AUM LAW

January 2020 | Bulletin

Year of the Rat Edition

January 25th marked the start of the lunar new year, and at AUM Law we want to wish all our clients and readers prosperity and success. 2020 is the Year of the Rat. It's also the year that the changes to the conflict of interest and related RDI rules in National Instrument 31-103 come into effect. 2020 is also a RAQ (Risk Assessment Questionnaire) year for Ontario registrants, with RAQ responses due on May 27. And so it's time to act like our industrious, organized rat friends and get ready for those big deadlines.

In this bulletin:

1. Client-Focused Reforms: A Closer Look at the Misleading Communications, RDI, Compliance Training and Record-Keeping Rules

As we reported in our October 2019 special bulletin, the Canadian Securities Administrators (CSA) have finalized their client-focused reforms (CFRs) to National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (NI 31-103) and its related Companion Policy (NI 31-103CP) (Policy). These provisions came into force late last year and will take effect in two phases, beginning on December 31, 2019.

This month, we highlight the new prohibitions on misleading communications as well as the relationship disclosure information (RDI), compliance training and record-keeping requirements. **The RDI requirements will come into effect on December 31, 2020** and the other provisions discussed in this article will come into effect on December 31, 2021. To streamline our discussion, we refer to NI 31-103 and NI 31-103CP in their current form as the Current Rules and Policy and to the amended versions as the Revised Rules and Policy.

This article is the third in our series of closer looks at the CFRs. We discussed the conflict of interest provisions in our October 2019 bulletin and the know-your-client (KYC), know-your-product (KYP) and suitability provisions in our November 2019 bulletin.

A. Misleading Communications

Securities regulators and investor advocates have been concerned for years that some registered firms and individuals use confusing or misleading titles, designations, awards and/or other descriptions of themselves and their services. The securities regulatory framework already incorporates prohibitions that are broad enough to capture at least some of this conduct. For example, subsection 44(1) of the Ontario *Securities Act* prohibits people and companies from making statements that a reasonable investor would consider relevant in deciding whether to enter into or maintain a trading or advising relationship with that person or company if that statement is untrue or omits information necessary to prevent the statement from being false or misleading. Section 2.1 of National Instrument 31-505 Conditions of Registration requires registered dealers, advisers and representatives to deal fairly, honestly and in good faith with clients. And in 2011, the Canadian Securities Administrators (CSA) outlined their specific concerns and provided guidance to portfolio managers regarding the use of trade names and individual titles in marketing materials in Staff Notice 31-325 Marketing Practices of Portfolio Managers.

New section 13.18 of NI 31-103 reflects the securities regulators' conclusions that this principles-based approach is inadequate. The new rule, scheduled to come into effect on December 31, 2021, will prohibit registrants from holding out their services in any manner that could reasonably be expected to deceive or mislead any person as to:

- Their proficiency, experience or qualifications;
- The nature of the person's relationship or potential relationship with the registrant; or
- The products or services provided or that might be provided.

It also will prohibit registered individuals who interact with clients from using from any title or designation without their sponsoring firm's approval. In addition, they will be prohibited from using corporate officer titles unless appointed to that office under corporate law, and they will not be able to use any title, designation, award or recognition based on their sales activity or revenue generation.

The Revised Policy emphasizes that particular scrutiny should be given to titles that may convey an expertise in seniors' issues or retirement planning. It also recommends that firms consider whether a particular designation has a rigorous curriculum, examination process and experience requirements issued by a reputable or accredited organization when deciding whether to approve the designation's use.

As registrants develop their project plan for implementing these new requirements, they should also take into account the following:

- The CSA has indicated that there is potential for further rulemaking on the use of titles and designations. And in 2020, the Financial Services Regulatory Agency of Ontario (FSRA) intends to consult stakeholders and publish draft rules to implement the *Financial Professionals Title Protection Act*, which will regulate individuals' use of "financial planner" and "financial advisor" titles in Ontario. AUM Law will monitor these developments and keep you informed.
- As noted above, there are principles-based laws already on the books that could support enforcement action against a firm or individual for misleading communications. Therefore, although the official effective date for the new rules is December 31, 2021, we encourage firms to review their policies, procedures and practices in this area sooner rather than later.

