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May 8, 2018

Financial Services Commission of Ontario
5160 Yonge Street
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Toronto, ON M2N 6L9

Sent via email: marketconduct@fSCO.gov.on.ca

Dear Sirs/Mesdames:

**Re: Consultation Draft – Superintendent’s Guideline No. 01/18
*Treating Financial Services Consumers Fairly***

On behalf of Advocis, The Financial Advisors Association of Canada, we are pleased to provide our comments in regards to the Financial Services Commission of Ontario’s (“FSCO”) Consultation Draft of Superintendent’s Guideline No. 01/18 *Treating Financial Services Consumers Fairly Guideline* (the “Guideline”).

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 a number of 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 financial advisors, 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

FSCO and Advocis must work together to lead the change

We are supportive of FSCO's efforts to enhance the regulatory framework in a way that ensures consumers are treated fairly. The principles set forth in the Guideline advance that objective, so we are by-and-large supportive of them. We appreciate and agree with FSCO's desire to cultivate a consumer-focused business culture that goes beyond strict legal requirements. We also see the Guideline 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.

However, we are concerned with how the Guidelines will be implemented. The Guidelines are drafted at a high level, and to put their intentions into action, some entity must be charged with taking the lead on the interpretation, implementation and enforcement of the concepts therein. We urge FSCO 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 insurance regulators to lead the advancement of regulatory and public policy.

FSCO must be cognizant of the competing loyalties that could challenge the CLHIA's ability to give full effect to the Guideline. 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 Guideline 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 Conduct¹ 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 Guideline. Therefore, it is clear that professional associations such as Advocis must be trusted with a leadership role if FSCO and consumers are to fully realize the benefits of the Guideline.

Going beyond 'fair treatment' to 'best interest'

The Guideline speaks to important concepts of consumer protection such as the exercise of due skill, care and diligence, product suitability, continuing service and addressing conflicts of interest. We believe the best way to make these concepts 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, it 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

¹ 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>.

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 Guideline – 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 Guideline 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 FSCO to use the opportunity of the promulgation of the Guideline 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 Guideline's principles through the lens of a best interest duty.

Privacy

The Guideline speaks of FSCO's expectation that licensees will protect the private information of financial services consumers through the establishment of policies and procedures regarding the protection and use of personal and financial data and a positive obligation to inform consumers of any privacy breach.

Given the increasing importance of the protection of consumers' privacy and data, and the repercussion that can follow from a breach, we believe the Guideline should go further by requiring licensees to identify who, within an organization, will be responsible for ensuring the policies are put into action. The principle of proportionality discussed in the Guideline should apply, with larger licensees being required to name a specific officer that is charged with these duties.

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 Guideline represents key principles towards meeting that objective.

Once the principles are agreed to by stakeholders, the next step is to interpret the Guideline, integrate the concepts into daily business practices and have an accountability or enforcement structure that makes adherence with the Guideline truly meaningful. Here, FSCO 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 Guideline 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 FSCO as it finalizes the Guideline. 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.

Sincerely,

A handwritten signature in black ink, appearing to be 'GP', with a long horizontal line extending to the right.

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

A handwritten signature in black ink, appearing to be 'JV', with a stylized '2' at the end.

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