

COMPLIANCE IN A BRAVE NEW WORLD

IIROC – CLS COMPLIANCE CONFERENCE

December 1, 2015

Presentation prepared by:

Robert L. Armstrong

Leader, Gowling's Commercial Litigation Practice Group

Gowling Lafleur Henderson LLP

Robert.Armstrong@gowlings.com

416.862.3594

Usman M. Sheikh

Partner, Litigation

Gowling Lafleur Henderson LLP

Usman.Sheikh@gowlings.com

416-862-3627

Introduction

- My name is Robert Armstrong and it is a great pleasure to be here today.
- I have spent my entire 34 year career practising law in this area and I have the good fortune of knowing many of you in the audience.
- When I was asked by Joy to be the Keynote Speaker, I gladly accepted and I told her that I wanted to try to offer you a creative point of view in a practical and beneficial way for each of you.
- In preparing these comments, my partner Usman Sheikh and I spoke to senior regulators, CCO's, CEOs, lawyers, RRs and people on the line in the Compliance Departments.
- The messages that we heard were powerful and were presented in a thoughtful and compelling way.
- I hope I can do them all justice today.

Context

The Increasing Focus on Compliance and Risk

- As one of the leading securities associations recently stated:

“[T]he securities industry in the last 25 years has experienced change which is unmatched in the recent history of financial services... The role of compliance has moved to center stage.” (SIFMA)

The Importance of Compliance

- **Investors** – An increasing number of people want to invest their money, obtain a healthy return, and to do so with a very low risk.
- **Dealers** – Dealers and others want to earn a reasonable profit in exchange for the advice that they give and the protection that they offer.
- **Regulators** – Want to further regulatory mandates, including the investor protection mandate, while ensuring efficiency of the capital markets.
- Whenever one or more of these objectives is under attack, many stakeholders will be concerned.

- The last 25 years have seen a remarkable attack on each of these objectives and, therefore, the demands with respect to the roles you play are increasingly under scrutiny and are more and more difficult to achieve.

The Question of Context

- As you are not all veterans of the 1980s or 1990s, I am going to start today by giving you a context for the role you are asked to play, so that this discussion is not abstract but real.
- It is very important for all of you to understand this context because you need to be respectful of the challenges you each face in order to work together effectively and to have success.
- Before the **1987 stock market crash**, compliance was mostly concerned with discretionary trading and concentration. That was the essence of suitability assessments.
- After that crash, and the very challenging markets in the early 1990s there were thousands of complaints by customers about their returns and losses.
- A whole new legal industry grew up at that time around the word “suitability” and many lawsuits were commenced.
- This significant development created concern for dealers, regulators and compliance officers and it definitely got the attention of salespeople.
- Therefore, it was not a surprise that even greater regulation was imposed on your industry.
- Things were not entirely chaotic in the early 1990s but all of that changed with the **Bre-X scandal** in the mid-1990s.
- That scandal led to the proposal of 1998's New Regulations for Standards of Disclosure for Mineral Projects, which mandated disclosure standards for release of technical / scientific information.
- More importantly it also led to the creation of another form of lawsuit - the securities class action claim and new legislation relating to secondary market trading.
- Today in Canada there are dozens of these lawsuits seeking billions of dollars in damages.
- Therefore, by the end of the 1990s, the compliance industry was occupied with its increasingly demanding roles.

- Unfortunately, the industry did not have much of a chance to adapt because this period of change was followed almost immediately by the **Enron, WorldCom and Tyco scandals**.
- These US accounting scandals were so large and so unexpected that they caused the financial industry, the accounting industry, government, compliance officers and regulators to add more regulation. The credibility of the markets was at stake.
- As everyone was trying to manage these changes, the financial world was hit even harder.

Scandals and Crises Starting in 2007

- (1) **The ABCP Crisis** – The \$35 billion ABCP market freezes due to the concern of exposure to sub-prime mortgages.
- (2) **The Bernard Madoff Scandal** – The world’s largest Ponzi scheme is uncovered (\$65 billion). The SEC received multiple whistleblower reports.
- (3) **The Global Credit Crisis** – The largest financial crisis since the Great Depression is triggered by the collapse in the subprime loan market. The crisis is exacerbated by highly complex financial products.

