CSA/ACVM Canadian Securities Administrators Autorités canadiennes en valeurs mobilières

CSA Staff Notice 33-320

The Requirement for True and Complete Applications for Registration

July 13, 2017

Purpose of Notice

The purpose of this Notice is to alert stakeholders to the serious problem of false or misleading applications for registration, to caution them about the potential consequences of submitting such applications, and to provide guidance regarding the completion of the application form.

The application process is governed by National Instrument 33-109 *Registration Information* (**NI 33-109**), and applications for individual registration are submitted through the National Registration Database using a Form 33-109F4 *Registration of Individuals and Review of Permitted Individuals* (**Form F4**). The application process, including the Form F4, is an integral part of the registration regime.

Individual applicants are encouraged to carefully read this Notice and consider whether they are complying with their obligation to provide true and complete information in their applications, and firms are encouraged to self-assess their existing policies and procedures relating to the due diligence they must exercise to ensure the truth and completeness of applications they sponsor.[1]

The securities legislation of the various jurisdictions in Canada imposes other document delivery obligations on registrants. These obligations are generally found in NI 33-109 and National Instrument 31-103 *Registration Requirements, Exemptions, and Ongoing Registrant Obligations*. While this Notice addresses the specific problem of false and misleading applications for registration, registrants should consider the guidance in this Notice as generally applicable to all registration-related documents they are required to deliver to their securities regulatory authority under applicable securities legislation.

The Issue of False or Misleading Applications is Serious

Applications for registration are made in a prescribed form that requires the applicant to disclose various items of information that are used to assess the applicant's suitability for registration. Unfortunately, false or misleading applications for registration have been a significant and recurring issue since the early years of securities regulation in Canada. Staff has historically

[1] In each jurisdiction in Canada, a designated official of the local securities regulatory authority is responsible for deciding whether to grant registration applications from individuals in all categories of registration except, in certain jurisdictions, those with investment dealers. For example, in Ontario this official is the "Director". Pursuant to an assignment of powers to the Investment Industry Regulatory Organization of Canada (**IIROC**), IIROC is responsible for granting or refusing applications from individuals seeking registration to work at investment dealers. Staff of IIROC share the views set out in this Notice. For additional IIROC guidance on the suitability requirement for registration, refer to IIROC Notice 09-0192 *IIROC Registration – The Fit and Proper Test for Approved Persons*.

taken a strong stance against false or misleading applications,[2] and will continue to do so in the future.

A registration application may be false or misleading because it includes information that is simply untrue, omits relevant information, provides vague information, or mischaracterizes information. In addition, applications may be false or misleading because of things said (or not said) on the application form itself, or in information and materials provided in connection with the application, such as correspondence from the applicant or statements made during interviews with staff of one of the members of the Canadian Securities Administrators (**Staff** or **we**).

An applicant's suitability for registration is determined with reference to three criteria: integrity, proficiency, and solvency. An obvious consequence of a false or misleading application for registration is that it raises a red flag for Staff that the applicant may be lacking in integrity. In this regard, the Ontario Securities Commission said in an earlier case:

> The keystone to the registration system is the application form. A desire and an ability to answer the questions in it with candour in many respects can be said to be the first test to which the applicant is put.[3]

In addition to having consequences for the application itself, false or misleading statements made during the application process may constitute a provincial[4] or criminal offence[5] attracting

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[2] See for example: *Re Base*, (1949) OSCB 10 (January) (false information regarding prior refusal of a licence); *Re Morton*, (1949) OSCB 7 (October) (false information regarding prior employment); *Re Lindover*, (1950) OSCB 7 (February) (failure to disclose criminal convictions).

[3] *Re Thomas*, (1972) OSCB 118 at p. 120.

[4] The Securities Acts of the various jurisdictions in Canada generally include a provision that makes it an offence to provide false or misleading information in a document required to be filed or furnished under the securities laws of that jurisdiction. For example, paragraph 136(1)(a) of the *Securities Act* (Manitoba) states: "Every person or company that . . . makes a statement in any material, evidence, or information submitted or given under this Act or the regulations to the commission, its representative, or the Director, or to any person appointed to make an investigation or audit under this Act, that, at the time, and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact or that omits to state any material fact, the omission of which makes the statement false or misleading . . . is guilty of an offence and is liable on summary conviction to a fine of not more than $5,000,000 or imprisonment for a term of not more than five years less a day, or both." In the 2010 case of *R. v. Fileccia*, the accused pled guilty under this section after she provided false and misleading information to staff of the Manitoba Securities Commission about her criminal record in support of her application.

