IN THE MATTER OF

The *Securities Act*

S.N.B. 2004, c. S-5.5

\- and -

IN THE MATTER OF

LEGACY ASSOCIATES INC.

(Respondent)

REASONS FOR THE DECISION

Date of Hearing: 12 November 2008

Date of decision: 23 March 2009

Panel:

Donne W. Smith, Panel Chair

Kenneth Savage, Panel Member

Sheldon Lee, Panel Member

Representatives:

Mark McElman	For Staff of the New Brunswick Securities Commission
Robert Boyd	For the Respondent

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REASONS FOR THE DECISION

1. INTRODUCTION

[1] On 7 October 2008, Staff (Staff) of the New Brunswick Securities Commission (Commission) filed a Statement of Allegations with respect to the Respondent, Legacy Associates Inc. (Legacy). In the Statement of Allegations, Staff were seeking temporary sanctions against Legacy relating to alleged deficiencies in Legacy's systems of regulatory compliance.

[2] On 6 November 2008, Staff and Legacy entered into a Settlement Agreement (Agreement), in which they agreed to a proposed settlement of the proceeding commenced by the Statement of Allegations. A Settlement Hearing was held on 12 November 2008, at which time this Panel was asked to determine if it was in the public interest to approve the Agreement. Counsel for Staff and counsel for Legacy filed a joint written submission in favour of the Agreement, and both counsels also made oral submissions to the Panel.

2. FACTS

[3] This matter involves the Commission's jurisdiction to oversee the conduct of legitimate market participants in the area of regulatory compliance. The facts in this matter are set out in Part II of the Agreement, which contains a Statement of Facts as agreed upon between the parties. The facts are briefly summarized below.

[4] Legacy is a mutual fund dealer registered in New Brunswick. Since 2005, Legacy has been the subject of four compliance reviews. Three of these reviews were conducted by Commission compliance staff; one was a joint review by the Mutual Fund Dealers Association (MFDA) and Commission compliance staff. Each review revealed a number of instances of material non-compliance. Legacy was informed of these deficiencies through separate written reports. The most recent compliance review was conducted in June of 2008.

[5] Due to the ongoing and numerous alleged contraventions identified in the compliance reviews, Staff commenced enforcement proceedings in the fall of 2008. Staff and Legacy have now executed the Agreement in an attempt to resolve these enforcement proceedings. The Agreement proposes that Legacy implement certain changes to its compliance structure, and be subject to certain terms and conditions during a transitional period. The proposed sanctions include numerous terms and conditions relating to regulatory compliance that are to remain in place until further order of the Commission or the Executive Director.

[6] In the Agreement, Legacy admits that it has not committed sufficient resources to regulatory compliance. Legacy admits that as a result of this lack of resources, its operations have been marked by instances of material non-compliance which constitute contraventions of New Brunswick securities law.

[7] Specifically, Legacy admits to the following contraventions of New Brunswick securities law, concerning activities occurring prior to the compliance review conducted in June of 2008:

(a) failure to ensure daily supervision of trades in terms of timeliness and the information monitored;

(b) processing trades under Limited Trading Authorizations in the absence of notes detailing the instructions received;

(c) insufficient disclosure to clients regarding switches of fee-free units of DSC funds at 0% front-end versions of the same fund;

(d) insufficient disclosure of information to clients in support of fee rebates and a failure to supervise the underlying trades for suitability;

(e) failure to maintain sufficient internal control of Legacy's back office system;

(f) failure to properly collect and retain information and records concerning leveraged accounts;

(g) failure to maintain complete and sufficient know-your-client information and documentation;

(h) failure to meet FINTRAC requirements concerning confirmation of client identity;

(i) inadequate supervision of group plans;

(j) insufficient monitoring, supervision and client disclosure of dual employment activities and the disclosure of such activities on the National Registration Database;

(k) failure to monitor, supervise and provide client disclosure of referral arrangements by sales persons;

(l) inadequate supervision of client communications; and

(m) failure to conduct certain internal audits of sub-branch offices.

[8] In the Agreement Legacy also acknowledges that Staff will be scheduling a further compliance review of Legacy's activities. If Staff discovers further issues of material non-compliance during this subsequent review, Legacy

acknowledges that Staff may institute further proceedings against Legacy and that Legacy's past non-compliance and the admissions contained in the Agreement will form part of Staff's submissions.