B. Updated RDI Requirements

Section 14.2 of NI 31-103 has been amended to reflect changes with other CFRs (e.g. relating to conflicts of interest, KYC, KYP and suitability determination requirements) and, according to the CSA, to "better

implement" the principle in subsection 14.2(1) that a registrant must deliver to the client "all information that a reasonable investor would consider important about the client's relationship with the registrant." Among other things, when revised section 14.2 comes into effect it will:

- Expand the existing requirement for registrants to provide a general description of the products and services that the firm offers to the client to include, as applicable, descriptions of any restrictions on the client's ability to liquidate or resell a security and any investment fund management expense fees or other ongoing fees the client may incur;
- Require registered firms to describe generally any limits on the selection of products or services that the registrant will offer to the client, including whether the firm will primarily or exclusively use proprietary products in the client's account;
- Require registered firms to explain generally the potential impact of operating charges, transaction charges, investment fund management fees, and any other ongoing fees the client might occur; and
- Expand the requirement for pre-trade disclosure to expressly require disclosure of investment fund management expense fees or other ongoing fees that the client may incur.

Also, the existing requirement to describe compensation paid to the registered firm in relation to the types of products a client might purchase will be broadened. It will require a general description of any benefits received or expected to be received by the registrant from anyone other than the registrant's client, in connection with the client's purchase or ownership of a security through the registrant.

The Revised Policy includes expanded sections on:

- Information to be included in the description of the nature or type of a client's account;
- Factors to consider in describing limits on the selection of products or services, including guidance emphasizing that a registrant is required to tell a client if it does not have products or services suitable for them; and
- When a firm is expected to provide a client with the KYC information it has collected (i.e. at the time of account opening and when the firm collects updated information).

The new RDI rules will take effect on December 31, 2020. AUM Law can help you prepare for the new regime by reviewing and updating your existing disclosure materials for clients, as well as the related policies, procedures and controls.

C. Compliance Training

Under the Current Rules and Policy, training is specifically addressed through:

- Prohibitions on registered individuals performing registrable activities, and chief compliance officers (CCOs) performing their responsibilities as CCOs, without having the education, training and experience that a reasonable person would consider necessary to perform the activity competently; and
- Language in the Current Policy indicating that registered firms should provide training, including ongoing communication and training on changes in regulatory requirements or the firm's policies and procedures, to ensure that everyone at the firm understands the standards of conduct and their role in the compliance system.

Section 11.1 of NI 31-103 has been amended to introduce a broadly worded requirement for registered firms to provide training to their registered individuals on **compliance with securities legislation**, including without limitation the KYC, KYP, suitability determination and conflicts of interest

requirements. This new rule is supplemented with guidance in the Revised Policy, which emphasizes the following concepts:

- A firm's compliance training will depend on the nature, size and complexity of its business. For some small firms, a formal compliance training program or written training materials might be unnecessary. However, the CSA will expect firms to exercise professional judgment in determining what training is appropriate for their operations.
- Although Section 11.1 of the Revised Rules speaks only to the need for firms to train registered individuals, the Revised Policy retain the concept that CSA members expect firms' training programs to ensure that **everyone** at the firm understands the standards of conduct when dealing with clients and understands their role in the compliance system. In our view, this broader definition of the firm's training responsibility can be seen as flowing from the existing requirement in section 11.1 for registered firms to have a system of controls and supervision sufficient to provide reasonable assurance that the firm and every individual acting on its behalf complies with securities legislation.
- Although the Revised Rule calls for compliance training on securities legislation generally, it and the Revised Policy specifically highlight the need for compliance training on the KYC, KYP, suitability, and conflicts of interest provisions. According to the Revised Policy, training should provide examples of how to:
    - Identify existing and reasonably foreseeable, material conflicts of interests between registered individuals and their clients;
    - Address material conflicts of interest in the client's best interest; and
    - Put the client's interest first when making suitability determinations.
- Consistent with the KYP requirements, firms also will be expected to assess whether any additional training or proficiency requirements are needed so that their registered individuals understand the securities and can make appropriate determinations.
- Firms can outsource elements of their training programs but remain responsible for demonstrating that their registered individuals have been trained on the firm's policies and procedures.
- Training programs should include "ongoing" communication and training on changes in regulatory requirements or the firm's policies and procedures.
- Firms will need to document their compliance training programs.

