

From: Mario Frankovich
Sent: June 14, 2011 3:25 PM
Subject: RE: Consultation Paper - Suitability and Loss Assessment Process

I have read the Consultation Paper and given it much thought. My preamble is that unlike some of my peers I think that the Ombudsman Office should continue to offer services as a requirement of registration through IIROC. While the assertion by many IIROC Members that the Ombudsman is in conflict of interest when it acts as both an advocate for the public and a complaints investigator is true, however under proper procedural process such conflict of interest can be managed. The concept of conflict of interest management is not unusual in our industry.

Problems with the Process as described in the Consultation Paper

Essentially the problems with the process described in the Paper lie in areas where the conflict of interest seems to be procedurally slanted in favour of the public. Members reasonably complain that the Ombudsman Office is a Public Advocate and as part of the investigation process can tip the scales in favour of complainants. There are a number of areas where this concern needs to be addressed, however, the points that cause the greatest concern to Members are not irreconcilable. I note some issues:

1. Suitability Complaints are not a matter of "fair and reasonable" as the Ombudsman Office states because each side has a different opinion of what fair and reasonable is. Whenever, the Ombudsman favours the opinion of fair and reasonable as set out by a complainant, then the Member will always perceive bias and assume that the conflict of interest was not adequately managed by the Ombudsman. However, when Suitability is based on whether rules, laws or regulations are broken no perception of bias can be asserted. Until the Ombudsman Office starts to apply such a standard (instead of "reasonable and fair") in its process there will be a lobby by certain IIROC Members and others to opt out of any services provided by the Ombudsman.
2. Investor Responsibility is a major issue since dealing with honest and truthful clients is essential to the survival of the investment advisory business. By the Ombudsman Office reaching a Conclusion that the signed client KYC is not to be used to determine KYC in an assessment is a slippery slope. There is a tendency to suggest clients be absolved of responsibility to read the documents they sign. While it is reasonable to provide such exemption for clients with literacy challenges and mental challenges, it is not reasonable to absolve clients of responsibility as a principle. Without diligent clients who honestly assist in the completion of KYC information it is impossible to supervise suitability. Anecdotally this is the single greatest complaint I hear from confreres about the Ombudsman service.
3. Disclosure of Unsuitable Recommendation is at the heart of capital markets principles. If clients come forward with unsolicited purchases and they are told that such investments do not match their KYC profile, rather than force clients to execute such orders with discount brokers clients should be able to enter such orders with advisory firms after they have been warned. However, if unsuitable orders are solicited, then disclosure of the unsuitable order is not sufficient.
4. Generally the approach to compare losses to a benchmark is reasonable, however, assessing interest on the differential between the investment performance of a benchmark to the portfolio is an unreasonable double dip in favour of a client. If the investment return on the benchmark exceeds the portfolio by \$x then that is the return that would have been earned and to apply interest in addition to the return offered is not realistic as fair compensation.
5. Finally, assessing the risk profile of investments is highly subjective and the relativity of products has to be considered. For example if reviewing the risk profile of products offered by an MFDA Member, then a high risk mutual fund as described in the prospectus is high risk. However, that same mutual fund could be moderate/high risk at an IIROC firm because mutual funds as a whole fall in the mid range of the spectrum of products offered by such a dealer.

Regards

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