Paragraph 122(2)(b) of the *Securities Act* (Ontario) states: "Every person or company that . . . makes a statement in any application . . . or other document required to be filed or furnished under Ontario securities law that, in a material respect and at the time and in the light of the circumstances under which it is made, is misleading or untrue or does not state a fact that is required to be stated or that is necessary to make the statement not misleading . . . is guilty of an offence and on conviction is liable to a fine of not more than $5 million or to imprisonment for a term of not more than five years less a day, or to both."

[5] In the 2014 case of *R v. Khalkhali*, the accused pled guilty to a charge of falsifying an employment record, which she had submitted to Staff in connection with an application for registration. The falsified record indicated that she had resigned from a previous employment position when in fact she had been terminated for cause.

significant sanctions, including the potential for imprisonment. In this regard, the importance of truth and candour in the application process is emphasized by the inclusion in Form F4 of Item 21 – *Warning*, which states: "It is an offence under securities legislation and derivatives legislation, including commodity futures legislation, to give false or misleading information on this form."

Carelessness or Misunderstandings are not Satisfactory Explanations for Non-Disclosure

Each year, Staff reviews numerous applications for registration that contain false or misleading statements. In our experience, while some applicants admit to intentionally making false or misleading statements on their application, more often they will cite carelessness or a misunderstanding of the form as the reason for their conduct.[6]

As has been stated in previous decisions in this area, explanations based on carelessness or misunderstanding are not convincing. For instance, in a 2007 case refusing an application for registration where the applicant had not disclosed a guilty plea for a fraud-related criminal offence, the Executive Director of the Alberta Securities Commission said:

> [I]ntegrity is broader than dishonesty and encompasses a certain duty of care in one's work product. One may not be dishonest and yet be reckless or lackadaisical over whether one complies with the rules or requirements of one's industry. . . . The Applicant's actions reveal a lack of attention to detail in complying with formal requirements. This, in my mind, reflects either a lack of integrity, based on a reckless or wilful disregard of matters critical to her responsibilities, or a lack of competence, either of which is fatal to her registration application.[7]

In a similar case arising in 2010, a Director of the Ontario Securities Commission adopted the reasoning in the Alberta case and said:

> Moreover, even if the Applicant somehow was honestly mistaken in the chain of inaccurate disclosure he provided to OSC staff (which I doubt) I agree with the statement in *Re Doe* that integrity is broader than dishonesty and encompasses a certain duty of care in one's work product. The Applicant had a duty to carefully complete documents relating to his registration, including his initial application for registration. In my view, he did not meet this duty.[8]

[6] See for example *Re Ryan* (1990), 1990 LNBCSC 262, where a respondent in an enforcement proceeding admitted to providing false answers on his application form, but claimed he was "too busy to pay attention to the completion of the forms", and had never learned to properly complete forms because throughout his career he had always had others do things for him and he relied on his lawyers. In ordering sanctions against the respondent, the hearing panel of the British Columbia Securities Commission dismissed the respondent's explanation as "ludicrous".

[7] *Re John Doe* (2007), 2007 ABASC 296, para. 13.

[8] *Re John Doe* (2010), 33 OSCB 1371 at p. 1377, para. 47.

Two years later, in another Ontario case where the applicant was refused registration for his failure to disclose a criminal conviction, the Director said:

> First, the application form is designed to provide the OSC with the information it needs to assess the applicant's suitability for registration. Sometimes the information sought by the application form may reflect negatively on an applicant's suitability. The effectiveness of the application process would be significantly diminished if applicants could avoid disclosing detrimental information on the basis of unreasonable assumptions, forgetfulness, or misunderstandings. Second, the OSC must be reasonably confident that the individuals to whom it grants the privilege of registration will discharge their professional obligations to their clients honestly and diligently. The application process is the seminal event in an applicant's career as a capital markets professional, and a lack of care and diligence in this process may be a worrisome signal about how they will approach the interest of their clients.[9]

The Disclosure Obligation is Ongoing

If the information included in an individual's Form F4 changes after the individual becomes registered, the registrant is required to update that information by delivering a Form 33-109F5 *Change of Registration Information* within the time periods provided for in NI 33-109. For instance, if a registrant is charged with a criminal offence, they must update their information within 10 days of the charge. This means that it is not acceptable for a registrant to wait to disclose a criminal charge until after they have been found not guilty at trial.