These crises made your industry desperate to address these significant concerns with:

- the adequacy of disclosure;
- internal controls;
- compliance;
- risk management; and
- governance.

Regulatory Response to Crises

- Not surprisingly significant regulatory reform followed:

Examples

- **Sarbanes-Oxley Act of 2002 (SOX)** – SOX is passed by United States Congress in 2002 in response to the Enron and Worldcom failures.
 - SOX mandated strict reforms to improve financial disclosure from corporations to prevent accounting fraud. It placed an increased focus on internal controls, audit procedures and compliance.

- SOX changed everything in terms of executive awareness and executive accountability. The need for the CEO/CFO to certify financials was significant. This had a ripple effect through companies. While enhanced financial disclosure remained the purview of CFO/Finance groups, organizations began to realize they needed better compliance functions.
- **Canadian SOX** – Canada also passed reforms around this time, including Bill 198 (or Canadian SOX) and Multilateral Instruments 52-108, 52-109 and 52-110.
- ***Dodd-Frank Wall Street Reform and Consumer Protection Act*** – These reforms were passed by United States Congress in 2010 in response to the global credit crisis.
 - This was a sweeping legislative reform package to promote financial stability, and to improve accountability and transparency in the financial system.
 - Congress assigned significant increased responsibilities to Compliance and required compliance personnel to have closer involvement with the day-to-day business operations and decisions.
- **Canadian Reforms** – Canada also introduced regulatory reform in response to the global financial crisis regarding securitized products, credit rating agencies, derivatives, product suitability, conflicts of interest, etc.

The Important Role of Compliance

- Given the points I have just made, it is not surprising that you are seen as a linchpin to the success of the industry as it relates to the demands of the public and the demands of the regulators.
- Indeed very senior members of the regulatory community have repeatedly made this point:

“A firm's UDP and CCO have extremely important compliance roles. They are ultimately responsible for ensuring that a compliance system is in place to ensure that the firm, and its representatives, complies with securities law.”
(OSC Staff Notice 33-745 – *Annual Summary Report for Dealers, Advisers and Investment Fund Managers*)

“The work you perform as compliance professionals is critically important to investors and the integrity of the markets. ... Your work helps ensure that investors are armed with the information they need to make fully-informed decisions.” (Mary Jo White, Chair, SEC)

“You have a challenging and difficult job and play a critical role in fostering compliance with the federal securities laws. You work to ensure that your firms

have robust compliance programs and to provide sound advice and guidance to business line personnel.” (Andrew Ceresney, Director of Enforcement, SEC)

What Can be Done to Help you Succeed?

- The question for us today is whether there are any things that can be done to assist you in your extremely difficult work.
- I am suggesting that the answer is yes.
- If you think about that question for a second, you will agree with me that the starting point is to look at all of the contact points that compliance is supposed to be aware of and act as gatekeeper because it is at those contact points that your greatest risks exist.
- What are they?

Key Contact Points for Compliance

(a) Contact Between Client and Salesperson

- First, there is the contact between a client and a salesperson. That includes the significant first meeting, either in person or electronically, where an understanding of the client is to be developed and the risks and rewards of investing are to be fully explained in an understandable way – how does the compliance officer really know what happens in that meeting?
- Does the RR understand the products well enough to explain the risks and assess the suitability?
- One crucial element of the interaction between the client and salesperson is the client's expectation. In this age, there are no savings accounts at banks that will easily let people retire with a healthy rate of return so the public is moving into the investing business with the hope for safe, high returning investments.
- If the salesperson does not adequately inform the client of the risks of meeting those hopes, their expectations will be unrealistic and problems are very likely to occur in the future.

