ALBERTA SECURITIES COMMISSION

NOTICE AND REQUEST FOR COMMENT

Proposed Alberta Securities Commission Rule 15-501
Rules of Practice and Procedure for Commission Proceedings

26 May 2008

Introduction

The Alberta Securities Commission (the **Commission**) seeks comment on proposed Commission Rule 15-501 ***Rules of Practice and Procedure for Commission Proceedings*** (the **Rule**), attached to this notice as an Appendix.

The Rule would apply to: (i) requests from staff of the Commission (**Staff**) for an enforcement sanction order under sections 198 and 199 of the *Securities Act* (Alberta), RSA 2000 c. S-4 (the **Act**); (ii) applications brought before the Commission in relation to take-over bids or issuer bids; and (iii) appeals and reviews before the Commission under the Act.

The Commission requests comments on the Rule by **July 25, 2008** and proposes to implement the Rule by **October, 2008**.

Background

The Rule is designed to foster efficient, cost-effective and timely proceedings before the Commission that provide fairness to each participant and further the public interest.

The Rule represents a comprehensive outline of the procedural obligations that are imposed upon all parties who participate in a proceeding before the Commission. The Rule codifies both new and existing but unwritten practices and procedures. The two most significant elements of the Rule are: (i) the creation of a pre-hearing conference process to strongly encourage all participants to address and resolve preliminary issues early; and (ii) the imposition of reciprocal disclosure obligations to allow all hearing participants to be fully prepared.

Overview of the Rule

The following is a summary of the Rule:

Part 1 - Definitions

Part 1 contains a list of defined terms that are used throughout the Rule. Definitions that are of particular importance include: (i) panel, which includes a single member of the Commission who is authorized under the Act to take action in relation to a proceeding; (ii) party, which makes it clear that Staff of the Commission is a party to every proceeding; and (iii) proceeding, which identifies the matters brought before the Commission to which the Rule applies.

Part 2 - General Provisions
Part 2 includes the following provisions: (i) the overarching purpose of the Rule - securing an efficient, cost-effective and timely determination of the issues raised in a proceeding while respecting the rules of natural justice; (ii) the ability of a panel to waive or vary any provision of the Rule if it is in the public interest to do so; and (iii) the potential consequences of failing to comply with the Rule, or an order or direction from a panel made pursuant to the Rule.

Part 3 - Commencing Proceedings
Part 3 sets out how a person or a company may commence a proceeding before the Commission, provided the Act contains the authority for that person to commence such a proceeding. Part 3 also sets out the procedure for bringing motions, both before and during a hearing. Lastly, Part 3 outlines to whom notice of hearings, applications and motions are to be provided.

Part 4 - Summons and Production
Part 4 delineates the "without notice" procedure to be followed in relation to requests for summonses during a proceeding.

Part 5 - Sending and Delivery of Documents
Part 5 includes the following provisions: (i) the methods by which a notice or document may be sent to a person, company, or Staff; (ii) how the date upon which any notice or document was received will be determined; (iii) when notices or documents need not be sent to a person or company; (iv) how to prove that a document was sent in accordance with the Rule; and (v) how and when to seek variances or waivers from a panel regarding the obligation to send a notice or document.

Part 6 - Appearance and Representation Before a Panel
Part 6 outlines, among other things, how a panel will determine requests by a non-party to appear before the panel during a proceeding, how a party may be represented in a proceeding, how and when counsel may withdraw as a party's representative, and the consequences of failing to appear during all or part of a proceeding.

Part 7 - Disclosure
Part 7 addresses the disclosure related obligations of each party, including: (i) Staff's obligation to provide an opportunity to inspect relevant material to each respondent in an enforcement matter before a panel; (ii) the pre-hearing disclosure required of other parties in a proceeding; and (iii) disclosure related to the proposed use of an expert witness.

Part 8 - Pre-Hearing Conference
Part 8 sets out the various issues a pre-hearing conference may address in order to promote the efficient use of hearing time and to ensure that proceedings are completed in a timely fashion. In addition, Part 8 clearly indicates that agreements between the parties and orders, rulings or directions from a panel are binding.

Part 9 - Adjournments
Part 9 explicitly point outs that proceedings are expected to progress as scheduled, and that adjournments will not be granted as a matter of course. Part 9 outlines the various factors that a panel may consider in determining whether or not to grant an adjournment request.

