



May 24, 1996

SENT BY FAX & BY MAIL

Regal Capital Planners Ltd.
1351 Mountain Road
Moncton, New Brunswick
E1C 2T9

Att: [REDACTED],
A.A.,
Provincial Manager

RE: Application for Registration - Kenneth Francis Layden

Dear Sirs:

Following receipt from you on February 16, 1996 of the application for registration of Kenneth Francis Layden (the "Applicant") as a salesperson under the *Securities Act*, the Deputy Administrator undertook a review pursuant to usual office procedures. The Applicant was terminated allegedly for cause in December, 1994 by his previous employer, ScotiaMcLeod Inc. The Deputy Administrator requested additional information and met with the Applicant and spoke to his solicitor on several occasions to determine whether, in his opinion, the Applicant was suitable for registration under the *Act*. In a report dated April 16, 1996 the Deputy Administrator recommended to the Administrator that the application be denied.

Again pursuant to office procedures, and following administrative law principles, the Applicant and his counsel were given an opportunity to respond to the Deputy Administrator's recommendations. Counsel requested an immediate hearing which was held on April 19 in the presence of a short hand court reporter. At that time Mr. Allaby, counsel to Mr. Layden, presented arguments and comments to rebut or contradict the conclusions reached by the Deputy Administrator in his report. At the end of the hearing I undertook to render a decision on the application as soon as possible following receipt of a transcript and a further review of the Deputy Administrator's report.

As with any application received from an individual, the Administrator must determine whether an applicant is a suitable candidate for registration as a salesperson under the *Securities Act*. While suitability is not defined in the *Act* or regulations, there is extensive case law as well as industry standards and codes of conduct to provide guidance and upon which a decision may be based. For example, suitability has been determined to include the attainment of minimum educational standards. A candidate's personal qualities of good character, moral integrity, and financial competency are also important considerations. Previous employment and professional experience, especially if within the securities industry, are relevant as is the extent to which an applicant has been involved in disciplinary actions while registered under securities legislation. One factor alone is not sufficient to determine suitability. Rather the totality of the candidate's application must be considered.

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I have carefully reviewed the Deputy Administrator's report, the submission made by counsel to Mr. Layden at the hearing, and statements given by several individuals to the Investment Dealer's Association (the "IDA") investigator during the course of an investigation of Mr. Layden's activities with ScotiaMcLeod Inc. I have not considered any evidence or testimony given during civil proceedings initiated by the applicant against his former employer as I believe neither these statements nor proceedings are relevant to this decision. While I have reviewed the above-noted documents, I do not propose to indicate here in detail my conclusions on each of the individual arguments made by the Deputy Administrator or the Applicant's counsel with, however, one exception.

It is clear, in my opinion, that the single most significant incident which brings Mr. Layden's suitability for registration into question is his borrowing in 1994 of monies from a new, unsophisticated, 62-year old client. The Deputy Administrator argues that in requesting and obtaining three separate loans totalling \$40,000.00 from the client, Mr. Layden involved himself in a conflict of interest which is a violation of the spirit, if not the letter, of the Investment Dealer's Association Code of Ethics and Conduct. This code states, in essence, that client assets are solely the property of the client and should be used only for client purposes and that personal financial dealings with clients should be avoided.

Counsel for the applicant argues, correctly, that this standard is not an absolute prohibition and that there may be circumstances where borrowing from a client is a permitted or an acceptable activity. There was no discussion at the hearing of circumstances where such an activity is not acceptable. Counsel argues that Mr. Layden's only mistake was that he borrowed money from somebody who changed his mind resulting in a complaint to his supervisor and his subsequent dismissal from employment.

