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VIA ELECTRONIC MAIL

Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: S7-37-10--Comments to Proposed Rule 202(a)(30)-1 of the Investment Advisers Act of 1940

Dear Ms. Murphy:

On behalf of our client, the Investment Industry Association of Canada (the "IIAC"),[1] we appreciate the opportunity to comment on Proposed Rule 202(a)(30)-1 of the Investment Advisers Act of 1940 (the "Advisers Act"). Section 203(b)(3) of the Advisers Act, which was amended as part of Section 403 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, exempts certain "foreign private advisers" from being required to register as investment advisers under the Advisers Act. Pursuant to Section 202(a)(30), a "foreign private adviser" is defined as any investment adviser that: (i) has no place of business in the United States; (ii) has, in total, fewer than 15 clients in the United States and investors in the United States in private funds advised by the investment adviser; (iii) has aggregate assets under management attributable to clients in the United States and investors in the United States in private funds advised by the investment adviser of less than $25 million; and (iv) does not hold itself out generally to the public in the United States as an investment adviser. In order to clarify the application of the foreign private adviser exemption, the SEC has Proposed Rule 202(a)(30)-1, which defines a number of the terms included in the statutory definition of "foreign private adviser."

[1] The IIAC is a professional association representing close to 200 Canadian securities dealers. The IIAC's mandate is to promote efficient, fair and competitive capital markets in Canada.

A. Summary of Our Comments

- Self-directed Canadian Retirement Accounts[2] offered by Canadian investment dealers under a non-managed/non-discretionary fee-based structure, should not be counted toward the 15 person or $25 million threshold outlined in the definition of "foreign private adviser."[3]

- Clients of Canadian investment dealers should not be considered to be "in the United States" for purposes of the foreign private adviser exemption if the relationship between the investment dealer and the client arose outside of the United States or arose while the client was within the United States in circumstances in which a Canadian Retirement Account could be subsequently transferred to a new Canadian investment dealer without triggering broker-dealer registration under the prior regulatory relief afforded by the SEC.

[2] Rules 237(a)(2) of the Securities Act of 1933 (the "Securities Act") and 7d-2(a)(2) of the Investment Company Act of 1940 (the "Investment Company Act") define a "Canadian Retirement Account" as a trust or other arrangement, including, but not limited to, a "Registered Retirement Savings Plan" or "Registered Retirement Income Fund" administered under Canadian law, that is managed by the Participant and: (i) operated to provide retirement benefits to a Participant; and (ii) established in Canada, administered under Canadian law, and qualified for tax-deferred treatment under Canadian law. Rules 237(a)(6) of the Securities Act and 7d-2(a)(6) of the Investment Company Act define a "Participant" as a "natural person who is a resident of the United States, or is temporarily present in the United States, and who contributes to, or is or will be entitled to receive the income and assets from, a Canadian Retirement Account."

[3] We are proposing the changes to address Canadian Retirement Accounts at this time solely to accommodate (i) fee-based accounts -- where the compensation to the Canadian investment dealer is based upon the average value of the client's assets over a specified period of time and where the Canadian investment dealer will regularly make recommendations to their clients based upon their individual circumstances, however the accounts are not discretionarily managed and clients still participate in the decision-making process of investments made; and (ii) continued investment by such accounts in Eligible Securities (as defined in Rule 7d-2(a)(3) under the Investment Company Act). Although we think that consideration should be given in the future to permitting such accounts to be managed on a discretionary basis given the quality of the Canadian securities regulatory system and the close cooperation of Canadian and U.S. regulators, we are not proposing that discretionary trading be permitted for these accounts at this time since current SEC relief from broker-dealer registration (as discussed below) and coordinating state relief for Canadian Retirement Accounts was premised on such accounts being self-directed, including investment in Eligible Securities.

- Investment advisers to mutual funds or other collective investment vehicles in which such Participants in Canadian Retirement Accounts invest should not be subject to investment adviser registration as a result of these investments regardless of the number of investors or assets attributable to these investments.

- The SEC should establish an exclusion within the definition of "in the United States" for temporary residents, utilizing a definition drawn from Internal Revenue Service Regulations that excludes persons present in the United States for fewer than 183 days.

- The foreign private adviser exemption should be available notwithstanding that affiliated entities engage in other permitted advisory activities involving U.S. persons.

