s=4>>, FINTRAC Policy Interpretations,

"Reporting", response 91, available online at <<http://www.fintrac-canafe.gc.ca/publications/FINS/2-eng.asp?s=1>>.

10 Securities dealers must make reports on suspicious transactions, terrorist property, and large cash transactions.

11 *PCMLTFA*, s. 9.6(1); *PCMLTFR*, s. 71(1).

12 FINTRAC Policy Interpretations, "Other", response 2, available online at:

<<http://www.fintrac-canafe.gc.ca/publications/fins/2-eng.asp?s=2>>.

13 FINTRAC Policy Interpretations, "Other", responses 2 and 35, available online at:

<<http://www.fintrac-canafe.gc.ca/publications/fins/2-eng.asp?s=2>>.

14 Available online at:

<http://www.osc.gov.on.ca/documents/en/Securities-Category3/csa_20100730_31-317_rpt-obligations.pdf>.

15 Available online at: <<http://www.fintrac-canafe.gc.ca/publications/guide/Guide6/6E-eng.asp>>.

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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