(b) Review of Salesperson's Documentation

- The next contact is the Compliance Officer's review of the salesperson's documentation, files, KYC information and trading. The Compliance Officer is trying to be a great support to the salesperson.
- They have a deep knowledge of the rules that govern these relationships and they want to make sure that the salespeople are acting appropriately for the benefit of the client, for their own benefit, for the benefit of their employer and to ensure that the regulator does not feel a need to act.
- This point of contact is essential. It is at the very core of the culture of compliance that the regulator and the Compliance Officers hope to achieve.
- If the Compliance Officers and the salespeople are not working collectively that job is remarkably difficult to manage properly or successfully. In the **Institutional World, Discount World and Digital World**, KYCs are either not needed or are completed online in some cases and in part by a meeting.
- This relationship is of significant interest to the regulators in 2016.
- They are interested to know if you have accurately defined the relationship with the customer.
- What is being offered to the client? A bucket of general securities that you think generally meets the suitability standards for a category of client or has an individual assessment been made of the client's needs?
- Have you addressed the issue of suitability and the question of advice where it is called for?
- When necessary, do you know if the KYC has been completed properly by an informed client?
- Has a compliance officer followed up on the account to see whether or not it is consistent with the KYC?
- As we know, new and better education is being offered to this sector of the industry because of their views that the typical compliance education for retail sales is not entirely appropriate for them - so everywhere we look there are compliance challenges.

(c) Senior Management and Sales Staff

- The next point of contact may be between a manager or other executive and their sales staff and compliance.

- The regulator will want to know whether the employer and the manager value compliance.
- Do they want to help and support compliance and the salesperson?
- Is there evidence of a culture of compliance that makes management, compliance and sales all work together for the best interests of the client and in manner that meets the regulators requirements?

(d) Compliance and Regulators

- The next point of contact would be between the compliance department and a regulator. It may be a spot audit, it may be self-disclosure, or it may be a host of other experiences.
- The regulator is looking for something.
 1. Is there anything unusual about the behaviour of your sales team?
 2. Are portfolios suitable?
 3. Does the RR really know the client and the product?
- If the answer of compliance or the salesperson is everything is satisfactory, the next question they will ask is what evidence is there that the compliance system was in place, was used and was effective?

Here is what the Director of Enforcement for the SEC said about this point of contact and these issues:

“I have found that you can predict a lot about the state of a firm’s compliance function by asking for answers to these questions:

- 1. are compliance personnel included in important meetings?***
- 2. are the views of compliance sought and followed?***
- 3. is the compliance department viewed as an important part of the business or simply a support function?***
- 4. is compliance given sufficient personnel and resources to cover the employer’s compliance needs?”***

- Each of the points of contact I have identified creates a risk that you and your organization will be found to not be in compliance with the regulatory regime.

- There is always the risk that your customer is not properly informed.
- Equally there is the risk that your client will say he was not properly informed and make a complaint because he doesn't like the rate of return.
- There is the risk that deliberately or negligently an RR does not properly advise a client and this does not come to the compliance officer's attention in a timely way.
- There is a risk that the culture of compliance has not permeated all levels of the organization and, therefore, the hard work of the compliance officers and the legal department are undermined from time to time and are not considered comprehensive by the regulator.
- There is the risk that a regulator may assume the worst about a certain situation and dramatically impact the reputation of your employer and yourself without having all of the facts.
- Even though you and your colleagues believe that you took all the steps you could to ensure that their requirements were met you are continuously under pressure from inside and outside of your work place.
- It's in this context and with this background that I'd like to talk to you about what may be some helpful approaches to address these challenges.
- **Let's start by asking the question, what is your actual role in the securities industry?**
- Here is what IROC has said:

“Industry compliance professionals play an important role in the system of securities regulation. IROC and industry compliance professionals share a common objective to promote compliance at their member firms and set high industry standards.”

– IROC Guidance Note 12-0379, *“The Role of Compliance and Supervision”*

- So, the regulators believe that you are in this together with them and that your common objectives are:
 1. **Prevention** – You work to prevent violations from occurring in the first place. Develop and maintain effective compliance programs.
 2. **Detection** – You serve as the “front-line” defence for detecting possible violations. Help identify, escalate and report wrongdoing if it occurs.

