

**IN THE MATTER OF STAFF'S RECOMMENDATION FOR THE REFUSAL OF THE
REACTIVATION OF REGISTRATION OF A.E.**

**OPPORTUNITY TO BE HEARD BY THE DIRECTOR UNDER SECTION 31 OF THE
SECURITIES ACT (ONTARIO), R.S.O. 1990, C. S.5, AS AMENDED**

Reasons for Decision

1. On June 21, 2024, I made the decision (with reasons to follow) refusing the application by A.E. for a reactivation of registration as a dealing representative with a mutual fund dealer. I also made the decision that the proceedings be closed to the public, that the record, including transcripts and all exhibits submitted at the opportunity to be heard (**OTBH**) pursuant to section 31 of the *Securities Act* (Ontario) (the **Act**), be sealed and not disclosed or made available to the public, and that the identity of A.E. be protected through the use of initials.
2. The OTBH was held on May 24, 2024. Mark Skuce, Senior Legal Counsel appeared and made submissions on behalf of staff (**Staff**) of the Ontario Securities Commission (**OSC**), and A.E. appeared and made submissions on their own behalf.
3. These are my reasons.

Background

4. On August 3, 2021, A.E. became registered as a dealing representative of a mutual fund dealer (**Sponsoring Firm A**).
5. On the evening of February 26, 2023, A.E. was pulled over by the police for driving 140 Km/hr in a 60 km/hr zone. A.E. admitted to drinking, failed a Breathalyzer test, was arrested and had their vehicle impounded. Later that evening, having previously failed three Breathalyzer tests, A.E. was released from police custody with an Appearance Notice dated February 27, 2023.
6. Section 3 of the Appearance Notice, titled “Alleged Offence”, states that A.E. was alleged to have committed the offence of “Operation while impaired – blood alcohol concentration (80 plus) CC 320.14(1)(b)”; an offence under the *Criminal Code*, R.S.C. 1985, c. C-46, commonly referred to as “driving over 80”.
7. At the time of the arrest, A.E. was registered as a representative of Sponsoring Firm A. As part of the terms and conditions of employment with Sponsoring Firm A, A.E. was subject to a Code of Conduct which, under the heading “Demonstrating Personal Integrity: Criminal Record”, requires employees to “inform their manager or Human Resources as soon as possible when charged with a criminal offence, and again if found guilty of, or plead guilty or no contest to, a criminal offence, including providing information related to the situation, unless prohibited by local law [...] If unsure whether a charge, guilty finding or plea should be reported, employees should discuss the situation with their manager or Human Resources”. A.E. acknowledged to have received training on the Code of Conduct.

8. A.E. did not report the driving over 80 charge to Sponsoring Firm A and did not return to work. Immediately after the arrest, A.E. took personal time off and was later approved for leave of absence due to short-term disability until their resignation effective May 18, 2023.
9. On March 7, 2023, approximately 8 days after the arrest and while A.E. was off work from Sponsoring Firm A, A.E. applied to a position with another mutual fund dealer (**Sponsoring Firm B**). A.E. received an offer letter dated May 2, 2023 to join Sponsoring Firm B starting on May 22, 2023. A.E. did not inform Sponsoring Firm B of the driving over 80 charge at any time during the interview process.
10. On May 31, 2023, the OSC received a Form 33-109F7 *Reinstatement of Registered Individuals and Permitted Individuals* (**Form F7**) for the reinstatement of A.E.'s registration with Sponsoring Firm B.
11. On June 13, 2023, Staff advised Sponsoring Firm B that A.E. was not eligible to use Form F7 because Form F7 is available to individuals previously registered only if there has been no change to prescribed items in their permanent record, including their criminal record information and, therefore, A.E. would be required to submit a Form 33-109F4 *Registration of Individuals and Review of Permitted Individuals* (**Form F4**) for a reactivation of registration.
12. On September 13, 2023, a Form F4 was submitted with the OSC for the reactivation of registration of A.E. as a dealing representative of Sponsoring Firm B. This Form F4 submission disclosed the driving over 80 charge.
13. On November 2, 2023, A.E. attended a voluntary interview with Staff.
14. On January 19, 2024, A.E. forwarded to Staff a letter from A.E.'s defense lawyer stating that the driving over 80 charge had been withdrawn by the Crown on January 10, 2024.

Summary of Submissions

Staff's submissions

15. Staff alleges that A.E. failed to provide true and complete disclosures on multiple occasions and provided a series of conflicting and unreasonable explanations for failing to provide true and complete disclosures.
16. Specifically, Staff alleges that
 - (i) while registered as a representative at Sponsoring Firm A, A.E. was charged with driving over 80 and failed to disclose this criminal charge to Sponsoring Firm A as required
 - (ii) in applying to transfer their registration from Sponsoring Firm A to Sponsoring Firm B, A.E. filed a statutory application form (*i.e.*, Form F7) that falsely omitted reference to the then outstanding criminal charge

- (i) when called upon by Sponsoring Firm B to account for the failure to disclose the criminal charge, A.E. claimed to have relied on legal counsel not to disclose the criminal charge, which was false as no such legal advice was given to A.E.