Although these specific, new compliance training requirements won't come into effect until December 31, 2021, we recommend that firms begin enhancing their compliance training programs in 2020, so that your employees become familiar with the CFRs. AUM Law offers compliance training programs tailored to your firm's needs. We can help you identify compliance gaps or topics that need reinforcement, determine who needs to be trained and when, develop the content for training sessions, update your compliance manual to reflect the new training requirements, and prepare the needed documentation to show that the compliance training requirements have been met.

D. Record-Keeping Requirements

Section 11.5 of NI 31-103 has been expanded so that registered firms will have to maintain records that:

- Demonstrate compliance with the new KYP and suitability determination requirements;
- Demonstrate compliance with the conflict of interest provisions in Part 13, Division 2;
- Demonstrate compliance with the requirements relating to misleading communications;
- Document training actions conducted by the firm; and

- Document the firm's sales practices, compensation arrangements and incentive practices as well as any other compensation arrangements and incentive practices from which the firm, any of its registered individuals or any of its affiliates or associates, benefit.

The Revised Policy provides detailed guidance on the kinds of records that it expects registered firms to keep. It also stresses the importance of firms maintaining adequate documentation to support the firm's **supervision** of its compliance processes in these areas. We expect that some of the more challenging aspects of these new requirements will include:

- Documenting suitability determinations and related supervisory measures (e.g. to address patterns of unsuitable trades); and
- Documenting the KYP process, including where the firm concludes that using proprietary products and services as opposed to a third party's products and services puts the client's interests first.

In addition to presenting some conceptual challenges, some of the new record-keeping requirements (such as those documentation of conflicts of interest, sales practices, compensation arrangements, incentive practices) will require a substantial deployment of firm resources to design and maintain.

AUM Law can help you implement these new requirements by, for example, assessing your existing record-keeping practices, identifying any gaps and developing new protocols and record types to cover the elements listed above.

E. Now What?

This is the last article in our introductory series highlighting the CFRs. Giving registered firms practical advice on compliance with NI 31-103 is one of AUM Law's core services, and we have already started with working with some of our clients on implementation. We can help you understand the implications of the CFRs for your business, develop a pragmatic implementation plan, revise any of your policies and client-facing documentation that are looking a little "ratty" in light of the recent reforms, update your record-keeping protocols, and train your employees on the new requirements. Please contact your usual lawyer at AUM Law for assistance or, if you're not already a client, request a free consultation.

2. IIROC and FINRA Publish Their Compliance Priorities for 2020

On December 20, 2019, the Investment Industry Regulatory Organization of Canada (IIROC) published its annual compliance report, which covers recent and current initiatives as well as 2020 priorities. And on January 9, 2020, the U.S. Financial Industry Regulatory Authority (FINRA) published its 2020 Risk Monitoring and Exam Priorities Letter (Letter). Although the Notice and Letter will be of most relevance to firms supervised by these regulators, we think that the supervisory trends highlighted below will also be of interest to all Canadian-registered firms.

A. IIROC's Compliance Report

IIROC's focus areas for compliance in the coming year include the following:

- **Cyber-security risks and controls:** IIROC plans to publish updated cyber-security "best practices", incorporate criteria to assess cyber-security risk into its FINOPS risk model, and conduct a cyber-security "table-top" exercise for small and medium-sized firms.
- **Client-focused reforms (CFRs):** IIROC is preparing the IIROC rule amendments needed to implement the rule amendments recently adopted by the Canadian Securities Administrators. It also will be enhancing its examination program to reflect the CFR amendments.
- **Best execution:** IIROC is focusing on the content and disclosure of best execution policies, how firms are documenting and implementing policies and procedures that consider the factors and

elements that lead to best execution, governance around best execution, and firms' training for employees involved in the best execution process.

- **Automation of supervisory processes:** IIROC is enhancing its examination program to test the effectiveness of automated supervisory processes being used by order execution only (OEO) dealers and is planning to expand its existing guidance (which deals only with OEO dealers) to cover all dealers and the use of automation more broadly.