Part 10 - Hearing Procedure
Part 10 includes provisions addressing how a panel will determine the location of a hearing, and whether or not the use of videoconferencing or other technology will be permitted during a hearing.

Part 11 - Public Access to Hearings and Related Documents
Part 11 expressly indicates, subject to the delineated exceptions and a panel's decision to order otherwise, the public nature of hearings and hearing related documents, including evidence admitted at a hearing. Part 11 also addresses issues related to the presence of the media.

Providing Comments
The Commission invites written comment on the Rule **by 17:00 on July 25, 2008**. If you are not sending your comments by email, you should also forward a diskette containing the submissions (in Windows format, Word). Comments will be publicly available and will be published on the Commission website at www.albertasecurities.com.

Please direct your comments to:

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LIST OF COMMENTERS

Proposed ASC Rule 15-501
Rules of Practice and Procedure for Commission Proceedings

Request for Comment May 26, 2008

	COMMENTER	NAME	DATE
1.	Borden Ladner Gervais LLP	John D. Blair Barrister & Solicitor	July 23, 2008
2.	May Jensen Shawa Solomon LLP	Glenn Solomon Barrister & Solicitor	July 31, 2008

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VIA EMAIL to samir.sabharwal@seccom.ab.ca

July 23, 2008

Alberta Securities Commission
4th Floor, 300 - 5th Avenue S.W.
Calgary, AB T2P 3C4

Attention: Samir Sabharwal
Legal Counsel

Dear Sir:

Re: Proposed Rule 15-501

We will restrict our comments to Part 7 of Proposed Rule 15-501 (the "Proposed Rule"), dealing with Pre-Hearing Disclosure.

We believe section 7.3, dealing with expert witnesses, is reasonable in theory, although we would suggest that the notice period in section 7.3(a) be 120 days, instead of 90. This would then allow a responding party more than 45 days to retain, instruct and receive a rebuttal report. In our experience, 45 days is often insufficient in that regard. In virtually all cases the party providing the initial expert report will be Staff, who will have had plenty of time to arrange for an expert report, so that our proposed 120-day period should not be unreasonable or prejudicial.

We disagree with section 7.2 of the Proposed Rule, requiring respondents to inform Staff of their case. We recognize that other securities commissions have imposed similar requirements, but we do not believe they are reasonable. The obligation of Staff to provide Pre-Hearing disclosure is rooted in principles of fairness and natural justice, and deriving from decisions such as *Stinchcombe*. Those principles do not, however, apply to accuseds in criminal proceedings or respondents in quasi-criminal or regulatory proceedings. In cases such as *Re Kusumoto* (2006 ABASC 1680) the ASC has confirmed that respondents are entitled to procedural fairness, including "knowing the case to be met and being able to make full answer and defence". In *Re Kusumoto*, the Panel also noted:

> "There is no dispute that the principles of natural justice and fairness for enforcement proceedings under the *Act* support

> the application of a standard of disclosure of evidence similar to that required in a criminal trial."

In other words, long-established principles of procedural fairness for administrative proceedings require ASC Staff to disclose its case to respondents. There is simply no corresponding or reciprocal obligation on the part of respondents to disclose their case to Staff, however. The Proposed Rule changes that, and imposes such a burden on respondents. It converts a Staff obligation into a reciprocal obligation even though there is no legal or administrative basis for doing so.

It is our view that Staff should continue to be obliged to disclose its case, and then to prove that case based on cogent evidence. There is no basis for respondents to assist Staff in the presentation of its case by advising Staff in advance about the identity of witnesses and what they will say. This is particularly so when the witness is the respondent.

Further, section 2.4 of the Proposed Rule describes the consequences for non-compliance of the Pre-Hearing Disclosure obligations in section 7.2. Under 2.4, a Panel would have the authority to deny a party's request to call a witness or introduce a document. This would apply equally to Staff or a respondent. However, another of the consequences (section 2.4(b)) is the assessment of costs. Under section 202 of the *Act*, costs are strictly a one-way street. The only party that can be directed to pay costs is a respondent, not Staff. Staff can never be penalized in costs because there is no statutory jurisdiction for that. In other words, not only does Proposed Rule 7.2 confer disclosure obligations on respondents that are not founded in principles of natural justice, Proposed Rule 2.4(b) provides for a penalty that can only be imposed upon respondents, not Staff. This too renders section 7.2 unfair, in our view.