3. **Investigation** – You are best positioned to quickly and efficiently investigate suspected violations.
 4. **Correction** – You are best placed to take immediate corrective and remedial action in order to prevent further harm and ensure problems do not recur.
 5. **Tone at the Top** – You can help play a critical role in instilling a culture of compliance at a firm.
- I suggest to you that by acting together in an innovative way to solve your challenges, you will find the greatest success.
 - Remember that as difficult as these crises have been for registrants and their employees, they have been equally challenging for regulators.
 - They have taken steps that they think are necessary to ensure that their mandates are successful.
 - When they come to your office for a conversation or you go to their office they're not looking to find that you have done something wrong: rather, they're looking for the evidence that you recorded to show that what you did was right.
 - As we go forward today, keep that in mind at all times as that will be your best aid to establish that your salespeople and your colleagues are compliant.
 - Before we look at some helpful tools, let's quickly list some of the most significant challenges you are facing so we can discuss how you may move forward most effectively.

The Growing Challenges Facing Compliance Officers

(i) Increasingly Complex Regulatory Landscape and Rapid Change

In a 2015 survey by Thomson Reuters, compliance officers expressed “regulatory fatigue and overload” due to rapid regulatory reform. 70% of firms are expecting regulators to publish even more regulatory information in the next year, with 28% expecting significantly more.

Over the past few years, you have been required to address significant regulatory reform initiatives such as:

- **A New Registration Regime** – National Instrument 31-103 – (NI 31-103) (Fall 2009).

- **The CRM “Client Relationship Model” (CRM) and Phase 2 (CRM2) Project** – (cost disclosure, performance reporting and client statements) (Phased in over 2013-2016).
- **Over-the-Counter (OTC) Derivative Regulation** – Including the release of CSA Consultation Paper 91-401 – (2010), which was followed by six consultation papers relating to trade repositories, registration, surveillance/enforcement, clearing, and other topics (2011-2013). A trade repositories rule has also recently come into effect (2014).
- **Market Structure Reform** – For example, the Joint CSA/IIROC Position Paper 23-405 – *Dark Liquidity in the Canadian Market* (2010), the CSA Notice and Request for Comments following a review of the Order Protection Rule framework (2014), and other initiatives.

In addition to that, we have also heard from the regulators regarding other high priority enforcement priorities for 2016, including:

- **Suitability** – The regulator is very focused on this issue because products are increasingly complicated, investors’ expectations are high and there is incredible pressure on sales personnel to perform.
- **Seniors** – The regulator is very concerned about the increasing age of the population of investors. The expectations of seniors are very high and that means a salesperson has greater challenges to meet their requirements. They must ask constantly: are the products in their portfolios suitable for their clients given the complexity of the products and the very significant ups and downs in the market.
- **Improved Reporting** – The regulator is very concerned about transparency and ensuring that the quality of reporting to the client is complete and easy to understand. Off-book transactions are seriously problematic for the dealer and for compliance and the regulator is concerned about it.
- **Cyber-security** – Finally they wish to address cyber-security.

(ii) Emergence of Novel / Complex Products

- At the very top of the concerns of the regulator are complex products.
- Examples of complex financial products include structured instruments, credit-linked notes, hybrid instruments, equity-linked instruments, asset-backed securities, collateralized debt securities, other financial derivative instruments (e.g., credit default swaps, covered warrants).

- Several concerns in relation to these products have been expressed by regulators, including in relation to:
 - Asset-Backed Commercial Paper (ABCP) – Retail investors purchased such notes in ABCP crisis.
 - Leveraged / Inverse ETFs – These instruments have been the focus of several IIROC cautionary notes (see, e.g., “Sales Practice Obligations Relating to Leveraged and Inverse Exchange-Traded Funds”; IIROC Guidance Note 09-0172; June 11, 2009).
- The regulators are not sure that these products are understood or if they are suitable in every case. They are also concerned that they are seeing a great number of these types of products in many accounts where it doesn’t really make sense.
- It is noteworthy that at the same time as the business is becoming more complex, compliance officers report significant recruitment challenges in finding and retaining suitably skilled staff with relevant subject-matter expertise.

