

**In the Matter of Staff's Recommendation  
to Impose Terms and Conditions on the Registration of  
R. Alan Filer**

**Opportunity to be heard by the Director  
under Section 31 of the *Securities Act* (Ontario)**

**Decision**

1. For the reasons outlined below, my decision is that the registration of R. Alan Filer (**Filer**) be subject to close supervision terms and conditions as set out in paragraph two and that the required close supervision report be filed in the form set out in CSA Staff Notice 31-349 *Change to Standard Form Reports for Close Supervision and Strict Supervision Terms and Conditions*.

**Background**

2. By letter dated February 10, 2017, staff (**Staff**) of the Ontario Securities Commission (**Commission**) advised Filer that it had recommended to the Director that the registration of Filer as a mutual fund dealing representative with FundEX Investments Inc. be subject to the following terms and conditions until such time as his financial obligations under the consumer proposal described below are satisfied:
  - a. The registrant is subject to close supervision
  - b. Monthly close supervision reports are to be completed on the registrant's sales activities and dealings with clients. The supervision reports are to be retained by the sponsoring firm and must be made available for review upon request.
3. Pursuant to section 31 of the *Securities Act* (Ontario) (**Act**), Filer is entitled to an opportunity to be heard (**OTBH**) before I, as Director, decide whether to accept Staff's recommendation. Staff and Filer agreed that the OTBH would proceed by written submissions from Filer and Staff.

**Brief outline of relevant dates and facts**

4. The facts of this case are simple and are undisputed. Filer invested in tax shelters over a 15 year period for some time prior to 2014 and the Canada Revenue Agency (**CRA**) denied the deductions associated with these tax shelters. When Filer disputed CRA's position, he incurred penalties and interest on the taxes owing. Rather than pursue litigation against the CRA, Filer entered into a consumer proposal and agreed to pay a high six figure amount to the CRA over a defined five year payment schedule.
5. The consumer proposal was made by Filer on July 14, 2016. The proposal was accepted by the CRA, and approved by the Ontario Superior Court of Justice on December 13, 2016.
6. On December 20, 2016, Filer submitted a financial disclosure change notice (**Disclosure**) under National Instrument 33-109 *Registration Information* (**NI 33-109**). On December 22, 2016, Staff sent an email requesting further information regarding the Disclosure. Filer responded on January 6, 2017.
7. On February 10, 2017, Staff advised Filer that it had recommended to the Director that the registration of Filer be subject to close supervision terms and conditions.
8. Filer's written submissions were dated February 23, 2017. Staff's written submissions were dated October 23, 2017.

**Submission**

***Solvency criterion***

9. The mandate of the Commission includes protecting investors from unfair, improper or fraudulent practices. It is well established that registration is a privilege and not a right. Paragraph 28(a) of the Act provides that

the Director may impose terms and conditions on the registration of an individual if it appears to the Director that the individual is not suitable for registration or has failed to comply with Ontario securities law, or the registration is otherwise objectionable. The factors to be considered by the Director in determining suitability for registration are found in section 27(2) of the Act and include proficiency, solvency and integrity, and such other factors as the Director considers relevant. Staff submits that Filer's solvency and proficiency are at issue here.