We recognize that if respondents are obliged to provide a witness list, summaries of evidence and copies of documents to Staff in advance, it could expedite some hearings. However, having participated in many such hearings, the writer has seldom encountered a case where the hearing would have been expedited by Proposed Rule 7.2. The actual effect of 7.2 would be to assist Staff in conducting its prosecution, which is not a valid reason for the proposed changes. The Proposed Rule codifies the disclosure obligations that already apply to Staff based on principles of fairness and natural justice, but then confers similar obligations on respondents who would have no such corresponding duties.

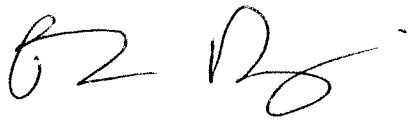
Finally, Proposed Rule 7.2 overlooks the fact that, in many cases, respondents do not know what witnesses they will definitively call or what evidence they will elicit from those witnesses, until Staff has presented its case. Simply because Staff provides disclosure to respondents (including the enhanced disclosure contemplated by Proposed Rule 7.1) does not mean that respondents will then automatically know what witnesses they may call, what those witness may say, or what documents to introduce. Oftentimes, for example, the cross-examinations of Staff witnesses obviate the need to call a respondent witness or introduce other documents.

Our suggestion is that Proposed Rule 7.2 be omitted. To the extent that Proposed Rule 7.1 confers obligations upon Staff that exceed its existing disclosure obligations under law, then such components of rule 7.1 could be eliminated as well.

In terms of expediting Hearings, it has been and should continue to be the practice that Staff continue to winnow the *Stinchcombe* disclosure down to an actual set of exhibits that they propose to put before a Panel during the Hearing. It would be reasonable to require Staff to provide such a list 30 days before the Hearing. It would also be reasonable to invite respondents to comment on Staff's proposed documents, including raising evidentiary objections in advance or suggesting the addition of other documents to the proposed exhibits. Those steps would expedite hearings. However, in our submission, Proposed Rule 7.2 goes well beyond expediting hearings into the area of interfering with or compromising principles of fairness and natural justice.

Yours truly,

BORDEN LADNER GERVAIS LLP



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VIA EMAIL (Samir.Sabharwal@seccom.ab.ca)

July 31, 2008

Samir Sabharwal
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Dear Sir:

Re: Proposed Alberta Securities Commission Rule 15-501
Rules of Practice and Procedure for Commission Proceedings

Thank you for alerting us to the proposed Alberta Securities Commission Rule 15-501 Rules of Practice and Procedure for Commission Proceedings, and for inviting our comments thereon. Thank you, as well, for confirming that we could provide our comments by August 1, 2008. We are pleased to have the opportunity to provide some input on the process and rules, particularly in light of this firm's frequent attendance before the Securities Commission.

Definitions

In the definitions section of the Rules, some of the definitions appear to be redundant, given that they appear in the Act. These include Section 1.1 (b), (e) and (m). Other terms in the definitions section appear in the Act, but have a different definition. This includes Sections 1.1(d), (g) and (q). This will create the potential for some confusion. In addition, some of the defined words have ordinary meanings in common parlance, and therefore the words in the Rules should be capitalized throughout to avoid ambiguity. We note that Section 223(ff) of the Act provides authority to the Commission to define, for the purposes of the Act, terms used in the Act that are not defined in the Act. In those cases where a defined term in the Rules also appears as a defined term in the Act, we suggest that the Rules should have a modified term.

Section 1.1(c) indicates that a business day is a day on which the commission is open for business. Nobody other than the Commission would know that information. The Court issues a Court calendar indicating which days it will not be open for business. We suggest that the Commission create something similar on its website, and that the Rules reference that.

Section 1.1(l) deals with the meaning of a party. While we appreciate that there are different descriptions for the different functions within the Commission, the fact is that the Alberta Securities Commission is a single entity at law. While the Commission is the decision maker, from the respondent's perspective, it is also the opposing party.

General Provisions

Section 2.1, where it references "those provisions", is unclear with respect to which provisions it is referring to.

