On February 25, 2011, the Canadian Securities Administrators published CSA Staff Notice 31-323 Guidance Relating to the Registration Obligations of Mortgage Investment Entities [available here], which provides long awaited guidance on how the registration requirements under National Instrument 31-103 Registration Requirements and Exemptions apply to mortgage investment corporations (MICs), mortgage syndications and other mortgage investment entities. Although the Staff Notice provides some additional clarity on the application of these rules, a number of questions remain unanswered. In addition, the Staff Notice highlights that the members of the CSA have not come to a uniform position about these vehicles, with different positions being taken by the securities regulators in Alberta and British Columbia.

The application of securities law registration requirements to mortgage investment entities has been surrounded by a great deal of uncertainty since NI 31-103 was introduced in September 2009. Prior to that time, most mortgage investment entities had been subject to minimal regulation under securities laws. However, that changed significantly when securities regulators raised the prospect that certain mortgage investment entities may be required to obtain registration under NI 31-103 in up to three different categories of registration – investment fund manager, adviser and exempt market dealer. Mortgage investment entities, and firms that provide services to such entities, that have been operating under existing investment fund manager and adviser registration exemptions granted by each CSA member in relation to MICs and other mortgage investment entities (for example, in Ontario, see OSC Decision [available here] and in BC, see BC Instrument 32-521 [available here]) (the 2010 exemptions) will be required to apply for registration in one or both of these categories as early as March 31, 2011 and incur the additional costs associated with these registrations, unless they determine based on the guidance provided in the Staff Notice or otherwise that such registrations are not required.
What is a “mortgage investment entity”?

Securities regulators use the term “mortgage investment entity” to refer to a person or company whose purpose is to directly or indirectly invest substantially all of its assets in debts owing to it that are secured by mortgages or in any other manner on real property, and whose other assets are limited to deposits with a bank or other financial institution, cash, certain specified debt securities and certain other specified permitted investments. Mortgage investment corporations (MICs) as defined by the Income Tax Act (Canada) will commonly fall within the definition of mortgage investment entity. In addition, mortgage syndications may also come within the definition.

INVESTMENT FUND MANAGER REGISTRATION

The application of the investment fund manager registration requirement to a mortgage investment entity, or a service provider to that entity, depends on whether the entity falls within the definition of “investment fund” under applicable securities laws. A mortgage investment entity that is an investment fund must ensure that the person or company that directs its business, operations or affairs is registered as an investment fund manager. Where investment fund manager registration is required, firms now relying on the 2010 exemptions will be required to apply for registration in the jurisdiction where their head office is located by no later than March 31, 2011 or in the case of BC, by June 30, 2011, and newly established firms will be required to obtain such registration before acting as an investment fund manager.

The Staff Notice identifies circumstances in which a mortgage investment entity will not require registration:

- Mortgage syndications that involve a mortgage investment entity holding an interest in a single mortgage will not typically be subject to the investment fund manager registration requirement where that mortgage investment entity or a related entity had a role in the creation or syndication of that mortgage. Although this may provide some element of guidance in relation to this specific scenario, the Staff Notice does not provide any further general guidance on the application of the registration rules to mortgage syndications.

- In jurisdictions other than Alberta, a mortgage investment entity will not be considered to be an investment fund if its primary activity is mortgage lending through a business that creates and manages mortgages. Factors identified as relevant to this determination include:
  - the mortgage investment entity originates the mortgages in the name of the mortgage investment entity directly or through an agent retained by the mortgage investment entity and acting on its behalf
  - the mortgage investment entity funds the mortgages
  - the mortgage investment entity enters into the mortgage agreements as the mortgagee, and
  - the mortgage investment entity administers the mortgages, either directly or through an agent acting on its behalf.

In addition, the Staff Notice identifies circumstances in which a mortgage investment entity will require registration:

- In jurisdictions other than Alberta, a mortgage investment entity, such as MIC, that is involved in the management of a portfolio of mortgages will be considered to be an
investment fund if its primary activity is managing an investment portfolio that includes mortgages. Factors identified as relevant to this determination include:

- the mortgage investment entity does not take an active role in originating the mortgages that become part of the investment portfolio, and

- the mortgage investment entity buys or sells mortgages in accordance with a stated portfolio investment strategy.