B. FINRA Letter

The FINRA Letter is detailed and includes questions that firms can incorporate into self-assessments. Although some of the topics are specific to the US regulatory framework, we think that the Letter it is worth skimming, especially the sections covering the following topics:

- **Sales Practices:** FINRA plans to continue focusing on firms' sales practices (and supervision of sales practices) with respect to complex products, private placements, representatives acting in positions of trust or authority, senior investors, variable annuities, and fixed income mark-up/mark-down disclosures. In addition, FINRA plans to assess firms' preparedness for the implementation of Reg BI, which comes into effect in June 2020.
- **Communications through Digital Channels:** FINRA notes that firms', registered representatives' and customers' use of an increasingly broad array digital communication channels presents challenges for firms to comply with obligations relating to the review and retention of such communications. (We discussed similar issues in our September 2019 case comment on the Ontario Securities Commission's settlements with the Royal Bank of Canada and The Toronto-Dominion Bank over inadequate supervision of chatrooms.) FINRA's Letter sets out helpful questions for firms to consider in this area, such as whether the firm: (1) has a process to evaluate new tools to determine which should be included in the firms' reviews and captured in its records; (2) periodically tests its systems to ensure these communications are being captured; and (3) has identified red flags indicating that a representative might be communicating through unapproved channels and whether the firms' supervisors are following up on such red flags during their reviews.
- **Trading Authorization:** FINRA plans to assess whether firms' supervisory systems are reasonably designed to detect and address representatives exercising discretion without their client's written authorization.
- **Best Execution:** FINRA will focus on a number of best execution themes, including whether conflicts of interest are affecting firms' order-routing decisions.
- **Digital Assets:** FINRA will look closely at firms' digital asset activities, including whether the firm has adequate controls and procedures to facilitate digital asset transactions and whether its marketing materials and any retail communications adequately address the risks presented by such assets.
- **Cybersecurity and Technology Governance:** FINRA will continue to assess whether firms' policies and procedures are reasonably designed to protect customer records and information. It also will look at firms' technology governance, especially their change and problem management practices and whether their business continuity plans (BCP) have been updated to reflect any material changes in the firm's business.

If you would like to discuss these supervisory trends and their potential relevance for your business operations, please contact your usual lawyer at AUM Law.

3. Get Ready to RAQ and Roll

Ontario Securities Commission (OSC) staff have begun notifying registrants that they will receive a risk assessment questionnaire (RAQ) on April 15. The OSC uses the information collected from these bi-annual questionnaires as part of its risk-based supervision program. Registrants must submit the completed questionnaire to the OSC by May 27, 2020, after their Ultimate Designated Person (UDP) has certified the contents as complete, accurate, free from any misstatements and not misleading in any respect. The RAQ will ask for information for the period ending December 31, 2019.

The OSC is making some changes to the RAQ process and questions. Some of these changes are part of its burden reduction initiative. For example:

- For firms that completed the 2018 RAQ, some questions in the 2020 RAQ will be pre-populated with the firm's 2018 answers (which of course, should be reviewed and revised if necessary).
- Some questions have been deleted from the 2020 RAQ (e.g. Question G18 on other business activities).

Changes to the RAQ process include the following:

- **Authentication to enhance data security:** On April 15, CCOs will receive an email from the OSC with a link asking them to create an account that is unique to the firm in the OSC's system. Once the account is created, the CCO will be granted access to the 2020 RAQ through this account.
- **Fund Form Separated from the RAQ:** The Prospectus-Exempt Fund Form, which used to be sent to investment fund managers who manage prospectus-exempt funds at the same time as the RAQ, has been removed from the 2020 RAQ. Going forward, it will be sent separately from the RAQ.

We encourage registrants to start planning for this exercise now by allocating resources to gather the needed information and draft responses, as well as scheduling time with key individuals including the UDP to review and sign off on the completed questionnaire. AUM Law has had extensive experience helping firms prepare their RAQs. If you would like us to help you complete this year's RAQ, please contact us for a fixed-fee quote.

4. IIROC Fines Registered Representative for His Coulda Shoulda Woulda KYC

A recent settlement between the Investment Industry Regulatory Organization of Canada (IIROC) and a registered representative (Representative) at Scotia Capital Inc. (Scotia) illustrates the importance for individual registrants of following through on their intentions to address any concerns they may have about how a client's account is being handled under a power of attorney (POA).