Section 2.2 provides for the panel exercising its powers on its own initiative. The exercise of powers *ex mero motu* is of concern. It has the tendency to make the decision maker the complainant, and therefore must be exercised with extreme caution so as not to create the apprehension of bias.

With respect to Section 2.3, we suggest that any waivers or variances as referred to therein should be determined not only in light of prejudice to the public interest, but also in light of prejudice to the parties. We submit that the parties have a more direct interest in the procedural rules than the public.

Commencing Proceedings

With respect to Section 3.2, we suggest that the notice of appeal should be a document separate from the record, decisions and transcripts. Often those latter items are controlled by the Securities Commission, and there is the possibility that a potential appeal could be delayed or frustrated as a result of the respondent not having access to those materials. We also note that this shifts the obligation of preparing a record, a task usually within the purview of the administrative tribunal.

Each of Sections 3.2, 3.3 and 3.4, conclude with an indication that "upon compliance with the above requirements, the Registrar will notify the parties …". This appears to delegate the determination of compliance to the Registrar. There must be a right of hearing, regardless of form, and that should occur without any risk of being stymied by bureaucracy. The Court has resolved this type of concern by allowing for a Fiat. There is no similar mechanism for proceedings before the Alberta Securities Commission. In the case of Section 3.2 and 3.3, this seems to only be a limitation on the party that is not the Securities Commission. The Registrar, of course, is part of the Securities Commission. Therefore, the opposing party seems to be controlling the threshold to an audience with the tribunal. The absence of the ability to obtain a Fiat, or to easily get beyond findings of the Registrar of the Commission with respect to whether there has been compliance, is compounded by the Securities Commission not having fixed Chambers dates or private Chambers access beyond what the Securities Commission employees can schedule. Simply, this creates the potential for access to justice to be denied completely, and is therefore of concern.

With respect to Section 3.3(b), we notice there is not a process for a response with affidavits, documents and case law to be provided. We suggest that there should be. Similarly, with respect to Section 3.4(a)(iv), we submit that there should be a right to cross-examine on affidavits, and there should be a deadline for response affidavits, documents and case law intended to be relied upon. If the purpose is to ensure that proceedings are dealt with fairly, openly, and on a level playing field, then the foregoing would stand to reason.

With respect to Section 3.4(b), a written notice of motion will now be required if a party to a proceedings seeks an order, ruling or direction from the panel during a hearing. Often, for example when a question is being objected to, an order, ruling or direction is being sought from the panel during a hearing. It is unclear how a notice of motion can be prepared before the question is asked, and the objection needs to be made. If this rule were applied as written, this would create endless delays during hearings, and would not operate in the interests of efficiency.

Summons and Production

Section 4.1 creates the ability for a respondent in the hearing to summons a witness. We encourage that development. However, the rule proposes that there be a written request to the Registrar. The Registrar is part of the Commission. The Commission is the opposing party from the respondent's perspective. The scheme of the Act is such that the Commission is often the complainant, the authority to commence an investigation, the investigator, the authority to prosecute, the prosecutor, the decision maker, and the beneficiary of the financial decisions made. This proposed rule adds that the Securities Commission will also be the party controlling whether and when a summons is issued. The Commission, in obtaining a summons, will not have to send anything to the respondent in order to do so. We note that in the Court of Queen's Bench lawyers are entitled to issue a notice to attend as witness on their own signature. We suggest that a similar model be adopted for Commission proceedings.

Appearance and Representation Before Panel

Section 6.3 of the proposed Rules is of some significant concern. It allows counsel for a party to a proceeding to withdraw as counsel "before a hearing date has been set". The present practice of the Securities Commission is that a Notice of Hearing is issued, and the return date is generally two or three weeks thereafter, at most. The return date is the date on which the hearing date is set. Often, by that date, disclosure has not been obtained or reviewed, and counsel is often rushed to make the preliminary appearance without having an opportunity to ensure a full retainer or a proper understanding of the case. Without disclosure, and an opportunity to review that disclosure, neither the client nor counsel can decide whether counsel can or should take the case on.

