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**Financial Services
Commission
of Ontario**

5160 Yonge Street,
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REGARDING the *Insurance Act*, R.S.O. 1990, c.1.8, as amended
(the "Act), in particular, sections 393(9) – 393(11)

AND REGARDING a hearing concerning the suspension or revocation of the life,
accident and sickness licence of Brian Mark Edward Nerdahl

DECISION and ORDER

Introduction:

Pursuant to a Notice of Hearing dated March 26, 2012, an Advisory Board was duly appointed under section 393(9) of the Act. The hearing was conducted on September 17, 2012.

The allegations were set out in Schedule "1" as attached.

The report of the Advisory Board is attached.

Findings of Fact:

The Advisory Board stated that “There was a **marked absence** of substantive **witnesses...**” While this does not detract from the due process at the hearing, the Advisory Board has communicated that its findings are made in that context.

Four allegations were made against Mr Nerdahl. The Advisory Board made the following findings with respect to the associated allegations:

1. “Nerdahl was the subject of an order by the MFDA,¹ where he was found to have breached MFDA rules by facilitating unauthorized loans to clients;
2. Nerdahl was the subject of an order by the OSC² where he was found to have breached the Securities Act; and
3. Nerdahl made material misstatement/omission in his licence renewal application dated December 29th, 2008; and
4. Nerdahl provided false, inaccurate and misleading information to an insurance company on an application for errors and omissions insurance coverage dated June 16, 2008.”

¹Mutual Fund Dealers Association

²Ontario Securities Commission

The Advisory Board summarized the disciplinary actions by the MFDA and the OSC. The MFDA found that Mr Nerdahl had continued in an occupation that was not approved by his employer on two separate occasions, in contravention of one of its rules. Several clients made investments and none of the clients received any payments on or of the amounts invested. The OSC found that Mr Nerdahl facilitated investments in a security by clients when he was not registered to do so. The investors were reimbursed by the company issuing the securities.

The Advisory Board specifically stated that it did not conclude that Mr Nerdahl is unsuitable to be a life insurance agent. Accordingly findings of lack of suitability as set out in the allegations were not drawn and the findings were restricted to specific actions by Mr Nerdahl.

I hereby adopt the findings of fact of the Advisory Board.

Recommendation of the Advisory Board:

The Advisory Board summarized the essence of the case as follows:

“Put succinctly, should Nerdahl’s misconduct in related regulated industries in and of itself be sufficient to lead to the conclusion that he is ‘unsuitable’ to be licensed in the insurance field and do the two instances of providing false and misleading information

lead to a like conclusion, thus requiring the invocation of the ultimate sanction in a recommendation that Nerdahl's licence be revoked?"

The Advisory Board stated the purpose of its recommendations as follows:

" This Board is of the view that both the risk to and the protection of the public, insurers, employers, other agents and the industry at large can be achieved (Footnote - The Board is of the view that Nerdahl has the potential to be rehabilitated as a suitable agent.), while at the same time achieving the rehabilitation of Nerdahl and providing him an opportunity to demonstrate that he is serious about taking the necessary steps to maintain his licence and comply with regulatory authority and preserve his ability to earn an income, support his family and continue a career spanning 24 years , and simultaneously sending a strong and meaningful message to the agent (and others in the industry) that the allegations are serious and that propensity towards untrustworthiness, dishonesty or misconduct will not be lightly tolerated...."

The Advisory Board made the following recommendations which are summarized below:

1. Nerdahl's licence should be suspended for a period of two years, effective from June 1st, 2012.
2. During this period of suspension, Nerdahl be required to enrol in, pay for, and provide proof of satisfactory completion of the Advocis course " Protect my Practice" or an alternative course or courses approved by and acceptable to the Superintendent dealing with professional ethics, responsibility and compliance within 20 months from the date of the decision of the Superintendent.
3. Nerdahl be required to provide within 30 days of the decision of the Superintendent, proof of errors and omissions coverage to the date of suspension which is to include a "Prior Acts" or a "Gap Coverage" clause acceptable to the Superintendent
4. Nerdahl be supervised for a period of 2 years post reinstatement and on reinstatement that the life insurance agent licence of Nerdahl be subject to the following conditions:
 - a. Nerdahl must be supervised by another agent acceptable to the Superintendent (supervising agent). The supervising agent must undertake to co-sign all applications, report immediately to the Superintendent any non-compliance by Mr Nerdahl, must prepare a report about the activities of Mr Nerdahl and his compliance every six months.
 - b. Mr Nerdahl must file the report of the supervising agent with the Superintendent within 15 days of the completion of the six-month period to which it relates.