B. Canadian Retirement Accounts and Relief Previously Afforded by the SEC

Individuals in Canada can invest a portion of their earnings in tax-deferred retirement savings accounts, which operate similarly to Individual Retirement Accounts in the United States. These Canadian Retirement Accounts are regulated by the Canadian government and have certain tax benefits. However, contributions to Canadian Retirement Accounts may only be made by individuals with earned income that is taxable in Canada. In Canada, such self-directed accounts held by regulated investment dealers may be either commission-based or fee-based and the client can decide which method of compensation will be more advantageous depending on their investment approach and frequency of transactions.

In Canada, investment dealers can offer non-managed/non-discretionary fee-based accounts to their clients without registering as portfolio managers (the Canadian status that permits approved representatives of Canadian investment dealers to provide discretionary management services to their customers). Such Canadian non-managed/non-discretionary fee-based accounts are offered by salespersons of investment dealers to clients who fully participate in the investment decisions that are made for the account. Fee-based investment accounts have become increasingly popular in recent years in Canada because they can, in appropriate cases, more closely align the interests of an investor, salesperson and securities firm as opposed to a traditional commission-based approach to compensation. Both commission-based accounts and fee-based accounts serve as valuable alternative service offerings depending on the needs of particular customers and Canadian securities regulation facilitates both approaches for Canadian customers, including Participants in Canadian Retirement Accounts. Fee-based accounts also allow for salespersons to be compensated for ongoing services and portfolio oversight offered to the client, regardless of transaction activity in a customer's account. In the United States, however, as a result of the U.S. Court of Appeals for the District of Columbia Circuit's decision in *Financial Planning Association v. SEC*, 375 U.S. App. D.C. 389 (2007), U.S. broker-dealers

that offer fee-based accounts may no longer be exempt from investment adviser registration under Rule 202(a)(11)-1 of the Advisers Act.

The SEC is familiar with the requirements of Canadian Retirement Accounts as it has already exempted Canadian investment dealers from broker-dealer registration in the United States when such investment dealers effect securities transactions for U.S. residents holding Canadian Retirement Accounts, subject to the conditions set forth in the SEC's order in SEC Release No. 34-42906 (June 7, 2000) (the "Exemptive Order"), which can be found at the following link: http://www.sec.gov/rules/other/34-42906.htm.[4]

Prior to 2000, individuals who had established Canadian Retirement Accounts and later moved to the United States were unable to make changes in their retirement accounts because the changes would involve the sale of unregistered securities and investment companies in violation of U.S. securities laws. However, the Exemptive Order afforded an exemption from broker-dealer registration for members of the IDA (now IIROC) and their salespersons dealing with U.S. residents who held Canadian Retirement Accounts.[5] The SEC's exemptive relief permits IIROC member Canadian investment dealers to offer their services with respect to Canadian Retirement Accounts to persons formerly resident in Canada who established Canadian Retirement Accounts and who now reside in the United States but continue to maintain their Canadian Retirement Accounts in Canada without requiring the investment dealer to register as a broker-dealer in the United States.

The SEC noted in the Exemptive Order, however, that the exemption was intended to be narrow in scope and was intended only to permit "Canadian broker-dealers that are not registered in the United States to conduct activities necessary to allow individuals, who have established Canadian Retirement Accounts and later moved to the United States, to effectively manage the assets in those accounts." The broker-dealer registration exemption was also subject to certain

[4] The self-regulatory organization ("SRO") functions of the Investment Dealers Association of Canada (the "IDA") referred to in the Exemptive Order were continued by the Investment Industry Regulatory Organization of Canada ("IIROC"), which commenced its operations in 2008. IIROC is the national SRO which oversees all investment dealers and trading activity on debt and equity marketplaces in Canada.

[5] On June 7, 2000, the SEC also adopted Rule 237 under the Securities Act of 1933 and Rule 7d-2 under the Investment Company Act of 1940, which exempt from their respective securities registration and investment company registration requirements, the offer and sale of eligible foreign securities and mutual funds to Canadian Retirement Accounts when the participants reside in the United States. The rules are designed to permit participants in Canadian Retirement Accounts who reside in the United States to purchase eligible foreign securities and mutual funds for their Canadian Retirement Accounts consistent with the requirements of the Canadian tax laws. *See* SEC Release No. 33-7860 (June 7, 2000).

other conditions: (1) the account must be managed by the client; (2) IIROC members and salespersons may not advertise such accounts in the United States (however, IIROC members may grant access to clients holding such accounts for trading and to obtain information about their accounts through a website); (3) IIROC members must disclose to clients holding such accounts, when a new account is opened and at least annually thereafter, that such accounts are not regulated under the securities laws of the United States and that the IIROC member is not subject to the broker-dealer regulations of the United States; (4) the IIROC member or salesperson must have a bona fide pre-existing relationship with the client before he or she entered the United States (IIROC members and salespersons must not solicit such accounts from U.S. residents); (5) the IIROC member and salesperson must comply with the anti-fraud provisions of the U.S. securities laws.