Section 6.3 limits the ability to retain counsel, as no counsel will appear without having a proper opportunity to review disclosure, consider the case, and ensure a proper retainer. A proper retainer cannot be determined without knowing the length or the hearing, which itself will only happen when the hearing date is set. This has the potential to enslave counsel to the respondent. It seems to give the Securities Commission the choice of counsel for the respondent, which we submit is not fair given that the Securities Commission is the opposing party in these proceedings. The provision runs contrary to the lawyers' Code of Conduct, in that lawyers will often have an ethical requirement to withdraw, and that can not be conveyed with any particularity to the opposing party or the decision maker given the surrounding issues of privilege. That is, the reasons for withdrawal are usually privileged, and could involve matters such as the instructions being provided, the intention of the client, a loss of confidence, or a deterioration in a relationship. The decision maker and the opposing party should not know any of those matters. Therefore, at best, counsel would only be able to provide vague reasons for withdrawing. It is hard to fathom of any circumstance where those reasons would be greater than "the public interest", which appears to be the stated test for allowing counsel to withdraw.

We know of no basis on which the Securities Commission would have jurisdiction to order counsel to appear. The Court has that jurisdiction, as counsel are officers of the Court. Counsel are not officers of the Securities Commission. That is because the Court is never the opposing party. The Securities Commission in proceedings before it is always the opposing party. This is a case, we submit, where the Securities Commission is not like the Court, and it cannot have the same control over the independence of counsel as a Court would have.

The test for granting leave to withdraw, when it is "not prejudicial to the public interest", is vague and has the tendency to be arbitrary, particularly given the restrictions noted above with respect to the inability of counsel to violate privilege in disclosing the reasons for withdrawal.

We also note that Section 6.3 does not deal with the decision of the client to change counsel, or to discharge counsel. In those circumstances, the lawyer's client and the Commission may make competing decisions. We submit that the lawyer and his client should make decisions involving counsel, not the decision maker on the merits or the opposing party.

We note that there is no particular need for this rule. Rather, a rule indicating that, where a party has obtained counsel, and counsel has appeared to set the hearing date, the withdrawal or discharge of counsel will not be a reason for adjourning the hearing would suffice. This would protect the integrity of the process, it would allow proceedings to move forward expeditiously, and it would obviate the fair concern of having proceedings frustrated by the withdrawal or discharge of counsel.

We also note that Section 6.3 does not deal with agents, but only with counsel. Section 6.2 mentions the ability to have agents appear. We submit that, if agents can withdraw at will, surely counsel with an occasional professional duty to do so, can also do so. There is also nothing barring counsel from merely appearing as "agents", as they do in the criminal Courts when not fully retained, and therefore counsel will appear before the Commission on a piecemeal basis to avoid the application of this rule.

With respect to Section 6.3(a), we suggest that where there is a withdrawal of counsel or an agent, the withdrawing counsel or agent should have to provide to all parties the last known contact information of the respondent, as is required in a Notice of Ceasing to Act in the civil courts, with more. The more should acknowledge that there is technology by way of fax and email, which should also be provided in the circumstances.

We are concerned, as well, with Section 6.5 of the proposed Rules. With respect to the *in limine* requirement that the panel is "not satisfied that the party to the proceeding has received notice", we consider that this would rarely if ever be satisfied. The new rules deem notice by the method of service pursuant to Section 5.1, and therefore the panel will likely always be satisfied that notice has been received. We note that a failure to appear allows a proceeding to continue in a party's absence. There should be a slip rule, as there is in the Rules of Court, in the event that the failure to appear occurred by inadvertence, accident or mistake. Section 6.5(d) provides that if a party does not appear at a proceeding, the panel may direct that the party is not entitled to any further notice of any step in the proceeding. We see the potential for serious natural justice issues to arise here. There is a right to notice to parties to a proceeding, and to a respondent in an administrative proceeding. That right cannot be obviated merely by a failure to attend on one occasion. We also note that there is no accounting for "reasonable cause" for the failure to appear, and that should be incorporated into Section 6.5. We do not see the problem with having to continue to provide notice to someone after they have failed to make one appearance. We

suggest that the right to notice mandates at least that. We see the possibility for unfairness in this proposed rule. For example, if counsel takes ill suddenly, this rule could operate to thereby disentitle the respondent to any further notice of proceedings. With respect, this seems punitive and excessive, and contrary to the rules of natural justice.