- c. Mr Nerdahl must notify the Superintendent forthwith if the supervising agent is no longer willing to undertake these responsibilities and Mr Nerdahl shall cease acting as an insurance agent until he complies with recommendation 4a above.
- d. Mr Nerdahl shall advise the Superintendent if he wishes to replace the supervising agent and Mr Nerdahl shall cease acting as an insurance agent until he complies with recommendation 4a above.
- e. Mr Nerdahl shall be entitled to a hearing prior to making any order to suspend his licence if there is a failure to comply with any conditions ordered.

The Advisory Board set out the factors it considered in making its recommendations. These included aggravating factors and mitigating factors. The Advisory Board included as mitigating factors that Mr Nerdahl's record of client service in the insurance business over 24 years is unblemished, that there was no evidence that the public was at risk by allowing Mr Nerdahl to continue to engage in the insurance business, and that he had co-operated in the investigation of allegations against him. The Advisory Board included as aggravating factors that insurance sales will also involve recommendations about investment in funds, failing to provide accurate and truthful responses to questions by regulators, and the absence of demonstrated contrition and acceptance of responsibility for his actions.

Decision:

The Advisory Board has summarized the essence of this case in its rhetorical question about the degree to which findings of unsuitability before a regulator of financial services, other than insurance, should be considered as a basis for a finding of unsuitability for purposes of a licence as an insurance agent.

In response to its rhetorical question, the Advisory Board did not find that orders by the MFDA and the OSC represented a sufficient basis to conclude that Mr Nerdahl was unsuitable as an insurance agent. That does not imply that there is a lesser standard of suitability under the Insurance Act.

Each case must be considered on its own merits. It is possible that a finding by a non-insurance regulator may relate to the honesty and integrity of an individual in such a way that an Advisory Board could find that the individual has the proclivity toward such behaviour and represents an unacceptable risk to the public or that a single action by the individual is so serious that the individual would not meet the suitability standard for an insurance agent. In such a case, the individual would be unsuitable to be licensed as an insurance agent. The Advisory Board did not find that either of these circumstances exists in this case.

It is also possible that an Advisory Board, taking into consideration both the agent's history in the insurance industry as well as the agent's history in other financial services,

might find conclude that any risk to the public is more specifically related to the non-insurance financial services and that the risk that such behaviour will recur in the insurance business can be managed. Such a finding would not represent condoning the action by the individual or a diminution of the findings of the non-insurance regulator. This is the conclusion of the Advisory Board in this case.

The Advisory Board, through its reference to the absence of substantive witnesses, has communicated that a finding by a non-insurance regulator, in and of itself, is not conclusive evidence of a lack of suitability to hold a licence as an insurance agent in this case. Accordingly, the Advisory Board needed to make its recommendations in the absence of witnesses who would speak either on behalf of or against Mr Nerdahl.

The proceedings before the MFDA and the OSC are the fundamental cause of these proceedings under the Insurance Act. The misstatements to the Superintendent and to an insurance company that placed required errors and omissions insurance at risk are contraventions of the Insurance Act that could not have existed independently of the proceedings before the MFDA and the OSC; they are related acts.

Any penalties ordered must be related to findings. Accordingly, since the first two findings of the Advisory Board relate to orders by the MFDA and the OSC, these are matters outside the jurisdiction of the Superintendent of Financial Services (Superintendent) for which no penalties can be ordered. The third and fourth findings of the Advisory Board relate to misstatements to the Superintendent and to an insurance company about proceedings before the OSC and MFDA. The third and fourth findings relate to the business of insurance and accordingly penalties can be ordered.

It is clear from the report of the Advisory Board that it concluded, correctly, that a finding of unsuitability would reasonably lead to an order for a revocation of Mr Nerdahl's licence. Section 393 of the Insurance Act makes suitability a condition to be granted a licence as an insurance agent and places a duty on the Superintendent to assess suitability. It is a question of fact whether an agent that is found to be unsuitable can rehabilitate him or herself over time and subsequently be found to be suitable.

Section 407 of the Insurance Act provides that "a licence may be issued to an agent or adjuster subject to such limitations and conditions as the Superintendent or the organization recognized under subsection 393 (14), as the case may be, may prescribe." Limitations or conditions are designed to manage risk in those circumstances where risk can practically be managed. This can be used in situations where protection of the public may require greater oversight of the actions of an agent.