So Many Red Flags: According to the settlement agreement, in May 2014, the son of a mentally incapacitated 90-year old woman (the Client) opened an account for the Client at Scotia with a registered representative (the First RR). The son was to manage the account pursuant to the POA and a court order appointing him as the Client's committee. The account was subject to an irrevocable letter of direction (LOD) providing that Scotia should not release any funds, other than income earned, to anyone (including the son as POA) without the prior written consent of the British Columbia Public Guardian (Guardian).

The Client's son began to conduct unsolicited short-term trading in the account shortly after opening it. Soon afterward, the First RR told the Client's son that he was unwilling to facilitate such trades because they were unsuitable. The First RR then asked his supervisor to move the account to another registered representative. In July 2014, the account was transferred to the Respondent, who at the time had over fourteen years' experience as a registered representative. In connection with the account transfer, he read a forwarded email from the First RR about his concerns regarding the Client's son's

short-term trading in the account. The Respondent also signed off on an LOD similar to the one signed by the First RR.

Coulda Woulda Shoulda KYC: The Respondent met with the Client's son once to effect the account transfer. He then tried unsuccessfully to meet with the Client's son again to discuss, among other things, the Respondent's concerns about the suitability the account's holdings and the historical trading. The Client's son declined to meet with him and all of their subsequent discussions were brief and by phone. Meanwhile, the Client's son continued to engage in short-term trading and speculative trading that exceeded the account's risk tolerance. At one point, the Representative asked the Client's son to stop such trading. The Client's son then placed orders by calling licensed assistants in the branch. The Respondent then advised the assistants not to take the orders, but the Client's son aggressively pursued the assistants to place the orders.

These activities continued until September 2015, when the Guardian directed Scotia to freeze the client's account, which had suffered significant losses. The account was moved to another financial institution in 2016 and in May 2017, the Guardian complained to IIROC. Scotia reimbursed the Client, with the reimbursement funds coming from the Respondent in the form of withheld compensation and disgorgement of all fees earned by the Respondent from the Client's account during the relevant period. IIROC initiated enforcement proceedings against the Respondent and, earlier this month, reached a settlement with him. Among other things, he agreed to a fine of $60,000, disgorgement of $3,500 and $3,000 in costs, as well as two months of strict supervision and a commitment to rewrite the Conduct and Practices Handbook exam.

Aside from the obvious "don't procrastinate on KYC" lesson, what are some takeaways from this case? First, the financial exploitation of senior and vulnerable clients is of continuing concern to regulators, and they expect registered firms and individuals to follow through on signs of potential abuse. Second, compliance and supervisory systems should factor in the phenomenon that even well-intentioned and experienced employees might put off uncomfortable tasks, such as following up on the completion of KYC forms and discussing concerns about account activity. To manage this risk, chief compliance officers (CCOs) should consider protocols such as flagging and consistently following up on client accounts that have POAs on file to ensure that: (a) appropriate due diligence has been completed to confirm that the POA is valid and current; (b) KYC information is complete and updated frequently to reflect the client's current circumstances; (c) activity in the account is consistent with the account's objectives and risk tolerance; and (d) concerns about the account have been resolved. Compliance training that facilitates discussion of challenging scenarios like this one can help employees spot problems in the future and motivate them to raise their concerns with Compliance.

AUM Law can help you address these challenges by, for example, drafting or enhancing your senior and vulnerable clients policy, conducting focused training on this subject for your employees, and/or conducting focused compliance risk assessments. Please contact us to discuss how we can help.

5. ASC Schools Registrants on Compliance with OM Exemption

On January 16, the Alberta Securities Commission (ASC) published Staff Notice 45-705 Compliance with Investment Limits under the Offering Memorandum Prospectus Exemption (the Notice). It outlines the results of staff's recent review of over 80,000 (!) recent distributions, purportedly in reliance upon the offering memorandum (OM) exemption from the prospectus requirements. From our perspective, the most interesting feature of the Notice was its reminder to issuers, as well as to managers of fully managed accounts, that the prospective beneficial owners of the securities themselves must complete Form 45-106F4 Risk Acknowledgment Form (RAF) where the issuer is relying on the OM exemption to distribute the securities. **Managers cannot complete the form on their clients' behalf.** This contrasts with situations where securities are distributed to the beneficial owner of a fully managed account in

reliance upon the accredited investor (AI) exemption, which contains a provision deeming the manager of a fully managed account to be purchasing as principal.

