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September 18, 2000

British Columbia Securities Commission
Alberta Securities Commission
Saskatchewan Securities Commission
The Manitoba Securities Commission
Ontario Securities Commission
Commission de valeurs mobilières du Québec
Office of the Administrator, New Brunswick
Registrar of Securities, Prince Edward Island
Nova Scotia Securities Commission
Securities Commission of Newfoundland
Registrar of Securities, Northwest Territories
Registrar of Securities, Yukon
Registrar of Securities, Nunavut

c/o John Stevenson, Secretary
Ontario Securities Commission
20 Queen Street West
Suite 800, Box 55
Toronto, Ontario M5H 3S8

Dear Sirs/Mesdames:

RE: CSA Notice 31-401 Request for Comments
Re: Registration Forms Relating to the National Registration Database

Thank you for publishing your proposed revised forms. We encourage the updating of the current forms, which have become significantly obsolete. The following are some comments on the forms, together with some comments on how the CSA propose to use them.

The request for comments noted that the NRD will be a web-based system to permit registrants to file application information in electronic format. We are a law firm that often prepares application forms on behalf of new dealers, new advisors and their individual applicants. Typically, the process of completing these forms is an interactive one, where drafts are prepared by the applicant, reviewed by us for completeness, and often revised before final submission by us on behalf of the applicants. It will be important that the new web-based system support this process.

If the system will simply allow users to download forms, such as PDF format, which can be completed on the computer, then filed by email, this would allow drafts of the forms to be shared back and forth between the applicant and our firm.

If, on the other hand, the web-based system means that the forms will be completed directly on the NRD database, then the process should have some facility for being able to store draft versions of a completed form before they are actually submitted to the CSA, in such a way that the applicant and its outside professional advisors can mutually review and revise the form prior to submission.

As a general comment, it is evident that the NRD forms are based upon U.S. forms. More work needs to be done to de-Americanize the forms to correspond more closely to Canadian requirements. The shotgun nature of some of the broad questions on past conduct do not reflect some of the more recent requirements of Canadian human rights and privacy legislation. Such questions are always intrusive. In the current privacy environment, regulators need to think carefully about what past conduct is actually likely to be relevant to their considerations and avoid asking questions that are so broad they conflict with human rights and privacy legislation.

Some comments on the details of the various forms are set out below.

<u>Dealer Firms</u>

1. Questions 4 and 5 ask for multiple branch office locations but only provide one set of answer boxes. Presumably, the electronic version will allow these sections to be repeated several times for each such location.

2. The head office and branch office *mailing* address boxes specify not to use a P.O. box. Since the business address will already show a street address, mailing addresses should actually show the address to which mail is to be sent. If this includes a P.O. box, then the P.O. box should be used for mailing addresses.

3. In Item 7, the difference between “Other Regulators” and “Other” is unclear.

4. In Item 8, “investment dealer” is listed twice, while “broker” is not listed.

5. In Item 13, the province of incorporation or formation is less relevant than the current province whose law governs. For example, a company may start out federally incorporated under the CBCA, but be continued into Ontario. Presumably, the CSA would want the firm identified as an Ontario corporation, which it currently is, rather than as a federal corporation, which it was originally.

6. The sections on criminal and offence disclosure have many flaws. All of these questions should be reviewed by legal counsel familiar with applicable Canadian criminal procedure, criminal records and human rights laws.

   For example, question 21(b) asks whether the applicant has ever been charged with an offence. This would be applicable even if the applicant had been found not guilty or the charge had been dropped by the prosecution. I understand that such broad questions caused difficulties for the RCMP criminal records section in the past. Being forced to disclose a past charge that did not lead to a conviction would seem to offend the *Charter* right to be considered innocent until proven guilty.

7. The *Ontario Human Rights Code* prohibits discrimination on the basis of, among other things, a record of offences, which it defines as an offence under any provincial enactment or an offence in respect of which a pardon has been granted under the *Criminal Records Act* (Canada). The *Code* also prohibits asking questions about such offences on employment questionnaires.

   There is an exception where the discrimination on the basis of record of offences is a reasonable and *bona fide* qualification because of the nature of the employment. This might be the case, for example, for a past conviction for a breach of the *Securities Act*. However, throwing the net too widely by asking for any conviction whatsoever, or indeed any charge that did not even lead to a conviction, is likely unsupportable under the *Ontario Human Rights Code* (or similar legislation in the other jurisdictions).

8. Item 22 refers to “misdemeanours”. This is not a Canadian legal term. In any event, I understand that in the U.S. context “misdemeanours” generally refer to minor offences, which would not include such serious offences listed in the question as fraud, perjury or extortion.

9. Similar issues arise with respect to Schedule C, the CDR. “Felony or misdemeanour” language is from the U.S., not applicable to Canada. Item II.4 of Schedule C is a problematic question, requiring someone to describe “the circumstances leading to the charge”. This may tend to breach the *Charter* right against self-incrimination. In addition, it should be limited to criminal or securities-related convictions, and not merely to charges.

10. The questions in item 23 are very vague and will be difficult to answer. What does “been found to have been involved in a violation” mean? What sort of finding is implied? Is it

different from a conviction? In answering "been a cause of investment-related business having its authorization to do business denied", what sort of causation does the CSA have in mind? These questions need to be made more explicit so that they can be answered with assurance.