The Advisory Board stated that there was "no evidence presented that the public is at risk by allowing Nerdahl to continue soliciting insurance business." However, the Advisory Board also recommended a period of suspension and licence conditions - "This Board is of the view that both the risk to and the protection of the public, insurers, employers, other agents and the industry at large can be achieved" through its

recommendations. I agree that there is a reasonable concern for the public that arises as a result of Mr Nerdahl's actions in the securities business notwithstanding that there was no evidence presented that clients in the insurance business have been harmed. This concern is described below.

It would be inappropriate to ignore the fact that an individual who did not comply with the regulations governing the sale of non-insurance financial products is also continuing to be licensed to sell insurance (another financial product) to the public. Regulated persons are expected to know and comply with the rules governing those financial services. In light of the findings of the Advisory Board, I agree that licence conditions providing for supervision, education with respect to professional ethics, responsibility and compliance, and monitoring of errors and omissions insurance coverage, are necessary to ensure that Mr Nerdahl's contraventions are isolated to the securities business and that he does not pose a risk to insurance clients.

The Advisory Board has noted that Mr Nerdahl "has failed to show contrition for his conduct and accept responsibility for such". While there may be different reasons for that, the reality remains that in the absence of such expression, nothing has been demonstrated by Mr Nerdahl nor by any witnesses that he might have called on his behalf to demonstrate that he is sorry for his actions and has been rehabilitated as a result of the disciplinary action by the non-insurance regulators. The Advisory Board notes that some of Mr Nerdahl's clients suffered loss and it is a concern that he appears not to care and rationalizes the losses by clients as not being his responsibility. Accordingly, I also agree with the Advisory Board that a necessary aspect of the managing the risk associated with an insurance licence is a period of suspension to convey a message that such conduct is also not acceptable. To be clear, as demonstrated by Mr Nerdahl's failure to show contrition and accept responsibility at the Advisory Board hearing, this is a necessary part of ensuring that Mr Nerdahl understands that the behaviour exhibited in the securities business is not acceptable as an insurance agent; it is not a further penalty for securities related contraventions.

The Advisory Board made findings that Mr Nerdahl made a material misstatement to the Superintendent in his application for a licence and provided also provided false information to an insurance company in his application for errors and omissions insurance. False information in an application for errors and omissions insurance can potentially place the insurance coverage and accordingly the public at risk should there be a claim. Providing false or misleading information to the Superintendent is a serious matter. The absence of this information precludes the Superintendent from requiring closer supervision of the agent to ensure that misconduct in the sale of securities does not become misconduct in the sale of insurance. Regulation would not be possible if licensees did not bear serious consequences for providing false or misleading information to the regulator.

These two contraventions of the Insurance Act warrant disciplinary action. I believe that a period of suspension is also appropriate.

Accordingly, a period of suspension is required for the contraventions of the Insurance Act and as a necessary part of the risk management of Mr Nerdahl as an insurance agent. However, I believe that the Advisory Board's recommendation for a period of suspension of two years may be more than is necessary to achieve these objectives. This case is unique.

I believe that a licence suspension for a period of nine months is appropriate. This is neither the longest nor the shortest period of suspension that has been ordered. The suspension is similar to some recent suspensions ordered for cases involving errors and omissions insurance and is designed to reflect that Mr Nerdahl's case is at least as serious as those cases. I have also considered that a longer period of suspension may preclude Mr Nerdahl from returning to the insurance industry and would be inconsistent with the Advisory Board finding that he is not unsuitable to be a life insurance agent. The Advisory Board did not explain the reasons for its recommendation that the two-year period of suspension should commence on June 1, 2012; however, the nine month period of suspension that I am ordering will conclude prior to the conclusion of the period of suspension recommended by the Advisory Board.

The principles that have been applied in this case where a disciplinary action by a non-insurance regulator leads to a proceeding under the Insurance Act are as follows:

1. If the proceeding under the Insurance Act finds that the agent is not suitable, the agent does not meet the requirements under Section 393 of the Insurance Act to hold a licence.
2. If the proceeding under the Insurance Act finds that the agent is suitable to hold a licence under the Insurance Act, it is necessary to ensure that misbehaviour does not emerge for insurance business. To achieve this objective, licence conditions and a licence suspension can be considered.
3. If the proceeding under the Insurance Act finds that the agent is suitable to hold a licence under the Insurance Act, any penalties should reflect only the Superintendent's responsibilities under the Insurance Act. This does not detract from the seriousness of discipline imposed by the other regulators.