(iii) Technological Developments / New Types of Misconduct – Technology creates new opportunities and efficiencies in the market, but also exposes firms to new vulnerabilities and risks, such as:

- **Cyber-security.**
- **Market Structure Enforcement Issues** – High frequency / algorithmic trading (e.g., layering, spoofing), dark pools (e.g., protection of customer order information), direct market access (e.g., out-of-control automation).
- **Social Media Concerns** – Examples include issuing stock recommendations via social media (suitability concerns); receiving / providing endorsements via “re-tweets” or “thumbs-up”; conveying material non-public information via chat groups or instant messaging (IMs).

(iv) Shrinking Budgets – This speaks for itself.

(v) Complexity / Concealed Nature of the Misconduct

- **Insider Trading** – Examples include use of off-shore brokerage / bank accounts, code language, multiple / foreign exchanges, nominee accounts, sophisticated trading (e.g., puts, calls, forwards, etc), money laundering, destruction of evidence, misleading statements.
- **Concealed Misconduct** – Examples include forgery, fraud, theft, misappropriation, and stealth advising.

- **Off-Book Transactions** – Private placements which occur off book.

(vi) Increasing Personal Exposure: Enforcement Actions Against Chief Compliance Officers (CCOs) and Other Compliance Staff

- **Recent SEC Enforcement Actions** – There have been several recent SEC enforcement actions which have raised concerns that Compliance personnel are being unfairly targeted (e.g., BlackRock (2015) and SFX (2015)).
- **Regulatory Statements** – A recent IIROC regulatory note also indicated that it would pursue Compliance for failures to satisfy their supervisory obligations. See, for example, IIROC Notice 12-0379, “The Role of Compliance and Supervision” (December 17, 2012):

“Under appropriate circumstances, IIROC may initiate enforcement proceedings relating to compliance or supervisory matters against one or more of a Dealer Member’s Directors, Executives, UDP, CCO, CFO, Supervisors, or any other Approved Persons, if:

They violate securities laws and/or the Corporation’s requirements or aid and abet another in such violations; or

They fail to satisfy their supervisory obligations.”

Guidance for Compliance Officers

- The compliance industry is huge and diverse.
- Therefore I haven’t been able to deal with all of the issues affecting every type of dealer or advisor or provider in this paper.
- In essence, no matter which part of the industry you are coming from I believe that the guidance that I am about to talk about will benefit you equally.

Practical Advice

- The reason I talked about many of the touch points is that I believe it is at those points that you need to create tools and processes to make sure that:
 - (a) what the salesperson tells the client is correct and the client agrees,
 - (b) what the salesperson tells the Compliance Officer is complete,

- (c) you have proof for the regulator that at each touch point the steps you say were taken were in fact completed,
- (d) personnel understand what the compliance system has called for, and
- (e) the products are understood by your team and, if not, you have available education to help them.

Tools and Processes

- Let's now talk about those tools and processes:

1. Description of Products and Risks

If your sales representatives are recommending complex products to clients, they should have a description of those products and the risks associated with them that can be given to the client before the trades are made so that the client acknowledges that it was explained properly and he or she has signed off on the risk.

Equally at the first meeting the RR could have in hand a clear description of the risks and rewards of investing in the stock market so that that is demonstrably stated in a way that the regulator will be satisfied and the client signs off on its receipt.

2. Checklists

The Compliance Department could create a checklist that the salesperson would have to deliver to their Compliance Officer confirming that they have taken all of the steps that are on that checklist and have it signed off by the salesperson and in certain circumstances by the client.

3. Desktop Tools

Create various tools on the desktop of salespeople and others where they could make a note of phone calls or meetings where they discuss the client's requests, their recommendations and rationale. This will provide evidence that they were considering the requirements of the client throughout their relationship as the regulator says they are supposed to do.

4. In-House Compliance Interviews

Regulators expect key individuals at a firm to be able to respond to questions that should be within their expertise. Therefore, compliance officers should ask firm members questions and review applicable regulations, policies and procedures on a regular basis. This will help ensure the firm is sufficiently knowledgeable to pass a compliance review or a pre-registration review.