11. Item 26 asks about any civil proceedings anywhere in the world at anytime where fraud was alleged. It is easy for a plaintiff to make an allegation and quite a different thing to be proven. For example, virtually every securities class action strike suit in the U.S. routinely alleges fraud and misrepresentation. If an allegation is made, but subsequently not found to be proved, it should be irrelevant to the CSA. Accordingly, this particular question should be limited to civil proceedings where fraud, theft, deceit, misrepresentation or similar conduct was found, or any such action that is currently in progress.

12. All of the forms currently provide for being sworn under oath. This may be discrimination on the basis of religious grounds, and consideration should be given for the applicant to make a solemn or statutory declaration instead.

13. The form requires dealers to indicate whether their owners are "domestic" [U.S. language again] or foreign entities. Given that there are no longer any restrictions on foreign ownership of Canadian dealers, the necessity for this disclosure is not clear. On the other hand, if the owner is an individual, there is no distinction drawn as to whether the individual is a Canadian citizen or foreign. The approach should be consistent whether the owner is an individual or a corporation.

14. In Schedule D, there are 3 repeated sections under each part of Section IV. If this is so that multiple owners can be described, the same process should be used for this electronic form as is intended to used for the multiple locations of branches and sub-branches which will be used in the first part of the form (see item 1).

15. It is unclear why the distinction has been drawn in Item 18 between controlling companies that are engaged in the securities or investment advisory business versus banks. Perhaps this distinction comes from U.S. laws limiting banks owning dealers. Such is obviously not the case in Canada and there seems no need to distinguish separately those types of owners. If the distinction is to be maintained, the questions asked in Schedule D, Section IV should be consistent between Parts 1 and 2.

Advisor

16. Where the same questions are asked in the advisor form as in the dealer form, the same comments apply.

17. The advisor form asks radically different detailed questions about the advisor's business. For example, why are advisors being asked how many employees or clients they have,

while dealers are not? I suspect that many of these questions relate to requirements under the United States *Investment Companies Act*, and they should be reviewed more rigourously to determine if they are even necessary for Canadian regulatory purposes.

18. There is a timing problem with virtually all of the business-related questions for advisors. These questions seem to proceed on the assumption that the advisor is already in business. Since it is not possible to advise legally without registration, most of these questions are premature. Our experience is that advisor applications are most often filed by new entities, that may intend to offer various services. For example, at the time of initial application, the correct answer in items 16 and 17 should always be "zero", at least until after registration. Similarly, Item 18 would only be a business plan, rather than a sworn fact.

    If the first CSA regulator would be prepared to register a new advisor without it having any clients yet, it seems illogical that a subsequent CSA regulator needs to know how many clients the advisor now has before it will consider another registration.

    If the questions are truly "to prepare for field examinations" applicable to advisors and not to dealers, we suggest that Items 15 through 23 be removed from the application form and used for some form of later questionnaire.

19. Much of the nomenclature is applicable in the United States and not Canada. For example, Items 18 and 21 refer to "investment companies" which is a U.S. legal term. In Item 18 what constitutes a "high net worth individual"?

20. Presumably answering "yes" to Item 30(a) would show a breach of Section 115(6) of the Regulations under the *Securities Act* (Ontario), which prohibits the purchase or sale of a security in which an investment counsel has an interest to or from any portfolio managed by the investment counsel.

21. The reason for asking about brokers discretion in Section 32 is unclear. This might also be added to the questionnaire referred to in item 18.

Individuals

22. In Item 10, "spouse" is no longer a term generally recognized under securities legislation, and requiring such information should be reviewed against the applicable human rights requirements, as it could represent discrimination based upon marital status.

23. In Item 11, consideration should be given to eliminating the requirement to check every single box yes or no. This is over 90 check boxes on a single page. Is it absolutely necessary, for example, to check Exempt? "No" for each course?

24. Is Item 14 necessary? This is not a disciplinary matter. In addition, the reason for granting the exemption may only be known to the regulator.

25. The criminal disclosure sections suffer from many of the same defects referred to in the dealer form. In particular, the instructions require offences to be reported even though an absolute or conditional discharge has been granted, and offences are only not disclosable if a pardon has been granted. However, this does not reflect recent changes in the law affecting criminal records and pardons.

Under Section 6.1 of the *Criminal Records Act* (Canada) introduced in 1992, absolute discharges are automatically purged after one year, while conditional discharges are purged automatically after three years. In these circumstances, no pardon is actually "granted". The applicant is thus placed in the position of being required to disclose a discharge after it has been purged simply because a "pardon" has not been granted.

A purge should be treated as an automatic pardon. As a result, the instructions should say that applicants are not required to disclose any offence for which a pardon has been granted and not revoked, or any offence for which the applicant was granted an absolute discharge more than one year ago or a conditional discharge more than three years ago.

26. Item 37 requires disclosure of any judgement ever entered in a civil court "for any reason whatsoever". This is an unusual question since it says "in respect of a fraud or for any reason whatsoever". The distinction between a fraud and a small claims court dispute is potentially wide. By contrast, Item 32(a) refers to civil claims made which are based upon fraud, theft, deceit, misrepresentation or similar conduct. We suggest that Item 37 should be similarly limited.

All of which is respectfully submitted.

Yours very truly,

Ross McKee

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