The failure by a registered individual to update their information on a timely basis may impugn their suitability for registration, and also constitutes a breach of securities legislation, and accordingly the guidance in this Notice extends to an individual's obligation to keep their registration information up-to-date.

The Consequences of Non-Disclosure

The mere fact that an applicant or registrant has detrimental information to disclose does not necessarily mean that their application will be refused or that their registration status will be negatively impacted. The nature and age of the detrimental event, and the circumstances surrounding it, will be considered when assessing the matter.

However, a failure to disclose detrimental information will always be concerning to Staff, and will likely result in the matter being investigated further, which could result in a recommendation by Staff that the application be refused. At a minimum, applicants should expect that the review of their application will take longer than it would have had it been properly completed.

Similarly, 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

[9] *Re Couto* (2012), 35 OSCB 4106 at p. 4106, para. 15.

matter will be investigated and could result in regulatory action being taken against the registrant, including a possible suspension of their registration.

The Responsibilities of the Sponsoring Firm and its Personnel

Subsection 5.1(1) of NI 33-109 states: "A sponsoring firm must make reasonable efforts to ensure the truth and completeness of information that is submitted in accordance with this Instrument for any individual." Registered firms often assign an employee to support an applicant in completing their application. In larger firms, this employee may be a part of a registration department, and in smaller firms this support may be provided directly by head office personnel such as the ultimate designated person or chief compliance officer.

If it appears to Staff that someone within a firm has been complicit in an applicant's delivery of a false or misleading application, or has otherwise facilitated such an application through their own carelessness, we may expand our investigation into their conduct, and we may take regulatory action against them and the firm itself.

Guidance for Completing Applications

The application form is an integral part of a registration regime that is intended to protect investors. It follows from this and from the integrity requirement for registration that the "golden rules" for completing registration applications are:

1. Read the application form carefully.
2. Complete the application form truthfully and with candour.

These rules mean that applicants should always err on the side of disclosure. Form F4 is intended to foster investor protection, and accordingly it does not admit of novel, aggressive, or otherwise self-serving interpretations that would diminish its effectiveness.

Against the backdrop of this general guidance, we have set out below some of the more frequently encountered specific issues of non-disclosure that we have encountered, and our responses to them.

a. Item 10 – Current employment, other business activities, officer positions held and directorships

Item 10 of Form F4 directs the applicant to complete Schedule G, which in turn requires that current business and employment activities be listed and officer and director positions be disclosed. Some applicants have taken the position that because they were not receiving any compensation for a particular activity, it did not need to be disclosed, even though it otherwise had the appearance of a business activity. This position is inconsistent with the instructions in the Form F4, which requires disclosure whether or not the applicant receives compensation for the services in question.

b. Item 11 – Previous employment and other activities

Item 11 of Form F4 directs the applicant to complete Schedule H, which in turn requires that certain previous employment positions be listed and the reasons for departing those positions be identified. Staff has encountered numerous instances where an applicant who had been fired or asked to resign from a job has stated in Schedule H that they left that same job "to pursue other opportunities". Staff considers this to be a misleading answer.

c. Item 12 – Resignations and terminations

Item 12 of Form F4 asks:

> Have you ever resigned, been terminated or been dismissed for cause by an employer from a position following allegations that you
>
> 1. Violated any statutes, regulations, rules or standards of conduct?
>
> . . .
>
> 2. Failed to appropriately supervise compliance with any statutes, regulations, rules or standards of conduct?
>
> . . .
>
> 3. Committed fraud or the wrongful taking of property, including theft?
>
> . . .

In our view, the purpose of item 12 is to capture all situations where an individual was terminated for cause by a firm at a time when the individual was the subject of allegations of misconduct, regardless of whether the alleged wrongdoing was the stated cause of the termination or resignation.

In addition, we consider a firm's policies and procedures to be "standards of conduct" for the purpose of item 12.

d. Item 14 – Criminal disclosure

Item 14 of Form F4 asks:

1. Are there any outstanding or stayed charges against you alleging a criminal offence that was committed?

. . .