10. The solvency criterion has been addressed numerous times in case law. It was described in *Re Sabeh* (2009), 32 OSCB 6101 as "an indicator of a firm's capacity to fulfil its obligations and can be an indicator of the risk that an individual will engage in self-interested activities at the expense of clients". In response to an identified solvency concern and in order to mitigate this risk, it is Staff's practice to impose terms and conditions for monthly close supervision reporting on an individual's registration.
11. Filer submits that:
  - a. he sincerely believes that he was entitled to the tax deductions claimed and that he was forced to enter into the consumer proposal due to the high cost and long duration of tax litigation,
  - b. the amount of the consumer proposal is considerably less than the amount owed in taxes, penalties and interest, and he has the financial means to meet the payment schedule,
  - c. he runs his business with integrity and has never been the subject of a client complaint or criminal charge, and
  - d. other employees of the branch provide necessary checks and balances with respect to his activities.
12. In response to these submissions, Staff notes that the solvency concern need not rise to the level of personal bankruptcy to warrant close supervision terms and conditions. As the Director noted in *Re Sabeh*:  
It is [Commission] staff practice to impose terms and conditions for monthly close supervision reporting on an individual's registration when, among other things, a person files for bankruptcy, receives a notice of garnishment, receives a requirement to pay overdue taxes, or files for a consumer proposal. The terms and conditions are removed when the financial obligations resulting from the event have been satisfied. This practice is consistent with the investor protection mandate of the OSC.
13. Staff also submits that the large debt owed by Filer and the lengthy repayment schedule are cause for concern and notes that close supervision has been imposed for far less onerous solvency issues.

#### ***Proficiency criterion***

14. Section 4.1 of NI 33-109 requires a registered individual to notify the Commission within 10 days of a change of information previously submitted in respect of the individual's Form 33-105F4 *Registration of Individuals and Review of Permitted Individuals*, including a direction to pay issued by a federal or provincial authority. Guidance on this ongoing disclosure obligation was recently published in CSA Staff Notice 33-320 *The Requirement for True and Complete Applications for Registration*. The notice states that:  
if Staff discovers after an individual has become registered that their application was false or misleading, or that they have failed to meet their ongoing disclosure obligation, the matter will be investigated and could result in regulatory action being taken against the registrant
15. Staff also submitted that Filer failed to meet the proficiency criterion for the reasons outlined elsewhere in this decision.

#### **Reasons for decision**

16. My decision is that the registration of Filer should be subject to the following terms and conditions until such time as his financial obligation under the consumer proposal to the CRA is satisfied:

- a. The registrant is subject to close supervision
  - b. Monthly close supervision reports are to be completed on the registrant's sales activities and dealings with clients. The supervision reports are to be retained by the sponsoring firm and must be made available for review upon request.
17. I do not see any reason to vary from the Commission's long standing practice to impose close supervision terms and conditions in circumstances where Staff has solvency concerns with a registrant. This long standing practice, which in my view is also appropriate in this case, is consistent with the Commission's investor protection mandate. Filer clearly did not meet the solvency criterion once he entered into a consumer proposal with the CRA. The Commission's views have been set out in numerous decisions such as *Re Sabeh*, *Re Brown* (2008), 31 OSCB 5567, *Re Camden* (2009), 32 OSCB 4684, *Re Olea* (2009), 32 OSCB 4684, *Re Coalsworth* (2003), 26 OSCB 2348, *Re Collins* (2008), 31 OSCB 4855 and *Re Fitzgerald* (2008), 31 10865.
18. In my view, Filer's failure to meet the solvency criterion has a negative impact on his suitability for registration and is sufficient for me to impose terms and conditions. I was not convinced that, as Filer submitted, other employees of the branch he worked in could provide the necessary checks and balances with respect to Filer's activities to rectify Filer's failure to meet the solvency criterion.
19. Although Staff submitted that Filer also failed to meet the proficiency criterion, Staff's arguments were less clear regarding the specific details of Filer's failure to meet the proficiency criterion. It is clear that Filer was disputing the CRA for a significant number of years regarding tax shelter deductions. Staff also submitted that Filer had received CRA's direction to pay some years prior to the consumer proposal, which Staff submits should have been disclosed on a timely basis. It is also clear that Filer filed a consumer proposal on July 14, 2016, yet did not provide disclosure to the Commission until December 13, 2016 (after the consumer proposal had been approved by the Court). In my view, Filer failed to meet the proficiency criterion by failure to file timely disclosure of both CRA's direction to pay and the filing of the consumer proposal.

"Marriane Bridge", FCPA, FCA  
Deputy Director, Compliance and Registrant Regulation Branch  
Ontario Securities Commission  
Dated: November 13, 2017