In my view, however, this incident was not simply a case of the applicant borrowing from a client but rather an example of a salesperson's failure to put his client's interests above his own. While it can be argued that the first loan might not be a violation of the IDA's standard, giving the Applicant the benefit of the doubt, so-to-speak, his continued borrowing, especially the third loan, crossed the line into improper behaviour in my opinion. When one considers the client's relative lack of investment sophistication, the emotional and marital disturbances in his life at the time and his age in combination with the apparent desperateness of the Applicant to negotiate the third loan, one can easily conclude that a line had been crossed and the standard violated. Furthermore, this is not a case of a salesperson being unaware of the ethical standards required of him. Mr. Layden acknowledges in his statement given to the IDA investigator that he was aware of the Code of Ethics but decided to proceed with the loan and suffer the consequences. As we are all aware these have been severe for Mr. Layden. It should also be recognized that they have been distressing for the investor who was Mr. Layden's client.

While the circumstances surrounding the Applicant's borrowing of money from his client raise significant concerns, alone they are not sufficient to render him unsuitable for registration under the Act. Certainly, if he was still registered and this Office received a similar complaint against him today, there would be grounds to consider taking disciplinary action. However, Mr. Layden has not been registered in the securities industry since December, 1994 nor has he been

employed elsewhere. His application for registration within the mutual funds industry has been outstanding since February 1996, some four months. Furthermore, there is no question of Mr. Layden's qualifications to provide securities advice nor has there been any concern expressed about the nature of his trading activities while previously employed by any securities dealer. The questions of suitability are directed mainly to the circumstances surrounding his borrowing of monies from a client when he himself was in financial difficulties. These financial circumstances remain and are a factor in my decision.

Finally, I must address the ongoing investigation by the self-regulatory organization of which Mr. Layden was a member prior to his termination in December, 1994. Upon his dismissal an investigation was commenced by the Investment Dealer's Association to determine whether Mr. Layden violated any by-law of the organization, in particular the Code of Ethics and Conduct. While an investigator's report suggests there are sufficient grounds for the Association to take action against him for "conduct unbecoming", the IDA has yet to formally conclude its investigation.

After due consideration and pursuant to paragraph 12(1)(a) of the Act I have decided to accept the application of Mr. Layden as a salesperson with Regal Capital Planners Ltd., a mutual fund dealer, subject to the following conditions and written undertakings to be provided to me:

1. That Regal Capital Planners Ltd. and the Applicant's immediate supervisor in particular, provide the Administrator in writing with its agreement and undertaking to supervise Mr. Layden's sales activities, and provide to the Administrator within fifteen days of each monthend a report detailing the nature of sales made by Mr. Layden in the previous month, the number of clients acquired by Mr. Layden, and such other information as may be required by the Administrator from time to time. This close supervision will be for an indefinite period of time until the Administrator is satisfied that such close supervision is no longer necessary;
2. That Mr. Layden proceed to resolve the outstanding investigation of the Investment Dealer's Association and to report within fifteen days of each monthend the status of such investigation and any disciplinary action, if recommended, and/or settlement, if agreed. The Administrator will review the final results of the investigation and disciplinary action, if any, to determine whether in the public interest further action of a disciplinary nature should be taken against the Applicant, including terms of suspension or imposition of additional conditions on registration;
3. That the Applicant undertakes in writing to the Administrator not to borrow funds or assets from any investor who is a client of his employing dealer, or a family member of such client; and
4. That immediately, and at the end of each succeeding six month period, the Applicant files with the Administrator a statement outlining the nature and extent of his personal indebtedness, including his current plan for managing or reducing same.

Failure to meet any of the above conditions may be deemed grounds upon which the Administrator may take administrative action to suspend or cancel the Applicant's registration. Should the Applicant seek to transfer his registration from one dealer to another, these conditions will continue to apply.

Parties are reminded that the *Securities Act* provides rights of appeal from this decision. Should the Applicant accept the conditions on registration as proposed in this letter, I request the written undertakings be filed so that the appropriate certificate of registration may be issued.

Yours truly,



Donne W. Smith, Jr.
Administrator,
Securities Branch

DWS/lmr

cc: Kenneth F. Layden, Applicant
B.B. [REDACTED], Solicitor to the Applicant
C.C. [REDACTED], Compliance Officer, Regal Capital Planners Ltd.
Edouard O. LeBlanc, Deputy Administrator