2. Have you ever been found guilty, pleaded no contest to, or been granted an absolute or conditional discharge from any criminal offence that was committed?

. . .

3. To the best of your knowledge, are there any outstanding or stayed charges against any firm of which you were, at the time the criminal offence was alleged to have taken place, a partner, director, officer or major shareholder?

. . .

4. To the best of your knowledge, has any firm, when you were a partner, officer, director or major shareholder, ever been found guilty, pleaded no contest to or been granted an absolute or conditional discharge from a criminal offence that was committed?

. . .

Some applicants who had criminal charges outstanding at the time of their application and who failed to disclose those charges claimed that they mistakenly believed that only convictions had to be disclosed. This belief, even if honestly held, is unreasonable because it is inconsistent with the plain wording of question 1 of Item 14, which specifically refers to "outstanding charges".

Some applicants have also said that they did not disclose outstanding charges because they believed that they were innocent of the charges. An applicant's belief as to their guilt or innocence in respect of criminal charges is irrelevant to their obligation to disclose those charges on their application.

With respect to convictions, some applicants who have failed to disclose convictions have explained that they believed the disclosure obligation only applied to "white-collar crimes" or crimes that had been committed recently. Again, this interpretation is unreasonable because it is inconsistent with the plain wording of question 2, which states: "Have you ever been found guilty, pleaded no contest to, or been granted an absolute or conditional discharge from any criminal offence that was committed?"

Finally, some applicants have claimed that they did not understand the terminology that is used in Item 14. Form F4 has been drafted using language designed to make it as accessible as possible to the user. However, in some areas of the form legal terminology must be used, and Item 14 is one such area. If an applicant is truly uncertain about the meaning of a legal term used in Item 14 or any other part of the form, they should consider consulting a lawyer who practises in the relevant area of the law to get clarification before they submit their application form, as Item 22 of Form F4 includes a certification by the applicant that they understand the questions in the document.

e. Item 16 – Financial Disclosure

Part 1 of Item 16 of Form F4 asks the following questions:

> 1. – Bankruptcy
>
> Under the laws of any applicable jurisdiction, have you or has any firm when you were a partner, director, officer or major shareholder of that firm:
>
> a) Had a petition in bankruptcy issued or made a voluntary assignment in bankruptcy or any similar proceeding?
>
> . . .
>
> b) Made a proposal under any legislation relating to bankruptcy or insolvency or any similar proceeding?
>
> . . .
>
> c) Been subject to proceedings under any legislation relating to the winding up or dissolution of the firm, or under the *Companies' Creditors Arrangement Act* (Canada)?
>
> . . .
>
> d) Been subject to or initiated any proceedings, arrangement or compromise with creditors? This includes having a receiver, receiver-manager, administrator or trustee appointed by or at the request of creditors, privately, through court process or by order of a regulatory authority, to hold your assets.
>
> . . .

Some applicants have interpreted this item as applying only to corporate bankruptcies or insolvencies, but this is inconsistent with the item's introductory words "have <u>you</u> or has any firm when you were a partner, director, officer or major shareholder of the firm . . .".

Some applicants have said that they did not appreciate that this item requires the disclosure of consumer proposals. However, this ignores the express reference to "a <u>proposal</u> under any legislation relating to bankruptcy or insolvency or any similar proceeding".

Finally, some applicants have read a time limit into Part 1 of Item 16. However, no such time limit exists. Part 2 of Item 16 is entitled "Debt obligations", and asks applicants:

> Over the past 10 years, have you failed to meet a financial obligation of $10,000 or more as it came due, or to the best of your knowledge, has any firm, while you

were a partner, director, officer or major shareholder of that firm, failed to meet any financial obligation of $10,000 or more as it came due?

Part 2 is separate from Part 1, and importing the 10-year reference in Part 2 into Part 1 is another example of a self-serving and unreasonable interpretation of Form F4.

f. Supervisory Obligations

With respect to their due diligence obligation under section 5.1(1) of NI 33-109, we refer firms to that instrument's Companion Policy, which recommends that firms establish written policies and procedures to verify an individual's information prior to submitting an application, document the firm's review of the individual's information in accordance with those policies and procedures, and regularly remind registered and permitted individuals about their disclosure obligations.

Questions

If you have questions about the content of this Notice, please contact any of the following:

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