- And on and on.
- The benefit of this approach is that it standardizes the communication to the client and to the salesperson and to the Compliance Officer. This creates less room for error.
- Most importantly, it memorializes the evidence of your actions that the regulator told us they are looking for and most often do not find.
- However, the rationale for this isn't just the client or the regulator. You need to be sure that the Compliance Department is not just an expense item for a dealer.
- Rather, it must become a part of the business that will ensure that the damage to reputation and the very substantial costs associated with the complaints from clients or the regulator are eliminated or reduced as much as possible.
- It will become a profit centre by proactively reducing the expenses to come in the future.

Being Proactive

- You must not be reactive – you need to be proactive in compliance to service the client and ensure your career is not in jeopardy.

1. Outreach Programs

You should take advantage of free regulator outreach programs, such as those offered by the OSC's registrant outreach program. These seminars can help compliance officers keep up with the many new and complex regulatory changes.

2. Regulatory Reports

Regulators provide a report annually that will identify common, recurring and significant compliance deficiencies. IIROC Notice 15-0021, *Annual Consolidated Compliance Report*, January 27, 2015 lists several recurring deficiencies IIROC observed over the past year and provides guidance as to how to correct these deficiencies. These reports are a useful tool that identify and prioritize compliance education and improvement within the firm.

3. Demonstrate Visible Commitment

Culture of Compliance – You have no control over budgets or the compliance culture *per se* but you can remind your colleagues that senior management must demonstrate a visible commitment to compliance. Regulators are increasingly concerned with a firm's *culture* of risk and compliance.

Adequate Training – In addition you are entitled to receive from your employer training to ensure that everyone at the firm understands the standards of conduct and their role

in the compliance system, including ongoing communication and training on changes in regulatory requirements or the firm's policies and procedures.

Don't be afraid to ask your colleagues what training is available and if it's insufficient in your view ask for more.

4. **Written Policies and Procedures** – The firm must have regularly updated, detailed written policies and procedures. They are there for a reason and you should read them to make sure you understand clearly:
 - The firm's standards of conduct for compliance.
 - Clarify your roles and responsibilities.
 - If you think that there are risks in your business area that are not fully addressed or protected against speak to your colleagues about creating processes to ensure those risks don't occur: ask yourself what can go wrong with the firm's business and what will prevent things from going wrong.
 - Detailed compliance policies are not enough. Your employer must also have internal controls, day-to-day and systemic monitoring.
 - Make sure you understand how the firm monitors compliance and manages risks, because if you don't understand you won't have the help that you need in your job.
 - When I told you that the regulator is looking for evidence that you and your colleagues have acted properly, talk to your colleagues to make sure the firm keeps records of the activities conducted to identify compliance deficiencies and the action taken to correct them.
 - Also be proactive and have the people that you are supervising be proactive by maintaining their own written records that detail all steps that were taken to either correct, report or escalate the issues that were identified, along with any supporting documentation which demonstrates actions taken.
5. **Internal Whistleblowing Programs** – Be sure that you encourage people in your organization to report on a confidential basis those individuals who may have compliance, regulatory or ethical concerns, without fear of retaliation.
 - Even though there may be whistleblower programs outside of your organization this is a fruitful area of information for you to tap into.
6. **Cooperative Relationship with Regulators** – Finally and most importantly develop a thoughtful and cooperative relationship with the regulators.

Guidance for Securities Regulators

- I would now like to talk about the concept of a cooperative and innovative relationship between the registrants and their compliance personnel on the one hand and the regulators on the other.
- Two weeks ago there was a lead story and photograph on the front page of the *Wall Street Journal* which stated “Compliance officers think regulators are targeting them.” I’m sure that that story was not comforting either to the compliance personnel or to the regulators. In my experience, this headline is not accurate.
- I am extremely confident that the regulators have no desire to, and take no satisfaction in, investigating compliance officials.
- However, the fact that the perception exists in at least some quarters should be cause for concern.
- I say this because if all of these pieces of the compliance industry do not work together there is a high likelihood of failure.
- For example, if there is a perception among some regulators that there are many rogue salespeople – that will inform their views of compliance.
- If there is a perception in the industry that compliance officers are viewed by some regulators as the easiest gatekeepers to investigate and start proceedings against, that will certainly inform the compliance officer’s views of regulators.
- Equally, if there is overwhelming pressure on some regulators from the public or government to act immediately in response to a news headline or a crisis, that will also impact how they manage compliance.
- Finally, if there are some hungry class action lawyers promoting lawsuits, or widespread rumours on social media about some investment product, that may colour how the regulator will view compliance.

