

Closing Time

Canadians remembered those we lost on November 11 and mourned the passing of legendary poet and singer, Leonard Cohen, on November 7. The voice of the national icon and spiritual guide, best known for his song Hallelujah, will be sorely missed.

AUM Law will act as your regulatory (not spiritual...unless you're a fixed fee client) guide to recent IIROC and CSA developments this month, and will shed light on the CRTC's first decision under Canada's anti-spam legislation.



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1. IROC Releases Proposed Guidance on Order Execution Only Services

Those who access order execution only (OEO) services from a discount broker take note as IIROC's recently released proposed guidance will be of interest! The proposed guidance is intended to update outdated IIROC rules given the evolution of the type of products, tools and account types now offered by OEO dealers. To set the stage, the current rules generally provide that if an IIROC dealer accepts a client order where no recommendation is provided, certain suitability obligations do not apply for that order. The crux of the matter, of course, is whether or not a "recommendation" has been provided, given there is currently no clear definition of a "recommendation". The proposed definition of a recommendation would be one which is reasonably expected to influence a person's investment decision regarding securities.

The proposed guidance sets out a number of tools that are currently in use by discount brokers, and IIROC staff set out which of those tools they consider to be a means of providing implicit recommendations to clients, and thus should not be

In Brief

CMRA Names Its First Chief Regulator

The Capital Markets Regulatory Authority (CMRA), once launched, will be led by Kevin Cowan, former president of TMX Group Ltd.'s TSX Markets and TSX Venture Exchange.

Until the CMRA's launch, Mr. Cowan will serve as CEO of the Capital Markets Authority Implementation Organization (CMAIO).

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CSA Seeking Participants for Cybersecurity Roundtable

The Canadian Securities Administrators (CSA) has announced plans to host a roundtable discussion focused on cybersecurity issues early in the new year.

offered by discount brokers. Some of the tools reviewed which may amount to a “recommendation” include certain pricing recommendations, hyperlinks to third party websites and trading tools. Of interest to registered portfolio managers is the specific mention of model portfolios which are intended as a guide to the investor to help build their own portfolio, which IIROC generally considers to be a prohibited recommendation and thus should not be offered by OEO dealers.

There is a suggestion that IIROC might grant exemptive relief to allow OEO firms to make limited model portfolios available to their clients based solely on the criteria set out in the guidance.

Comments are open on the proposal until December 19, 2016. Please [contact us](#) if you have any questions on how the proposal could impact the services offered by your discount broker, or would like assistance with your comment letter.

2. A Published Electronic Address Does Not Always Trigger Implied Consent

In our [August 2014 Nutshell](#) on Canada’s Anti-Spam Legislation (CASL), we highlighted CASL’s conspicuous publication exemption, which establishes that a recipient’s implied consent to a commercial electronic message (CEM) can be derived if (1) the recipient conspicuously published its contact information (e.g., in a publication or a website), (2) without indicating that it doesn’t want to receive communications, and (3) the CEM is relevant to the recipient’s business.

In an important development, the CRTC’s first compliance and enforcement decision under CASL, released earlier this month, meaningfully narrows this exemption. By way of background, the CRTC issued a notice of violation (Notice) and an administrative monetary penalty of \$640,000 against Blackstone Learning Corp. in January of 2015. It alleged that Blackstone sent a large number of emails without consent of the recipients (primarily government employees) advertising educational and training services it offered, based on their publicly available electronic addresses.

As authorized by CASL, Blackstone, while not disputing the facts of the matter, challenged the Notice on two central grounds: (i) that it had implied consent to send the CEMs, and (ii) that the amount of the administrative monetary penalty was too high. Following receipt of satisfactory evidence, the CRTC reassessed that amount to \$50,000, taking into account various factors including the firm’s ability to pay the penalty.

