



Advocis  
10 Lower Spadina Avenue  
Suite 600  
Toronto, ON M5V 2Z2  
416.444.5251  
1.800.563.5822  
F 416.444.8031  
[www.advocis.ca](http://www.advocis.ca)

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Canadian Council of Insurance Regulators  
Canadian Insurance Services Regulatory Organizations  
c/o CCIR Secretariat  
5160 Yonge Street, Box 85  
Toronto ON M2N 6L9

Sent via email: [ccir-ccrra@fscs.gov.on.ca](mailto:ccir-ccrra@fscs.gov.on.ca)

Dear Sirs/Mesdames:

**Re: Guidance on the Conduct of Insurance Business and Fair Treatment of Customers**

On behalf of Advocis, The Financial Advisors Association of Canada, we are pleased to provide our comments in regards to the Canadian Council of Insurance Regulators and Canadian Insurance Services Regulatory Organizations (collectively, the “Regulator”) consultation draft of the Guidance on the Conduct of Insurance Business and Fair Treatment of Customers (the “Guidance”).

## **1. ABOUT ADVOCIS**

Advocis is the association of choice for financial advisors and planners. With more than 13,000 members across the country, Advocis is the definitive voice of the profession, advocating for professionalism and consumer protection. Our members are provincially licensed to sell life, health and accident and sickness insurance, as well as by provincial securities commissions as registrants for the sale of mutual funds or other securities. Members of Advocis are primarily owners and operators of their own small businesses, creating thousands of jobs across Canada. Advocis members provide advice in several key areas, including estate and retirement planning, wealth management, risk management, tax planning, employee benefits, critical illness and disability insurance.

Professional financial advisors and planners are critical to the ongoing success of the economy, helping consumers to make sound financial decisions that ultimately lead to greater financial stability and independence both for the consumer and the country. No one spends more time with consumers than advisors and planners, educating them about financial matters and helping them to reach their financial goals. Advocis works with decision-makers and the public, stressing the value of financial advice and striving for an environment in which all Canadians have access to the advice they need.

## **2. OUR COMMENTS**

Question #1: Does this guidance present contradictions with existing or future local instruments related to fair treatment of customers?

We do not believe that the Guidance presents substantive contradictions with existing local instruments related to the fair treatment of customers. The Guidance and other local instruments are designed to fundamentally adhere to the Insurance Core Principles of the International Association of Insurance Supervisors, so they are aligned in spirit.

The Guidance is perhaps more fulsome than other recently-published local instruments, such as the Financial Services Commission of Ontario's ("FSCO") consultation draft of its *Treating Financial Services Consumers Fairly* guideline,<sup>1</sup> as the Guidance also deals with business conduct principles including outsourcing, product design and product promotion.

Regardless, the business conduct principles in the Guidance are part of the same ecosystem of treating customers fairly. The business conduct principles provide greater detail on certain applications of the overarching principles (such as in regards to product design, conflicts of interest, complaint handling and privacy) in furtherance of integrating these ideas throughout business practices. We agree with Regulator's desire to cultivate a consumer-focused business culture that goes beyond strict legal requirements. We also see the Guidance as yet another example of the shift in regulatory focus from solvency regulation to market conduct regulation, which we believe is the right approach to advance the primacy of the consumer's perspective.

Question #2: Does this guidance strike the right balance between roles and responsibilities of Insurers, Distribution Firms, agents and representatives?

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<sup>1</sup> FSCO backgrounder available at [https://www.fSCO.gov.on.ca/en/about/superintendent\\_guidelines/pages/default.aspx](https://www.fSCO.gov.on.ca/en/about/superintendent_guidelines/pages/default.aspx).

The critical role of advisors and planners continues to be understated in the Guidance and in the overall regulatory framework. The Guidance notes that “... agents and representatives are often the first to enter into contact with Customers, through their Distribution Firm.” We feel that this critical point often does not garner the attention it deserves: financial advisors and planners are, in many cases, the consumer’s only direct touchpoint with the entire financial services sector, so they must also be the key consumer safeguard. And if a key tenet of financial services regulation is to protect consumers, financial services regulation must be crafted from the consumer’s perspective.

The way forward is clear: it is time to elevate financial advice and planning to a profession – by raising the proficiency standards of intermediaries and re-aligning the regulation of advice and planning so that it accords with the modern consumer’s perspective, we could solve more consumer protection issues, more dynamically and effectively than prescriptive regulation ever could.<sup>2</sup> And as a profession, advisors and planners must be granted the same respect as other professionals and be granted a key role in their own regulation.