3. FINDINGS AND SANCTIONS

[9] The Respondent admits, and the Panel finds, that the Respondent failed to comply with New Brunswick securities law as it pertains to regulatory compliance. The regulatory contraventions made by Legacy are numerous and serious. Regulatory oversight of Legacy has been on-going for a number of years; and the oversight has involved both Commission staff and MFDA staff. This oversight repeatedly revealed the noted issues of material regulatory non-compliance which necessitated Staff commencing this action.

[10] The Panel also finds that Legacy's actions were contrary to the public interest. Though there was no evidence of actual harm to investors, the admissions of material regulatory non-compliance made by Legacy are, as submitted by the parties, important to the integrity of the capital markets in the province.

[11] The Commission has a dual role: to protect investors from unfair, improper or fraudulent practices, and to foster fair and efficient capital markets in the province. Material non-compliance such as that admitted by Legacy increases the potential for investor harm, and undermines investors' confidence in the province's capital markets. The parties are correct in their submissions that the challenge they faced in reaching an Agreement in this matter is to address the regulatory problems identified in the Agreement, while at the same time recognizing that Legacy is a legitimate market participant, and that this matter does not involve allegations of investor harm.

[12] Staff and counsel for Legacy highlight in their joint submission that the intent of Staff commencing proceedings against Legacy was two-fold: firstly, to

propose a solution to the non-compliance issues at Legacy; secondly, to request a penalty be imposed to address Legacy's past non-compliance.

[13] The Agreement contains sanctions which Staff and the Respondents jointly propose be issued against the Respondents, and which address the two intents identified in the paragraph above. In this Panel's opinion, this two-stage approach is appropriate in the circumstances.

[14] The proposed sanctions relating to resolving Legacy's compliance issues are the following:

1. Legacy will appoint and register a qualified individual to act as its lead compliance officer;
2. Legacy will engage an independent consultant to assist it in reviewing and revising its documentation and procedures;
3. Legacy's registration shall be subject to the following terms and conditions:
    a. Legacy shall not register any further mutual fund salespersons beyond the current number of 38;
    b. Legacy shall not enter into any new referral arrangements;
    c. Legacy shall terminate the New Brunswick registration of any salesperson wishing to remain dually employed as a mortgage broker; and
    d. Legacy shall not trade in exempt securities;

    all of which shall remain until further order of the Commission or the Executive Director of the Commission.

[15] The sanctions proposed to address Legacy's past non-compliance are:

1. Legacy shall pay an administrative penalty for failing to comply with New Brunswick securities law in the amount of $15,000.00; and

2. Legacy shall pay fees and expenses relating to the 23 June 2008 compliance review in the amount of $5,000.00.

[16] Beyond the terms of the Agreement and the proposed sanctions, Legacy submits that it is committed to allocating additional resources to compliance and putting in place additional compliance reporting to its board of directors.

a. Law

[17] The Panel was asked to approve the Agreement and order the proposed sanctions pursuant to paragraph 191(a) of the *Act*. Paragraph 191(a) enables a hearing Panel to consider and approve a settlement agreement.

[18] The Panel stresses that its role in considering the Agreement presented by the parties is not to substitute the sanctions it would impose for those proposed in the Agreement. Rather, its role is to ensure that the sanctions proposed by the parties are appropriate and within acceptable parameters, given the particular circumstances of the matter. Also, the Panel gives significant weight to the Agreement negotiated between the parties. This position is supported by numerous decisions of this Commission regarding settlements, including *Re Locate Technologies Inc. et al.* released on 29 October 2008; *Re Sang H. Park* released 20 January 2009; and *Re James H. Oagles et al.* released on 21 July 2008.

[19] This Commission has outlined, in several recent decisions including those listed above at paragraph [18], potentially relevant factors to consider when deciding on the appropriateness of proposed sanctions in a settlement agreement. The parties, in their joint submission, list some of these factors, which include:

(a) the seriousness of the allegations proved,
(b) the respondent's experience and level of activity in the marketplace,

(c) whether the respondent recognizes the seriousness of the improper activity,

(d) the restraint of future conduct that is likely to be prejudicial to the public interest (with reference to past conduct);

(e) the need to deter not only those involved in the case being considered, but also any others who participate in the capital markets, from engaging in similar improper activity;

(f) any mitigating factors;

(g) the size of any profit (or loss avoided) from the illegal conduct,

(h) the reputation and prestige of the respondent; and

(i) the remorse of the respondent.