Notwithstanding this relief, as a result of the *Financial Planning Association* decision, Canadian investment dealers offering non-managed/non-discretionary fee-based accounts to persons in the United States in reliance on the SEC's relief from broker-dealer registration for transactions in Canadian Retirement Accounts may now be required to register with the SEC as investment advisers.

C. Our Proposals

In order to afford Participants with Canadian Retirement Accounts with the same choices Canadians generally have in managing their retirement savings, we recommend that Canadian investment dealers who effect transactions in Canadian Retirement Accounts for non-discretionarily managed fee-based accounts in accordance with the Exemptive Order be exempted from SEC investment adviser registration pursuant to the foreign private adviser exemption.

We know of no abuses that have been associated with the prior relief afforded by the SEC to Canadian Retirement Accounts. We therefore recommend that Canadian investment dealers offering fee-based Canadian Retirement Accounts that comply with the terms of the Exemptive Order should not be required to be registered as investment advisers in the United States based on such activities. The same rationale for providing the exemption from broker-dealer registration applies to creating an exemption for investment adviser registration as well. An exemption from investment adviser registration for Canadian investment dealers that provide fee-based Canadian Retirement Accounts would promote efficiency in Canada-U.S. investment activities and would remove the regulatory barriers that hinder the ability of participants to manage their Canadian Retirement Accounts. Furthermore, because Canadian law requires that Canadian Retirement Accounts comply with various tax regulations, account holders would be disadvantaged if they could not continue to deal with Canadian investment dealers familiar with both Canadian securities and the requirements of Canadian tax laws. Also, because Canadian law requires that these accounts be sited in Canada with a Canadian trustee and maintained by a

qualified Canadian financial institution, to transfer Canadian Retirement Accounts to a U.S. investment adviser would be highly impracticable, if not impossible, if the account holder wanted to avoid immediate taxation of such funds. Finally, the requested exemption would promote the public policies of both the United States and Canadian governments of encouraging individuals to save for retirement.

Proposed Rule 202(a)(30)-1(b) provides special guidelines for counting the number of "clients" for purposes of the foreign private adviser exemption. It includes specific examples of persons or entities that are required to be counted or permitted to be excluded from the 15 client threshold in the exemption. We suggest that Proposed Rule 202(a)(30)-1(b) be amended to include a specific statement that excludes from the definition of "client," Participants in respect of fee-based Canadian Retirement Accounts, as these terms are defined in the Exemptive Order and in Footnote 2 herein.

Similarly, we propose that the definition of "investor" in Proposed Rule 202(a)(30)-1(c)(1) exclude Participants in Qualified Companies as defined in Rule 7d-2(a)(7) under the Investment Company Act so that Participants in Canadian Retirement Accounts can continue to make investments in Canadian mutual funds and other collective investment vehicles used in Canada that would otherwise be considered to be private funds under the proposed rules. This change is essential to continue the policy demonstrated in the relief afforded to Canadian Retirement Accounts to facilitate such investment regardless of whether such accounts are fee-based or commission-based. In the absence of this change, the managers of such mutual funds and other entities would become subject to registration as investment advisers simply as the result of investments made by Participants in Canadian Retirement Accounts. If this change is not made, such a result would substantially negate the benefits of the relief previously afforded to Canadian Retirement Accounts.

In addition, Proposed Rule 202(a)(30)-1(c)(4) defines "assets under management" to mean the regulatory assets under management as determined under Item 5.F of Form ADV. We recommend that Proposed Rule 202(a)(30)-1(c)(4) be amended to include a statement that specifically excludes from the definition of "assets under management" those assets attributable to Participants in respect of fee-based Canadian Retirement Accounts.[6]

[6] We also believe that the assets attributable to Canadian residents who are temporarily present in the United States should not be counted as "assets under management" for purposes of Proposed Rule 202(a)(30)-1(c)(4). However, as discussed below, because Canadian residents who are temporarily present in the United States should not be considered to be "in the United States" for purposes of Proposed Rule 202(a)(30)-1(c)(2)(i), assets attributable to such persons should already be disregarded under the investment adviser registration threshold. Nevertheless, if Canadian residents who are temporarily present in the United States are considered to be "in the

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Similarly, for the purpose of avoiding the need for advisers to Canadian mutual funds and similar entities to register as a result of investments made by Participants in Canadian Retirement Accounts, we propose that the definition of "assets under management" exclude investments in Qualified Companies as defined in Rule 7d-2(a)(7) under the Investment Company Act.

