

MAKING "THE GOLDEN YEARS" TRULY GOLDEN - OSC SENIORS STRATEGY ESTABLISHES GUIDEPOSTS FOR REGISTRANTS TO TAILOR SERVICES TO OLDER CLIENTELE

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Background

On March 20, 2018, the Ontario Securities Commission (the "**OSC**") published OSC Staff Notice 11-779 *Seniors Strategy* (the "**Staff Notice**"). The Staff Notice brings attention to the unique challenges relating to the financial lives of Ontario seniors (65+) and outlines a vision to foster a stronger and more secure financial future for persons in this important demographic group.

The Staff Notice outlines an *inclusive, social* and *responsive* strategy intended to shape the OSC's future policy-making, operations, research, education and outreach to assist seniors: (i) inclusive in the sense that not all seniors are the same; (ii) social in that individuals tend to consider the effect of their actions on others and seek advice before taking action; and (iii) responsive in encouraging delivery of timely and relevant support to investors. The OSC's strategy reflects the vision and principles in the Government of Ontario's action plan, *Aging with Confidence*, for dealing with some of the broader challenges faced by Ontario seniors in a securities regulatory context.

Recommended "To Dos"

The Staff Notice provides guidance on how registered firms and their representatives, together with other stakeholders, can assist by providing solutions for their older clients. At a minimum, the OSC expects Registrants to review and develop methods to improve their own practices. The OSC also notes that both the Mutual Fund Dealers Association of Canada ("**MFDA**") and the Investment Industry Regulatory Organization of Canada ("**IIROC**") have taken steps to raise awareness and provide guidance on matters related to aging and the prevention of financial exploitation.

We recommend that registered portfolio managers and dealers ("**Registrants**") review their internal policies, procedures and marketing practices as a preliminary step. For example, suitability requirements in connection with KYC obligations should be updated such that information for senior clients can be collected, tracked and

updated more easily with respect to such individuals. Also, Registrants should review the use of titles for its representatives to ensure that they are not potentially misleading and are supported with the appropriate qualifications and certifications. Moreover, Registrants should institute a supervisory function over marketing initiatives generally so as to prevent potential exploitation of such a vulnerable group.

Review Forming Basis of Staff Notice

The Staff Notice summarizes the OSC's research on seniors and their financial lives, including the fact that they are living longer and their financial lives are increasingly complex. The Staff Notice highlights low public pension levels and the stalling of other retirement benefits forcing seniors to seek to fill this gap with income from employment, private pensions and savings.

Partially due to increased intergenerational pressures to assist children with university tuitions, renting or buying homes and/or allowing children to reside for longer periods of time in the family home, the average senior's balance sheet has become more leveraged and less liquid. Many older Canadians have moved their savings out of low-yielding products and into higher-risk, more volatile investments where the potential for gain, if successful, is higher.

Financial situations of Canadians have become increasingly complex over the last 20 years. Although Canadians are generally better equipped to address their financial situations, many remain overconfident. Specifically, the capacity of older Canadians to deal with such complexity remains a challenge due to normal changes in cognition and health resulting from the aging process make seniors prime targets for exploitation, fraud, and other undue influences.

In preparing the Staff Notice, the OSC reviewed reports and policy changes of other regulators, including in the United States, United Kingdom, Australia, and other Canadian provinces to get a sense of what steps are being taken to protect senior investors. The OSC found a wide range of approaches including both mandatory and voluntary measures aimed at addressing areas such as product and service design, education and community outreach, identification of vulnerable individuals, identification of "trusted contact persons", and "safe harbours" that empower registered firms to delay disbursements or make disclosure to government agencies or third parties in cases where financial exploitation is reasonably believed to be occurring.

Responding to Financial Exploitation and Cognitive Impairment

The strategy outlined in the Staff Notice seeks to develop a flexible and responsive framework to address potential financial exploitation and cognitive impairment of seniors through:

- enabling Registrants to place temporary holds on client accounts in appropriate circumstances;
- requiring Registrants to make reasonable efforts to obtain contact information for trusted contact

persons;

- issuing guidance to Registrants to assist them in collecting sufficient information about a senior client, supervising these client accounts, communicating effectively with clients, and
- supporting decision-making as they age; and
- focusing on improving the use of titles, designations and marketing practices of Registrants to strengthen the public confidence.

The OSC also draws attention to the breaking down of silos between the multiple regulators and agencies with mandates that affect the interests of seniors with respect to powers of attorney; privacy laws and disclosures of client information; probate fees; jointly-owned accounts; and “know your client” (KYC) obligations.

The Staff Notice emphasizes that KYC obligations represent a cornerstone of the investor protection regime in Canada and the OSC expects Registrants to comply with both the spirit and the letter of securities laws and policies. In particular, section 13.2 of National Instrument 31-103 - *Registration Requirements, Exemptions and Ongoing Registrant Obligations* and its companion policy, IIROC and MFDA member rules and CSA Staff Notice 31-336 – *Guidance for Portfolio Managers, Exempt Market Dealers and Other Registrants on the Know-Your-Client, Know-Your-Product and Suitability Obligations* collectively impose obligations on Registrants to, among other things: take reasonable steps to obtain and periodically update information about their clients, consider agents and life stages of clients as part of the client-adviser relationship, and be proactive in keeping KYC information current.

In light of the flexible nature of the KYC process, the Staff Notice emphasizes that Registrants should consider whether it is prudent to continue the common practice of using “one-size-fits-all” KYC forms for all of their clients, or whether it would be appropriate to amend their KYC forms to collect information specific to clients that have reached particular life milestones.

Future Plans and Opportunities

From an operations perspective, the OSC will be improving its existing processes and operations to better serve Ontario seniors by:

- providing training and education to staff members;
- allocating dedicated staff for older investor inquiries;
- encouraging all branches of the OSC to approach their respective projects and initiatives with consideration to the implications that their work will have for older investors; and
- developing new resources, tools, and other materials to assist staff in effectively communicating with Ontario seniors.

From an education and outreach perspective, the OSC plans to improve the distribution of written materials, digital publications, and in-person engagement:

- providing firms with access to a series of white label resources, such as forms, discussion guides, and educational materials that they can quickly brand and deploy to their representatives and clients as they see fit;
- building on the OSC's existing online resources to create a "resource hub" that aggregates information in a central on-line location, organized and curated for Ontario seniors, their friends, family, and caregivers, as well as for industry organizations and regulators;
- developing a discussion guide for older investors outlining key questions to ask, as well as guidance for interpreting how a firm representative responds to these questions;
- developing materials aimed at helping families, friends, and caregivers of older Ontarians engage in a conversation about aging and planning for the future, spotting signs of financial exploitation, and understanding the roles and responsibilities of a trusted contact in an investment relationship; and
- implementing an education and outreach strategy for new Canadians that includes a focus on older investors.

Future Update

The OSC will provide an update in the implementation of the seniors strategy outlined in the Staff Notice in March, 2019. In the interim, we recommend that Registrants review and develop methods to improve their practices for dealing with their senior clientele.

For assistance please do not hesitate to reach out to a member of the Investment Funds and Asset Management Group at McMillan LLP.

by Jeffrey Gebert, Leila Rafi and Michael Burns

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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