The Advisory Board has recommended that Mr Nerdahl be entitled to another hearing prior to making an order to suspend his licence if there is a failure to comply with an order made as a result of these proceedings. All agents have this right and accordingly there is no need to specifically provide for such right.

ORDER

I hereby order the following suspension and conditions on the life and accident and sickness insurance agent licence of Mr Brian Mark Edward Nerdahl:

1. Mr Nerdahl's licence as a life and accident and sickness insurance agent be suspended for a period of nine months commencing February 1, 2013.

2. Mr Nerdahl select a course dealing with professional ethics, responsibilities and compliance and seek approval from the Superintendent of Financial Services of the course chosen by March 1, 2013
3. Mr Nerdahl pay for the course.
4. Mr Nerdahl provide evidence of satisfactory completion of the course to the Superintendent of Financial Services by June 30, 2014. Such course shall be in addition to the continuing education required by Regulation 347/04.
5. Mr Nerdahl provide to the Superintendent by March 1, 2013 evidence of errors and omissions insurance acceptable to the Superintendent.
6. Mr Nerdahl's licence as an insurance agent shall remain suspended until the later of the completion of the period of suspension ordered in the first point and the date Mr Nerdahl obtains the written approval of the Superintendent of a written undertaking from another agent (the Supervising Agent) who is licensed in Ontario and acceptable to the Superintendent, and who undertakes for a period of 24 months commencing on the day following the conclusion of the period of suspension of Mr Nerdahl's licence to:
 - a. supervise Mr Nerdahl and co-sign all applications, as evidence of joint responsibility for the insurance business transacted by Mr Nerdahl.
 - b. report to the Superintendent immediately any contraventions of the Insurance Act and its regulations by Mr Nerdahl.
 - c. prepare promptly a report regarding the insurance business of Mr Nerdahl and his compliance for each six month period during the period of supervision (the Agent Report).
7. Mr Nerdahl shall file with the Superintendent the Agent Report within 30 days of the completion of each six month period to which it relates.
8. Mr Nerdahl shall notify the Superintendent forthwith if the Supervising Agent is no longer willing to accept these responsibilities. Mr Nerdahl shall not act as an insurance agent when he does not have a Supervising Agent.
9. Mr Nerdahl shall notify the Superintendent if he wishes to substitute the Supervising Agent and shall not act as an insurance agent until such time as he has received the written approval of the Superintendent of a substitute Supervising Agent.

Any approvals by the Superintendent required by this order shall not be unreasonably withheld.

Dated at Toronto, this second day of January 2013

Original Signed By

Grant Swanson
Executive Director, Licensing and Market Conduct
by delegated Authority from
Superintendent of Financial Services

Schedule 1

Allegations

1. Nerdahl has demonstrated untrustworthiness to transact the business of insurance for which the licence has been granted pursuant to section 8(d) of Regulation 347/04, and is thereby unsuitable to maintain his licence, by:
 - a. between February 2002 and July 2004, promoting and facilitating investment loans by clients of Clarica Investco Inc., his then employer, without the authorization of his employer, in breach of the terms of his employment and of rules established by the Mutual Fund Dealers Association ("MFDA"); and
 - b. in 2006, promoting and facilitating the participation of clients of Legacy Investment Management Inc, his then employer, without the authorization of his employer, in breach of the terms of his employment and of rules established by the MFDA;
2. Nerdahl has demonstrated untrustworthiness to transact the business of insurance for which the licence has been granted pursuant to section 8(d) of Regulation 347/04, and is thereby unsuitable to maintain his licence, by trading in securities for which there had been no prospectus and without being registered to do so, contrary to section 53(1) and 25(1) of the Securities Act RSO 1990, c. S.5 ("Securities Act");
3. Nerdahl has made a material misstatement or omission in his application for licence renewal dated December 29, 2008, contrary to section 8(b) of Regulation 347/04 by failing to disclose the OSC proceedings or to disclose fully relevant aspects of the MFDA proceedings and is thereby unsuitable to maintain his licence;
4. Nerdahl has demonstrated untrustworthiness to transact the business of insurance for which the licence has been granted pursuant to section 8(d) of Regulation 347/04, by providing false or misleading information to an insurance company on an application for errors and omissions insurance dated June 16, 2008, by denying that he had ever been subject to disciplinary action, when he had. He is thereby not suitable to maintain in his licence;

5. Such other allegations that FSCO may advise.

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