We would also like to express our support for the SEC's interpretation of what it means to be "in the United States." Proposed Rule 202(a)(30)-1(c)(2)(i) defines "in the United States" generally by incorporating the definition of a "U.S. person" and "United States" under Regulation S. However, in the note to paragraph (c)(2)(i), the SEC states that "a person that is in the United States may be treated as not being in the United States if such person was not in the United States at the time of becoming a client or, in the case of an investor in a private fund, at the time the investor acquires the securities issued by the fund." The note allows a Canadian investment dealer to determine whether a client or investor is "in the United States" by reference to the time the person became a client or an investor, thereby enabling advisers to make such determination only once. The investment dealers would not be required to monitor changes in the status of each client or investor. In addition, as the SEC pointed out, if a client or an investor moved to the United States, the adviser would not be forced to choose among registering with the SEC, terminating the relationship with the client, or forcing the investor out of the private fund.

The foregoing interpretation regarding "in the United States" would be helpful with regard to fee-based Canadian Retirement Accounts, but our proposed amendments to specifically address these accounts are also needed to address the acquisition of private funds for such accounts and the ability of Participants to switch the firms with whom they deal after they have become U.S. residents as permitted by the Exemptive Order.

We also recommend that the SEC provide a bright line test for determining when someone becomes a resident of the United States for this purpose under the Rule 902(k)(1)(ii) of Regulation S definition of "U.S. person." For purposes of determining the "temporary" nature of a person's presence in the United States, the United States Internal Revenue Code's 183-day "substantial presence" test could be adapted for this purpose. A bright line test would be a useful compliance tool in this context and provides a reasonable basis for determining a person's actual residence in the United States. We suggest that the SEC incorporate this concept for purposes of determining whether a client or investor is in the United States. In the Canadian context, this would provide clarity as to the client relationships that may properly be maintained by Canadian

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United States" for purposes of the final version of Rule 202(a)(30)-1(c)(2)(i), then we recommend that such persons' assets should be specifically excluded from the definition of "assets under management" under Proposed Rule 202(a)(30)-1(c)(4).

investment dealers with Canadian residents who spend substantial periods of time either for work or who vacation in the United States.

We also suggest that the SEC clarify in Proposed Rule 202(a)(30)-1 that the fact that a foreign investment adviser is affiliated with a U.S. registered investment adviser, does not affect the foreign investment adviser's ability to rely on either the exemption from investment adviser registration for foreign private advisers, in its proposed form and as we suggest that it be amended, or the private fund adviser exemption outlined in Proposed Rule 203(m)-1 of the Advisers Act. Further, we would like confirmation that such exemptions will not prevent or limit foreign investment advisers from engaging in advisory activities outside of the United States. These clarifications will be helpful for Canadian financial services firms and their clients where the Canadian firms may have U.S. subsidiaries that engage in investment advisory activities that are separate from the services offered by IIROC members to Participants and other clients more closely associated with Canada.

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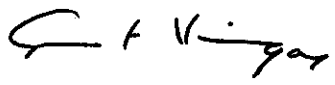
The amendments that we have suggested and proposals that we have supported are of great importance in the context of an increasingly mobile North American population and the need to promote retirement savings in both Canada and the United States. Our proposals are limited refinements to the SEC's proposals that are intended to protect the relief previously afforded to Canadian Retirement Accounts and do not, in our view, raise broader policy issues. These changes would help ensure that the SEC's prior policy determination with regard to the treatment of such accounts is continued and reasonably updated in accordance with Canadian practices.

Thank you for providing us with the opportunity to provide comments on Proposed Rule 202(a)(30)-1. We would be pleased to discuss any comments expressed herein, or provide the SEC with any additional assistance as it proceeds with the rule proposals. Please do not hesitate to contact me at (212) 715-1130 if you have any questions.

Very truly yours,



D. Grant Vingoe

cc: Ian C.W. Russell, Investment Industry Association of Canada