17. Staff contends that A.E. had multiple opportunities to inform Sponsoring Firm A and Sponsoring Firm B of the driving over 80 charge or seek clarification from personnel at either firm or the OSC on whether A.E. had an obligation as a mutual fund dealing representative or applicant for registration to report the events of February 27, 2023. Instead, A.E. offered multiple, and sometimes conflicting, explanations for not disclosing the driving over 80 charge, including that A.E. did not understand that they had been charged and believed that the obligation to disclose this information would only arise upon being found guilty of the charge, which explanation was neither honestly held nor reasonable.

18. Staff contends that, upon being asked by Sponsoring Firm B to confirm that A.E. had chosen not to disclose the criminal charge on the advice of legal counsel, A.E. responded “Yes, that is correct”, but subsequently admitted to Staff that “Nobody told me not to disclose my charges to my employer specifically wording it that way, they just said to take time and I figured since I am not returning to [Sponsoring Firm A], and I was off on short-term disability I would not need to tell [Sponsoring Firm A] until my return if I decided to return”.

19. At a minimum, Staff alleges that A.E.’s purported misunderstanding about being criminally charged or the obligation to disclose such information to A.E.’s sponsoring firm was the result of recklessness or wilful blindness, which is inconsistent with the integrity required of a registered individual.

20. Staff also contends that the withdrawal of the driving over 80 charge by the Crown on January 10, 2024 is no longer relevant to the matter of A.E.’s fitness for registration at this time.

A.E.’s submissions

21. A.E. admitted to the non-disclosure to both Sponsoring Firm A and Sponsoring Firm B. A.E. agreed that the driving over 80 charge should have been disclosed but stated that the reasons for this non-disclosure were due to embarrassment and misunderstanding of the legal implications associated with the criminal charge.

22. A.E. also contends that, following the incident on the evening of February 26, 2023 and early morning of February 27, 2023, A.E. experienced immense personal distress and embarrassment, which significantly impacted A.E.’s ability to continue working. After the arrest, A.E. applied and was approved for short-term disability, sought counselling, and was diagnosed with an adjustment disorder with A.E. “experiencing moderate impairment in decision making, concentration/focus, and insight/judgement”. A.E. claims to have been unaware of the obligation to inform Sponsoring Firm A of the events and that A.E. had not been advising mutual fund clients within the last year at Sponsoring Firm A.

23. A.E. also alleges that, when applying for reinstatement of registration with Sponsoring Firm B, which A.E. did only to be closer to home because of the suspension of their driver’s licence and not to avoid disclosure of the criminal charge, A.E. genuinely believed there were no

charges to disclose. While completing the criminal background check questionnaire for the role with Sponsoring Firm B, A.E. took a screenshot of one of the questions which, in A.E.'s view, contained language in support of A.E.'s decision not to disclose the driving over 80 charge.

24. A.E. also submitted a letter of reference from A.E.'s manager in Sponsoring Firm B, a supportive email from A.E.'s manager in Sponsoring Firm A, along with a record of performance awards and nominations obtained between January 2020 and January 2023 while employed by Sponsoring Firm A.

Law and Analysis

25. Subsection 27(1) of the Act provides that the Director shall register a person applying for registration unless it appears to the Director that the person is not suitable for registration under the Act or that the registration is otherwise objectionable. Subsection 27(2) sets out the test of suitability for registration by requiring the Director to consider the requirements prescribed in the regulations, including requirements relating to proficiency, solvency and integrity, and such other factors as the Director considers relevant.

26. The question before me is whether A.E. lacks the integrity required for registration under the Act and whether A.E.'s registration would be otherwise objectionable.

Registration Information, Obligation to Disclose and Integrity

27. Pursuant to National Instrument 33-109 *Registration Information (NI 33-109)*, applications for registration are made in a prescribed form, Form F4, that requires the applicant to disclose various items of information that are used to assess an applicant's suitability for registration. If an application is granted, the information contained in Form F4 becomes the registered individual's permanent record. Item 14.1 of Form F4 asks the applicant the following question: Are there any outstanding or stayed charges against you alleging a criminal offence that was committed?

28. CSA Staff Notice 33-320 *The Requirement for True and Complete Applications for Registration (CSA Staff Notice 33- 320)* describes the application process, including Form F4, as an integral part of the registration regime. CSA Staff Notice 33-320 alerts stakeholders to the seriousness of providing false or misleading applications for registration. It provides the example of a registrant that is charged with a criminal offence and the requirement of the registrant to update their information within the prescribed number of days after the charge, adding that it is not acceptable to wait to disclose a criminal charge until after the registrant has been found not guilty at trial.

29. CSA Staff Notice 33-320 also references the decision in *Re Thomas (1972)*, OSCB 118, in which the OSC stated that:

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.

30. In *Re John Doe* (2010), 33 OSCB 1371, a case which also involved the non-disclosure of a criminal record in an application for registration, the Director stated that:

[...] 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* [(2007), ABASC 296] 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.

31. Any changes to the information in a registered individual's permanent record, including changes to Item 14.1, require an update in another prescribed form delivered to the regulator within 15 days in accordance with NI 33-109.