For a mortgage investment entity whose principal jurisdiction is Alberta, the determination on whether investment fund manager registration is required will continue to be addressed by the provisions of existing legislation in that province. Accordingly, Alberta-based participants involved in the management of a mortgage investment entity will need to look to the definition of investment fund and investment fund manager under the *Securities Act* (Alberta) and related guidance in Companion Policy 31-103CP *Registration Requirements and Exemptions* and Companion Policy 81-106CP *Investment Fund Continuous Disclosure*. We believe that the application of this legislation and guidance, rather than the guidance provided in the Staff Notice, to a mortgage investment entity located in Alberta may result in differing treatment from a similarly structured mortgage investment entity located in another jurisdiction.

Of note, the Staff Notice focuses only on the registration implications of the status of a mortgage investment entity as an investment fund and does not address other issues, such as the continuous disclosure obligations that apply to investment funds under National Instrument 81-106 *Investment Fund Continuous Disclosure*.

**ADVISER REGISTRATION**

Under NI 31-103, the adviser registration requirement will apply to a person or company that advises a mortgage investment entity about investing in or buying or selling mortgages or other securities if it is considered to be in the business of advising in securities. The Staff Notice does not provide additional guidance on the circumstances in which adviser registration will be required and instead simply makes reference to the existing guidance in the Companion Policy 31-103CP. Accordingly, this will continue to leave open the CSA's position on whether adviser registration is required where investment decision making for a mortgage investment entity is carried out by directors, officers or employees of a mortgage investment entity as part of the entity's business.

The CSA explain that they will consider applications from advisers to mortgage investment entities for discretionary exemptions from the prescribed portfolio manager proficiencies. If exempted, an adviser will typically be registered as a restricted portfolio manager, with terms and conditions limiting its registration to advising in respect of securities for a mortgage investment entity. The CSA may consider the proficiency requirements prescribed under mortgage broker legislation in certain jurisdictions as acceptable alternatives to the proficiency requirements in securities legislation. This clarification will be welcomed by many who had significant concerns about the prospect of requiring their employees to meet existing prescribed portfolio manager proficiencies.

Where adviser registration is required, firms providing advice to mortgage investment entities in reliance on the 2010 exemptions will be required to apply for registration by no later than March 31, 2011 or in the case of BC, by June 30, 2011; newly established firms will be required to obtain such registration before acting as an adviser.

**DEALER REGISTRATION**

In all CSA jurisdictions except BC, a mortgage investment entity or any other person or company trading its securities will be subject to the dealer registration requirement if it is in the business of trading in securities. In BC, a mortgage investment entity will not be subject to dealer registration until BC Instrument 32-517 [available here](https://www.canada.ca/en/financial-services-commission-british-columbia/legislation-regulations/instruments/32-517.html) expires on June 30, 2011. The Staff Notice indicates that the British Columbia Securities Commission intends to issue further guidance about the dealer registration requirement for mortgage investment entities in BC prior to June 30, 2011.
If you would like more information about the CSA's expectations on mortgage investment entities, please contact your usual lawyer in BLG's Investment Management Group, the authors of this Bulletin or any of the Investment Management Group leaders listed below.

AUTHORS

Jason J. Brooks  Jeremy S.T. Farr  Marsha P. Gerhart
Vancouver  Ottawa  Toronto
604.640.4102  613.787.3511  416.367.6042
jbrooks@blg.com  jfarr@blg.com  mgerhart@blg.com

BLG'S INVESTMENT MANAGEMENT GROUP LEADERS

National Leader

John E. Hall  Toronto  416.367.6643  jhall@blg.com

Regional Leaders

Brad J. Pierce  Calgary  403.232.9421  bpierce@blg.com
Anick Morin  Montréal  514.954.2532  amorin@blg.com
Jeremy S.T. Farr  Ottawa  613.787.3511  jfarr@blg.com
Lynn M. McGrade  Toronto  416.367.6115  lmcmgrade@blg.com
Jason J. Brooks  Vancouver  604.640.4102  jbrooks@blg.com

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