DOUCET McBRIDE
LAWYERS / AVOCAT(E)S

Harold Geller

hgeller@doucetmcbride.com

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by email

Dear Ms. Matear and Ms. Topp,

Re: CSA Submission on Accredited Investor

We submit our summary comments in response to the above-noted Staff Notice.

As background, we are litigating lawyers who represent consumers with respect to compliance and negligence issues in the retail distribution of financial products. Mr. Hollander is a former member of the OSC Investor Advisory Committee. Mr. Geller also works with advisors with respect to compliance investigations, and provides Continuing Education sponsored by dealers, manufacturers, insurers and MGAs.

The Public Consultation

Mr. Geller attended the Public Consultation session on February 13, 2012. This submission is supplemental to his comments at that session.

First, it was noted that every speaker who addressed the duties of dealers and advisors with respect to retail advice propounded the existence of a fiduciary standard of care. While such a standard may be appropriate, we simply accept the present standard as set out by the Albert Securities Commission in Re: Lamoureux, the OSC in Re: Daubney and recently reasserted by IIROC in Re: Gareau.

Secondly, other than Mr. Geller, every other speaker at February 13th consultation meeting was an industry participant. The industry domination of the consultation process raises substantive concerns about the impact of the exemptions on consumers. We only learned of this consultation through our access to industry channels. We watch for such notices in non-industry sources and did not see any such dissemination. To the extent that publication on a regulator's website is effective "public notice" (a dubious assumption), the dearth of response from the public suggests that the notice was not effective and there is no organized consumer lobby. The absence of consumer input undermines this consultation. As suggested by Mr. Turner at the Public Consultation, the need for empirical input by credible non-industry parties is self-evident in any reasonable public consultation.

To the degree that this consultation is part of a regulatory process impacting the public, empirical research requires pro-active solicitation from public advocates such as FAIR and PIAC. These consumer representatives require funding to prepare submissions. Such funding is available through OSC, IIROC and MFDA if these regulators choose to seek meaningful consumer input. It is not reasonable to expect that consumers or consumer advocacy groups will see, investigate and respond to public consultations without funding and without involving such consumer advocates, is not reasonable.

The accredited investor exemption

The existing accredited investor or minimum amount exemptions have no modern-day justification. In our experience they result in perverse outcomes. An arbitrary threshold is routinely used by advisors and dealers in substitution for their Know your client (KYC), Know your product (KYP) and suitability obligations. Again, the adoption of a strict Re: Daubney standard for advisors and dealers is preferable to the arbitrary exemptions threshold.

Further, the existing threshold is routinely used by advisors and dealers to deny KYC, KYP and suitability obligations and as evidence of "sophistication" and "disclosure" in court actions. Such positions can go so far as to contend the client is responsible and the advisor is simply an "order-taker". Such positions taken in legal proceedings are logical outcomes resulting from the arbitrary standard. Such defence positions should result in disciplinary action by regulators as prima facie evidence of breaches of the Re: Daubney standard.

With rare exceptions, the offering memorandum (OM) and prospectus disclosure of risk are insufficient as disclosure. Empirical studies indicate client financial literacy levels that are insufficient for the level of disclosure made to sophisticated industry participants (usually to advisors and dealers). While risk disclosure is an essential element, changing disclosure standards from that of an OM to that of a prospectus is unlikely to impact consumer understanding. Therefore, we make no submission in regarded to this proposed change. Our submission is that the OM and Prospectus disclosure standard to the consumer is inadequate. We propose the reassertion of the suitability obligations as defined in Re: Daubney.

Regulatory transparency

This public consultation is part of a continuing move toward regulatory transparency. We note that there is little public transparency for OSC and SRO development of policy in this field. To a large extent, independent advisors share common interest with the consumer in this debate.

The lack of transparency undermines the objectives of both consumer education and consumer protection. The only advisor who submitted comments at the February 13th consultation was Mr. Di Novo. Surely the advisory community (and distinct from the manufacturers and dealers) are important voices as are their communal voices such as Advocis.

The advisor and the consumer should be actively represented throughout the CSA, OSC, and SRO process. Such representation would allow for the consumer's views to be solicited and considered. In our view, such representation would be a step toward much needed regulatory transparency.

Harold Geller and John Hollander