Non-disclosure of criminal charge to Sponsoring Firm A

32. After the arrest, A.E. had at least two interactions with their reporting manager and at least one interaction with human resources at Sponsoring Firm A in relation to A.E.'s time off and leave of absence requests. In each interaction, A.E. chose not to disclose or seek clarification on whether the events ought to be disclosed to Sponsoring Firm A.

33. If A.E. had informed Sponsoring Firm A of the driving over 80 charge, Sponsoring Firm A would have been able to update A.E.'s registration information in accordance with NI 33-109.

Non-disclosure of criminal charge to Sponsoring Firm B

34. During the interview process with Sponsoring Firm B, which involved two interviews and a criminal background check questionnaire, or after starting with Sponsoring Firm B on May 22, 2023, A.E. again had multiple opportunities to either disclose the criminal charge or seek clarification on whether the criminal charge should be disclosed to Sponsoring Firm B. A.E. was deliberate in avoiding disclosure.

35. In applying to transfer their registration from Sponsoring Firm A to Sponsoring Firm B, A.E. was not eligible to use Form F7. The Form F7 process (known as "reinstatement of registration") is intended to allow individuals to move between registered firms without having to undergo the comparatively lengthy process of a Form F4 review.

36. Form F7 contains general instructions pertaining to the eligibility to use that form, including the requirement for there to have been no changes to criminal disclosure information in Item 14 of the individual's Form F4 since the individual left their former sponsoring firm. Form F7 also contains a warning that it is an offence under securities legislation to knowingly give false or misleading information to the regulator, and requires that the applicant certify as true, among other statements, that the applicant has read and understood the form, have discussed the form with a branch manager, supervisor, officer or partner of their sponsoring firm and to the best of their knowledge they are satisfied that the applicant understood all matters within the form, and to the best of the applicant's knowledge and after reasonable inquiry, all of the information provided on the form is true and complete.

37. Upon being asked by Sponsoring Firm B to confirm that A.E. had chosen not to disclose the criminal charge on the advice of legal counsel, A.E. responded with a false statement, as later admitted by A.E.

Explanations for non-disclosure

38. I am not persuaded that A.E.'s short-term disability is a reasonable excuse for not disclosing the criminal charge to Sponsoring Firm A. While on leave from Sponsoring Firm A, days after the arrest, A.E. applied for a similar job at Sponsoring Firm B, suggesting that A.E. was in fact able to return to work. It appears that A.E. chose not to return to Sponsoring Firm A because A.E.'s driver's licence had been suspended. Further, by A.E.'s own admission, A.E. incorrectly believed that as long as they did not return to work to Sponsoring Firm A due to short-term disability A.E. would not need to report the driving over 80 charge.

39. Regarding A.E.'s belief that they had not been formally charged, I find that belief was neither honestly held nor reasonable. Similar to the decision in *Re Thomas*, while A.E. may have never had any previous encounters with the police and the language used in the Appearance Notice may have appeared technical and complex, I am again not persuaded that A.E. did not appreciate the significance of the arrest and the allegation that they had committed a criminal offence. A.E. either knew or ought to have known that this information was relevant to their professional standing as a registered individual.

40. The effectiveness of the registration process would be significantly diminished if applicants for registration could avoid disclosing detrimental information on the basis of unreasonable assumptions, forgetfulness, or misunderstandings. 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.

41. I was not persuaded by any of A.E.'s explanations for the non-disclosure of the criminal charge. Overall, I found the various explanations to be unreasonable. A.E.'s non-disclosure of the criminal charge is inconsistent with what is expected of a registrant and the standard set out in *Re John Doe*.

Future Fitness for Registration

42. While I have decided that A.E.'s application should be refused, I do not think that A.E. should be barred from re-applying for registration in the future. Having heard from A.E. at the OTBH, I am of the view that A.E. is remorseful for their actions.

43. The decision in *Re Sawh* (2016), 39 OSCB 2477 set out the following six factors that must be considered in making a determination on an applicant's suitability for registration after a finding by the Director or the Commission that the applicant was not suitable for registration. Such determination includes evaluating the evidence supporting each of the factors prior to making a decision on the subsequent application for registration:

- a. the applicant must show by a sufficient course of conduct that they can be trusted in performing business duties;

b. the applicant must introduce evidence of other independent, trustworthy persons with whom the applicant has been associated since the prior refusal, suspension or revocation of registration;

c. a sufficient period of time must have elapsed for the purposes of general and specific deterrence;

d. where proficiency is at issue, the applicant must demonstrate how they have specifically remediated their proficiency;

e. the applicant must demonstrate that the misconduct that led to the prior refusal, suspension or revocation is unlikely to recur in the future by no longer engaging in business with non-compliant business associates; and

f. the applicant must demonstrate remorse and take full responsibility for their past conduct.

44. If A.E. can demonstrate in the future their fitness for registration, taking into consideration the factors above, A.E. can re-apply for registration at that time.

July 3, 2024

“FELICIA TEDESCO”

Felicia Tedesco,
Deputy Director,
Registration, Inspections and Examinations Division