This brings us to our major concern with the Guidance: while we are supportive of the principles espoused in the draft, we are concerned with how the Guidance will be implemented. The Guidance is drafted at a high level, and to put its intention into action, some entity must be charged with taking the lead on the interpretation, implementation and enforcement of the concepts therein.

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<sup>2</sup> Advocis has long been a key advocate for the professionalization of advisors and planners: in 2013, we launched the *Raising the Bar Professions Model* initiative and we were the driving force behind *The Financial Advisors Act, 2014*, which was the first piece of legislation in Canada that would have professionally recognized advisors and planners. That legislation had the support of all of Ontario’s major political parties, but it died on the order paper with the call of Ontario’s 2014 election. However, Advocis’ efforts served as a call to action and a major reason the Government established its Expert Committee to study the issue.

Rather than sitting idly by as the Expert Committee process unfolded, Advocis continued the push towards professionalism. In fact, the centrepiece of Advocis’ 2018-2022 strategic plan is to move beyond a membership association of advisors committed to professionalism and become a true professional association. This will be executed via a multi-faceted approach, with one of the key pillars being a new membership requirement: starting on January 1, 2019, all new members of Advocis will be required to achieve a recognized professional credential.

In conjunction with this requirement, Advocis will be launching two new designations aimed at newly-licensed advisors who are ready to establish themselves as professionals through a deeper understanding of the skills needed to build a sustainable business that is compliant with legal, regulatory and ethical standards.

Advocis is taking the lead to raise the professional bar for all financial advisors and planners so consumers can trust that they have the knowledge, competence and integrity to provide the high-quality professional service consumers deserve.

We urge the Regulator to ensure that stakeholders such as Advocis, which represents the financial advisors and planners who interact directly with the public, be granted a leadership role throughout this initiative. Advocis' position stands in stark contrast to entities such as the CLHIA which, despite first and foremost representing the interests of their member insurance companies, have previously been trusted by the Regulator to lead the advancement of regulatory and public policy.

The Regulator must be cognizant of the competing loyalties that could challenge the CLHIA's ability to give full effect to the Guidance. Consider for a moment that the senior executives of CLHIA's member companies have a fiduciary duty to their respective companies and shareholders. Also consider that these same executives direct the actions of the CLHIA, being the trade association for the insurance companies. Further, an insurance company's duty to the consumer/client is to treat them fairly, which is a far lower duty than the fiduciary duty their executives owe to the company. The potential challenge to fulfilling the spirit of the Guidance is clear.

At the other end of the spectrum is Advocis: members of our professional association voluntarily agree to adhere to a Code of Professional Conduct<sup>3</sup> that features, as its primary tenet, the advisor's commitment to serving the best interest of the client. As such, Advocis and its member advisors do not face the competing loyalties that necessarily impair the ability of the CLHIA and its member companies to implement the Guidance. Therefore, it is clear that professional associations such as Advocis must be trusted with a leadership role if the Regulator and consumers are to fully realize the benefits of the Guidance.

Question #3: CCIR and CISRO are mindful that in some industry sectors, the introduction of this guidance may raise questions about the possibility that intermediaries may be subject to multiple audits by regulators, self-regulatory organizations and insurers in a given year. CCIR and CISRO will address any need for clarification and invite stakeholders to comment.

We agree with the Regulator's concern that the introduction of the Guidance alongside existing requirements may result in intermediaries being subject to multiple audits. Our members already feel a heavy compliance burden that detracts from the time they can spend face-to-face with their clients. Nonetheless, the principles in the Guidance are of the greatest importance and should permeate everything advisors and planners do. The question is how to achieve this most efficiently and effectively and without harming the ability of advisors and planners to provide the utmost in service to clients.

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<sup>3</sup> The Advocis *Code of Professional Conduct* can be found at: <http://www.advocis.ca/pdf/Advocis-CPC.pdf>. The explanatory notes can be found at: <http://www.advocis.ca/pdf/AdvocisCPC-ExplanatoryNotes.pdf>.

## **Going beyond ‘fair treatment’ to the best interest of consumers**

We believe the best way to make the concepts in the Guidance meaningful is to animate them through a duty to act in the client’s best interest. However, given the gravity of a best interest duty, such a duty must be implemented in a particular and careful manner:

*Subjecting advisors and planners to a best interest duty without granting them professional standing would be fundamentally unfair*

Certain stakeholders have argued that a best interest duty be implemented, and compliance therewith judged, by regulators who are distinctly separate and uninvolved with the day-to-day operation of providing retail clients with financial advice. Given this detachment, it is our position that regulators do not appreciate the complete nature of the work that advisors and planners do and are therefore not in a proper position to apply “best interest” principles to their daily practice. This is not intended to be a slight; this is just the reality that regulators are sensibly focused on “macro” issues of laying the groundwork for healthy, functioning and fair markets.