View from the Regulators

- When I met with regulators prior to this speech, they were adamant that they viewed themselves as being supportive of Compliance Departments and sales representatives.
- They stated clearly that they do not hope to find rogue brokers or poorly managed compliance systems.

- I was told that they understand how difficult the compliance job is and that if someone comes before them once they are going to do whatever they can to understand all of the evidence and support their continued success in this industry, if possible.
- But they also said that if a person comes back more than once with a similar kind of problem they will not be as generous, as it should be.
- I was told that they have a concern for smaller dealers who may not have sufficient money to put in place the proper infrastructure and systems.
- They want proactive compliance systems rather the old system of reactive compliance.
- They want the relationship between the client and the broker to be based on “know-your - client” and not on a “bucket portfolio assessment” whereby many of the clients have largely the same bucket of products.

Suggested Approach

- Having said all of that, and accepting all of their statements as accurate, as I do, I would suggest that the most important development I can suggest would be for the regulators and the industry to meet frequently on an informal basis, and without prejudice, to collectively create a collaborative approach to ensuring that the industry is strong, trusted, good for the investing community and a great place for thousands of people to work.
- Your goals have an inherent adversarial element to them. I am very confident that if that does not define your relationship, you can be more efficient, helpful to investors, reduce costs and still pursue those who do not comply.
- I am equally convinced that if a lack of trust or the adversarial nature of the relationship dominates there will be no room for transparent and productive discussion or innovative problem solving.
- The suggested approach could start with these suggestions:
 1. The people here today, and their organizations, have all spent an enormous amount of money and time trying to be compliant. When an issue comes up for consideration or investigation, give each other the benefit of the doubt and listen carefully to their responses to your reasonable questions.
 2. Given the overwhelming burdens on all parties, afford a reasonable amount of time to respond to each other's inquiries.

3. Sit down together and discuss completely the main areas that each of you has concerns about and engage in creative thinking about how to improve the systems to ensure that both parties' concerns are met.
4. Work together to build industry standards about how to communicate better with clients so that everyone understands what is expected and so the client can receive the very best advice.
5. Discuss candidly the type of evidence that the regulators would find acceptable during reviews so that the dealers can create processes for the evidence to be stored in an efficient and organized manner.
6. Discuss the concerns that the industry has about the speed of regulatory reform and come to an agreement about how to make necessary amendments in the future in a timeframe that meets all interests.
7. Agree there should be sufficient consultation prior to the adoption of reform initiatives.
8. You should make a central feature of all informal meetings a clear communication about the expectations that the regulators have of firms, senior management and Compliance personnel.
9. Have a candid conversation about the possibility of avoiding rule-making by enforcement.
10. In light of the rapid pace of regulatory change and market innovation, try to agree that the ability to comply varies across the spectrum of firms.
11. Finally, address the recent fear that has arisen in the United States about bringing enforcement actions against compliance personnel. If possible, agree that it is only in rare cases that compliance will be held responsible for firm behavior.

Final Thoughts

- Compliance is now more important than ever.
- The pace of change in this modern age is remarkable.
- Firms struggle to keep up with the pace of regulatory change.
- Regulators struggle to keep up with the pace of business / market and product change.

- In this environment, however, both regulators and Compliance, have a common mission – to protect investors and the integrity of the capital markets.
- Fostering strong relationships between regulators and the regulated, as well as open and constant lines of communication about the struggles and challenges being faced by both, will serve this strong securities industry well.
- It is what has made Canada’s capital markets one of the strongest in the world.

Robert L. Armstrong

Leader, Gowling’s Commercial Litigation Practice Group

Gowling Lafleur Henderson LLP

Robert.Armstrong@gowlings.com

416.862.3594

Usman M. Sheikh

Partner, Litigation

Gowling Lafleur Henderson LLP

Usman.Sheikh@gowlings.com

416-862-3627