Disclosure

With respect to Section 7.1(a) a respondent who wishes to have a copy of the disclosure is responsible for paying the copying costs. The cost of that copying should be addressed. We submit that, if the document is important enough to be disclosed, then it is important enough to be provided to a respondent. The requirement to pay for copies places an obstacle before the right to make full answer in defence. A respondent should not have to pay for disclosure in circumstances where the respondent is merely seeking to defend proceedings being brought against him. The panel should, however, have residual authority to order that a respondent pay for copies of items that are marginally relevant, on the application of the parties.

With respect to Section 7.1(d), we note that the time for additional disclosure (witness lists, will say statements, and copies of documents to be entered in evidence) is 30 days prior to the commencement of a hearing. Section 7.2 would require the respondent to provide the response material within 15 days. Given that Securities Commission proceedings are often very voluminous, we suggest that this timing is simply too short. We suggest that 7.1 should be invoked 60 days before the commencement of a hearing, and section 7.2 should be invoked 30 days before the commencement of a hearing.

With respect to Section 7.1(b)(ii), we note the reference to transcripts of an interview. We submit that those should be part of the initial disclosure. Section 7.1(b) should be "in addition to the requirements of Section 7.1(a)".

With respect to Sections 7.5 of the proposed Rules, we are concerned that it may serve to broaden Section 7.2, Section 7.5 does not exclude privileged information. The wording of Section 7.5 is very broad. We could see circumstances where the breadth of Section 7.5 could have a negative impact on the rules of natural justice.

Pre-Hearing Conference

Section 8.1 should be more specific as to when, in the course of a proceeding, the Pre-Hearing Conference will be held. That will impact how the considerations in Section 8.1 are applied.

We submit that the panel dealing with a Pre-Hearing Conference should not be the hearing panel, given that the parties are being "directed" to discuss admissions and hearing strategy. With respect to Section 8.1(d), we note that one of the issues at a Pre-Hearing Conference will be to determine if any party intends to call expert evidence. The intention to call expert evidence must be privileged until reports are exchanged. Similarly, an indication that an expert may be called, when made to the decision maker on the merits, could be prejudicial to a party if they subsequently decide not to call expert evidence. Where a party changes its decision to call expert evidence, that should not give rise to the potential of any adverse inference, and the only way to protect against that is to ensure that the Pre-Hearing Conference is heard by persons other than those hearing the merits.

With respect to Section 8.2, dealing with the scheduling of a Pre-Hearing Conference, we would expect that scheduling would be in consultation with counsel. Counsel often have other obligations, and we submit that those should be afforded reasonable accommodation.

Adjournments

With respect to Section 9.1, dealing with adjournments, we note that hearings will be conducted as and when scheduled in order to achieve the purposes of the Rules. We assume that counsel for a party will be consulted as to their availability, if they are retained in whole or in part at the time that the hearing is scheduled, so that adjournments need not be sought for "convenience". Otherwise, the limitation on adjournments for the purpose of convenience, combined with the limitations on counsel withdrawing, could have highly undesirable results for both the Securities Commission and the respondents.

Hearing Procedure

We note that Section 10.1 allows each party to the proceeding to "question" a witness. We submit that the party calling the witness should be entitled to question the witness. The other parties should be entitled to cross-examine the witness. We note that the panel would have an entitlement to question the witness during the proceeding. In our experience, panels of the Commission already exercise that ability. However, notwithstanding any rule, a panel questioning a witness has its limits. When those limits are exceeded, the hearing tends to lack fairness. We submit that it is most appropriate for the panel to exercise some restraint in questioning witnesses, to ensure that the adversarial process as between the prosecution and the respondent is maintained.

We note that Section 10.2 indicates that the panel will determine the manner in which a hearing will be held. While we accept that to be appropriate on a broad basis, the provision itself is very broad and must be limited by fair process and natural justice.

With respect to Section 10.3(b), we note that the party requesting certain equipment will be required to pay for the cost of that equipment. We suggest that this should be the Alberta Securities Commission's actual cost.

General

A provision indicating that the singular intends the plural, and the plural intends the singular should be added, given that the terms used in the proposed Rules seem to be principally in the singular.

Thank you for the opportunity to provide some input with respect to these Rules.

Yours truly,

MAY JENSEN SHAWA SOLOMON LLP

GLENN SOLOMON
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