A best interest duty is a professional standard of care meant to ensure that a client receives the utmost in their advisor’s care and judgment, driven by an underlying ethical responsibility to do what is right for that client. It necessarily involves subjective assessments that take into account the client’s objectives, risk tolerance and financial position, as well as external conditions known at the time and projected out into the future. The breaching of a best interest obligation carries significant ramifications for the client, advisor, and the reputation of the industry as a whole, so a fair hindsight determination of whether a decision was in the client’s best interest requires an understanding of the real-world practice dynamic in play when the advisor made that decision.

It would be manifestly unfair to apply a best interest duty to a professional group while failing to involve them in their own regulation. Critically, we draw attention to the fact that there is no other profession, whether it be law, medicine, or so on, whose members are subject to a best interest duty while not being accorded professional standing and given a voice in their own regulation. Regulators in those other industries recognize that they have an important role to play in setting the framework, but they cannot, should not and do not attempt to regulate the nuances of the day-to-day professional relationship between practitioner and client to judge whether a particular action is in the client’s best interest. Instead, they respectfully leave professional proficiency and conduct regulation to accredited self-regulatory bodies, such as the College of Physicians and Surgeons of Ontario or the Chartered Professional Accountants of Canada.

In short, we support a best interest duty and believe that the duty should be a fundamental part of animating the principles in the Guidance – so long as the duty is interpreted and applied by those

who are connected with the client-facing work of advisors and are therefore positioned to understand the nuances of an advisor's real-world practice.

*Only advisors and planners themselves, through their own professional association, can interpret and apply a best interest duty in a manner that is fair to all stakeholders*

A best interest duty must be part of a regulatory framework that is flexible, contextual, principles-based and client-centered. This includes the granting of professional standing to financial advisors and planners and the creation of an official role for their professional association in interpreting and enforcing the best interest duty. This is no greater than the respect and deference granted to other professions.

A significant feature – indeed, perhaps the defining feature – of the “best interest” concept is its moral ambition, which lies in the expectation by the client of true good faith on the part of the advisor or planner. In this light, the ultimate focus of the duty is trained on the advisor or planner's motives and actions in advancing the client's overall interests, and not merely on the state of the client's accounts at any given point in time. Embedding a best interest obligation in the Guidance will make for a more robustly interpreted and applied obligation – which is of course an outcome very much in any client's best interest.

In interpreting and enforcing the best interest duty, the professional body would be enriched by the first-hand knowledge of its practicing member advisors, some of whom would serve as members of the professional body's hearing tribunals that consider whether a member breached the duty. As in the case of any profession, it is the professionals within it who best understand how the concept should be applied to the practice in which they work. Because of the involvement of active practicing members, the knowledge and understanding of the professional body would be constantly refreshed and in tune with the practices of the day. This flexible and evolving approach would be the superior way to address novel situations or changing market conditions.

We urge the Regulator to use the opportunity of the promulgation of the Guidance to advance the professionalization of financial advisors and planners and grant them agency in their own regulation – which also makes possible the animation of the Guidance's principles through the lens of a best interest duty.

### **3. CONCLUSIONS AND NEXT STEPS**

We believe that the concept of “treating clients fairly” means going beyond the letter of the law. It means creating a business culture that puts consumers at the centre of everything that the financial services industry does. The Guidance represents key principles towards meeting that objective.

Once the principles are agreed to by stakeholders, the next step is to interpret the Guidance, integrate the concepts into daily business practices and have an accountability or enforcement structure that makes adherence with the Guidance truly meaningful. Here, the Regulator should leverage the position of Advocis, whose members owe a duty first and foremost to their clients, rather than other stakeholders who may be in a position of divided loyalty that makes it challenging for the principles to be fully realized.

To ensure that clients are treated with the utmost in ethical service, the Guidance should be informed by a best interest obligation. However, this duty must be interpreted and enforced by financial advisors and planners themselves, through their chosen professional association, rather than by regulators or other entities who are not attuned to their daily practice. This is the way that best interest obligations are applied in other professions, and advisors and planners deserve the same professional respect.

We look forward to working with the Regulator as it finalizes the Guidance. Should you have any questions, please do not hesitate to contact the undersigned, or Ed Skwarek, Vice President, Regulatory and Public Affairs at 416-342-9837 or [eskwarek@advocis.ca](mailto:eskwarek@advocis.ca).

Sincerely,



Greg Pollock, M.Ed., LL.M., C.Dir., CFP  
President and CEO



Jim Virtue, CFP, CLU, CA  
Chair, National Board of Directors