AUM Law helps issuers, registrants and investors navigate Canada's exempt capital markets and avoid potholes like these. Please contact us if you have questions about how the rules apply to transactions that you are contemplating.

6. Like Rats in a Maze: Navigating the Application of Securities Laws to Crypto-Assets

On January 16, the Canadian Securities Administrators (CSA) published Staff Notice 21-327 *Guidance on the Application of Securities Legislation to Entities Facilitating the Trading of Crypto Assets* (Crypto Guidance). The Crypto Guidance is the latest in a series of publications intended to help the emerging crypto industry understand when securities legislation applies to their business models. (See, for example, our March 2019 article on regulatory approaches to crypto-asset trading platforms and our June 2018 article covering the CSA's guidance on token offerings.)

The major takeaways from this new publication are as follows:

- Most forms of tokenized crypto assets that carry voting rights and/or rights to receive dividends will almost always be considered a security and subject to applicable securities laws.
- One of the key determinations of whether a crypto platform is subject to securities laws is whether crypto assets traded on the platform are immediately delivered to the purchaser, with "ownership, possession and control" resting with that purchaser upon that purchaser. This means that services that provide custody functions on their crypto platform likely have to comply with applicable securities laws.

If you would like to further understand the implications of the Crypto Guidance, please contact your usual lawyer at AUM Law.

FAQ Corner

Can an advising representative act as the executor of an estate on behalf of a client?

The Investment Industry Regulator Organization of Canada (IIROC) and the Mutual Fund Dealers Association of Canada (MFDA) have rules against such arrangements. Although these rules do not apply to non-member firms and their employees, they reflect a general concern on the part of securities regulators about such arrangements. In particular, they are concerned about the potential conflicts of interest associated with one person performing both roles.

For example, if the client of the advising representative (Representative) passed away, the Representative could find themselves in the situation where they were expected to act as the executor of the estate and as the portfolio manager for the account now held by the estate, and these roles could come into conflict. As executor, the Representative would be expected to act in the best interests of the estate, but as portfolio manager, they would be interested in continuing to manage the portfolio. This potential conflict might cause the estate's beneficiaries (or regulators) to smell a rat if the Representative maintained their appointment as portfolio manager in such circumstances.

Before deciding to accept an appointment as executor for a client, a registrant should consider whether the underlying exposure from a legal, regulatory and reputational perspective is worth providing such a service to clients. Similar considerations would arise if a registrant is asked to act as a trustee, hold a power of attorney or otherwise take control or authority over a client's financial affairs outside the scope of a traditional, managed account relationship. AUM Law can help you evaluate your options and, if you decide to proceed with such an arrangement, we can draft the appropriate agreement, disclosures and protocols to manage such arrangements.

In Brief

CSA Consults on Access Equals Delivery Model for Disclosure Documents

On January 9, the Canadian Securities Administrators (CSA) published Consultation Paper 51-405 Consideration of an Access Equals Delivery Model for Non-Investment Fund Reporting Issuers (CP 51-405). They noted that electronic access is a more cost-efficient, timely and environmentally friendly way of communicating to investors than physical delivery. Under an "access equals delivery" model, issuers would effect delivery by issuing a news release to alert investors that the document is available on the System for Electronic Document Analysis and Retrieval (SEDAR) and the issuer's website. Initially, the focus would be on delivery of prospectuses, financial statements and MD&A but the CSA is also seeking feedback on whether the model should be extended to documents that require immediate investor attention, such as rights offering documents, proxy materials and takeover bid circulars.

CP 51-405 is more of a concept release than a rule proposal, with the CSA seeking feedback on questions such as whether such an initiative should be prioritized as a burden reduction measure, which documents should be covered, how withdrawal rights would be calculated, and whether issuers should be required to have websites where investor materials could be access under this model. The comment period expires on March 9. AUM Law will monitor this initiative and report back on further developments.

News and Events

Lexology Recognizes AUM Law Again for Thought Leadership in Our Publications

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