The CTRC maintained throughout its analysis that the conspicuous publication exemption and related requirements in paragraph 10 (9) (b) of CASL “set a higher standard than the simple availability of electronic addresses”. In order for the exemption to apply, it found that (1) the electronic address must not be accompanied by a statement that the person does not want to receive unsolicited CEMs and (2) the CEM must be relevant to *the recipient’s role or function*, in order to reasonably infer consent to receive the CEM.

The CRTC emphasized that “the legislation does not provide persons sending CEMs with a broad license to contact an electronic address they find online”. Rather, it is for the person sending the CEM to evaluate, on a case-by-case basis whether the message is relevant to the recipient’s business, role, function or duties. The initial January 2015 Notice provides illustrative examples of such an analysis.

This decision demonstrates that the conspicuous publication exemption requires more than a mere publicly available email address, and even if the recipient does not indicate it doesn’t wish to receive CEMs, the sender must assess the

In Brief cont’d

The announcement follows the release earlier this year of [CSA Staff Notice 11-332 - Cyber Security](#), (see our [September Bulletin](#) for a discussion of the staff notice) which examined the increasing complexity of the cybersecurity landscape.

The CSA is seeking roundtable participants from industry firms, market places, regulators and cyber security experts, in hopes to “explore how participants, individually and as a group, would respond in the event of a cyber incident”.

The roundtable will be held on February 27, 2017 at the Ontario Securities Commission (OSC) office.

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PMAC Announces New Board

The Portfolio Management Association of Canada (PMAC) has named its 2016-17 board, to be led by former chairman and treasurer Eric Léveillé (managing director of BlackRock Asset Management Canada Ltd.). Newly appointed directors include:

- Dona Eull-Schultz, President of Leon Frazer & Associates Inc.
- Thomas Johnston, Senior Vice President at CI Investments Inc.
- Lucas Pontillo, Chief Operating Officer for Canada at Manulife Asset Management Ltd.
- Marc Trottier, Co-Managing Director of Coerente Capital Management Inc.

relevance of the CEM to the recipient's role or function. In practice, this may be a trap for the unwary!

As well, this case demonstrates that challenging the CRTC's initial notice and administrative monetary penalty assessment may prove helpful to the company on the receiving end of the notice. Here, Blackstone reduced its administrative monetary penalty drastically from \$640,000 to \$50,000. Other factors that may impact the calculation of the administrative monetary penalty include cooperation with the CRTC investigation, ability to pay, and the demonstration of a good faith effort to comply with CASL.

Please [contact us](#) if you would like to discuss this topic further.

3. CSA's Guidance for Portfolio Managers for Service Arrangements with IIROC Dealer Members

The CSA recently published CSA Staff Notice 31-347 *Guidance for Portfolio Managers for Service Arrangements with IIROC Dealer Members* (the Notice). The Notice provides guidance to registered portfolio managers (PMs) that enter into service arrangements with dealer members (DMs) of IIROC. The Notice establishes new expectations and may restrict a PM's ability to continue to rely on a DM to satisfy certain of its client reporting requirements.

Under these so called Portfolio Manager - Dealer Member Service Arrangements (PMDSAs), a DM typically holds an investor's cash and securities (Investments) in an account over which a PM has discretionary trading authority, and executes and settles the investor's trades in the account based on instructions from the PM. The investor is thus a client of both the PM and the DM and each has a regulatory obligation to deliver statements of Investment positions and trades (Statements) to the shared client, as well as to maintain their own records of each client's Investment positions and trades.