[20] To assist in its determination of what is in the public interest, the Panel considered both the specific circumstances of this matter and the above factors.

b. Analysis of factors and decision on proposed sanctions

[21] Legacy has admitted to several areas of material non-compliance. As noted above, this matter does not involve any allegations of investor harm. However, this does not diminish the seriousness of Legacy's actions. In the Panel's opinion, Legacy's lax regulatory compliance systems, if not corrected, will put investors at risk. Material regulatory non-compliance also harms the integrity of the capital markets in the province.

[22] Legacy is a legitimate market participant. It is a registered mutual fund dealer in New Brunswick; it is aware of the regulatory requirements and ought to have put in place sufficient systems and resources to ensure regulatory compliance. Legacy has admitted that it has not committed sufficient resources to regulatory compliance, which has resulted in several contraventions of New Brunswick securities law. Legacy's admitted contraventions, highlighted above at paragraph [7], are of great concern. The Panel is of the opinion that the

material breaches admitted by Legacy are, in their entirety and continuity, extremely serious.

[23] Legacy does recognize the seriousness of its actions by participating with Staff in finalizing this Agreement. The Panel, however, finds it disconcerting that it took the commencement of enforcement action to spur Legacy to recognize the seriousness of its regulatory non-compliance. It would have been preferable for all involved if Legacy had worked with Commission and MFDA compliance staff in addressing their compliance issuers prior to warranting enforcement action.

[24] As for mitigating factors, the Panel finds that Legacy has cooperated with Staff in this proceeding, and has committed to putting in place more stringent compliance systems. Legacy has acknowledged that Staff will be commencing further enforcement action if material non-compliance continues to be an issue with its operations. Also, the Panel recognizes that Legacy's reputation may have also suffered as a result of the filing of this action, which may mitigate against more stringent penalties.

[25] The proposed sanctions seek to address Legacy's material non-compliance by putting in place interim terms and conditions that, amongst other things, prohibit activities that have the greatest potential to cause harm to investors. These interim terms and conditions also attempt to incent Legacy into creating and working within a culture of compliance.

[26] The parties, in both their oral and written submissions, indicated that after a reasonable period the Commission will arrange a further compliance review to determine that the required corrections to Legacy's compliance systems have been made. Both parties also agreed that if Commission compliance staff are not satisfied that the required corrections were made, then further action by Staff against Legacy will be taken.

[27] With regards to restraining future conduct that may be prejudicial to the public interest, the proposed sanctions are structured to serve both a specific and general deterrent purpose. The sanctions specifically address Legacy's particular non-compliance issues and seek to restrain any future non-compliance, while at the same time penalizing Legacy for its past contraventions.

[28] The proposed administrative penalty is not substantial, but should be sufficient to deter other mutual fund dealers from making the same contraventions made by Legacy. The parties submit that the amount of the administrative penalty was also influenced by the current state of the financial markets, and that Legacy's resources would be better spent on resolving its compliance issues. The Panel accepts this as being valid reasoning.

[29] The Panel also stresses that it found to be of particular importance the parties' submissions that Legacy would work with the Commission's compliance staff throughout the identified transition period to help ensure that all necessary compliance systems are put in place in a timely fashion – approximately six months.

[30] Based on the above analysis, the Panel finds that the sanctions proposed in the Agreement are appropriate in the circumstances. The parties submit that the proposed sanctions achieve the best possible resolution to the issues at Legacy. The Panel shares this view.

4. CONCLUSION

[31] It is for the reasons set out above that the Panel finds it in the public interest to approve the Agreement and issue the 12 November 2008 Order in this matter.

Dated this 23rd day of March, 2009

_____“original signed by”____________
Donne W. Smith, Panel Chair

_____“original signed by”____________
Kenneth Savage, Panel Member

_____“original signed by”____________
Sheldon Lee, Panel Member

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