The regulator has identified six key points as guidance to help PMs and DMs with their approach to PMDSAs, some of which may come as a surprise to PMs (and, to the extent applicable, exempt market dealers):

1. PMs must maintain their own records of its clients' Investment positions and trades, and may not rely on a DM's records as a substitute for its own records.
2. PMs and DMs should have a written agreement on the arrangement, which includes the key terms, and the roles and responsibilities of the PM and DM.
3. PMs are expected to provide written disclosure to their clients on the arrangement which summarizes its purpose and material terms, including the key services provided, and key obligations owed by the PM and DM to the client. (For existing clients, this must be provided no later than November 17, 2017.)
4. PMs that hold any Investments for a client must prepare and deliver its own Statements to the client.
5. If all of the Investments that a PM is authorized to trade for a client are held by a DM, the CSA are of the view that the PM may satisfy its Statement delivery obligations in NI 31-103 if the DM deliver Statements to the shared client (covering the same Investment positions and trades) that is compliant with the requirements in IIROC Dealer Member Rules, provided that the PM takes the appropriate steps outlined in this Notice to verify that the DM's Statement is complete, accurate and delivered on a timely basis.
6. The discussion above applies to PMs for their PM Statement obligations when they have entered into a PMDSA. The CSA states that it does not deal with a PM's obligations to issue to its clients an annual report on charges and other compensation and an annual investment performance report, which came into effect on July 15, 2016. These reports should be issued by PMs under the PM firm's name.

This new Guidance reflects a significant departure from the safe-harbour published in OSC Staff Notice 33-745. We are surprised by the timing of its release as we expect that this guidance will require significant changes to (or plans in respect of) account reporting for many registered firms, including, in particular, the expectation that PMs must issue the report on charges and other compensation and the annual investment performance report under the PM firm's name.

If you have any questions about the staff positions expressed in the Notice, and how this might implicate your business, please contact [your usual lawyer at AUM Law](#).

4. You've Got Mail – Do Benchmarks Require a Licensing Fee?

In recent months, we have seen several instances of registrant clients that use an index as a benchmark receiving demand letters from the managers of the index. The demand letters generally seek a licensing fee for continued use of that index as a benchmark, as well as outstanding licensing fees for past usage.

Registrants should assess the benchmarks they are currently using and consider whether the indices are intended for public use. Please [contact us](#) if you would like us to review your current benchmark and address any issues you may have – an ounce of prevention is worth a pound of cure!

Frequently Asked Questions

> Can a contract be executed with a stamp in lieu of a manual signature?

Black's Law Dictionary (5th ed.), defines the word "signature" as follows:

"The act of putting one's name at the end of an instrument to attest its validity. A signature may be written by hand, printed, stamped, typewritten, engraved, photographed, or cut from one instrument and attached to another, and a signature lithographed on an instrument by a party is sufficient for the purpose of signing it; it being immaterial with what kind of instrument a signature is made."

Individuals who routinely sign a large number of documents on a frequent basis may choose to forgo manually signing each document by ordering a rubber stamp bearing their signature. When a person imprints their signature with a stamp, that impression is as good as a signature manually produced.

When a contract is required to be executed by a signature of a party or its authorized agent, that signature may only be placed on the contract by the party or authorized agent of that party. But at common law there have been some cases where a person is allowed to sign by the hand of another who writes his or her name for him or her. Such a signature is called a signature by procuration, by proxy, "per pro", or more shortly "p.p." All of these expressions are derived from the Latin *per procuracionem* (fun stuff, eh!), which means by the action of another. Where a party wishes to sign a document by the hand of another, whether this be in the form of a stamp or a signature, an innocent party is entitled to rely on the apparent authority of the agent.

News & Events

PMAC Conference and AGM

We were once again proud sponsors of the Portfolio Management Association of Canada's Conference and AGM held November 15 at the Hilton Toronto. This year's theme was "Leading Through Trust", and featured presentations by John Taft (RBC Wealth Management) and Andrew Fastow (Former CFO of Enron Corporation), among others.



AUM Law primarily serves the asset management sector, with specific expertise in the regulatory and investment fund space. We strive to provide the most practical, forward-thinking advice and services, using a business model geared to efficiency, responsiveness and client service excellence. We are pleased to send you this summary of recent developments that may affect your business.



This bulletin is an overview only and it does not constitute legal advice. It is not intended to be a complete statement of the law or an opinion on any matter. No one should act upon the information in this bulletin without a thorough examination of the law as applied to the facts of a specific situation.