December 2023 | Bulletin

End of Year Edition

The weather outside may not (yet) be frightful, but this bulletin filled with insights on regulatory changes relevant to the investment management industry is of course delightful! From updates on expectations on advertising advisor awards, to binding decision proposals, to reminders of important upcoming filing deadlines, we can help you prepare for any impending regulatory storms. We hope Santa's sleigh is filled with toys and treats (and one or two compliance manuals) for you and wish you and yours a happy and healthy holiday season.

In this bulletin:

1. A Tale of Chilled Regulations: CSA Updates Expectations on Advisor Awards

Staff of the Canadian Securities Administrators (the **CSA**) and the Canadian Investment Regulatory Organization (**CIRO**) recently published an update to previously published guidance on the Client Focused Reforms – FAQs on the CFRs dated December 6, 2023. In the update, staff provided guidance on advisor ranking contests (see new FAQ #43). The guidance is substantially similar to guidance provided to registrants last July and published as an open letter from staff which we summarized in our August Bulletin. However, there is one notable difference.

In the new guidance, staff provides examples of what they consider to be client-facing interactions that the prohibition against misleading communications resulting from advisor ranking contests applies to. They include, but are not limited to:

- any marketing or client communications such as webpages or LinkedIn profiles,
- displaying an award or recognition in their physical or virtual office,

- displaying an award or recognition in their signature block (hard copy or electronic),
- mentioning the award or recognition to clients verbally in meetings,
- referencing the award or recognition in a media interview/publication, or
- emailing clients to tell them about the award or recognition.

Next steps

As we noted in our August Bulletin - this is a call to action. Staff have issued a reminder of the meaning of the rules on misleading communications and that both firms and individuals are required to comply. In addition, staff have reiterated that registrants should take immediate steps to get into compliance or may receive a compliance deficiency in their next review.

What should you do to avoid a compliance deficiency in your next review?

While we included this in our August Bulletin, it's worth repeating. If you haven't already done so, you should:

- Review your policy on misleading communications and update it, if necessary,
- Clarify when an advisor ranking would be a misleading communication (for example, pay to play contests),
- Prohibit your advisors from participating in contests that would result in the publication of misleading communications,
- Remove, or require your advisors to remove, all rankings that would be considered misleading communications from all sites that are accessible to the public,
- Require advisors to request approval prior to participating in any business-related awards program so that the firm can conduct a review of the award program methodology prior to the advisor participating in the program, and
- Develop guidance on qualitative and quantitative criteria that would lead to advisor rankings that are not misleading and could be published by the ranking agency or included in external communications by the firm or wealth advisor (for example, best practices, compliance records, client retention and industry expertise).

2. Heating up Financial Disputes: Proposed Changes for Binding Independent Dispute Resolution Service

In late November, the Canadian Securities Administrators (the **CSA**) published a Request for Comment proposing amendments to certain complaint handling provisions of National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (**NI 31-103**), relating to the independent dispute resolution service for Canadian registered firms. The amendments would be part of a new framework, where an independent dispute resolution service that is a not-for-profit entity would have the authority to issue binding final decisions.

Current framework

Registered firms are required to follow a dispute resolution process that includes making an independent dispute resolution service available to retail clients free of charge. Other than in Québec, the Ombudsman for Banking Services and Investments (**OBSI**) is the dispute resolution service mandated for Canadian registered firms. However, OBSI does not have binding decision-making power. This has been identified as a significant design flaw in Canada's investment dispute resolution system, both internationally and domestically. It is expected that OBSI would be the not-for-profit entity referenced in the new framework.

What stays the same?

For dissatisfied clients, the first step will continue to be advising the firm of the complaint using the firm's internal complaint process. Once a complaint is made to the firm, a client may choose to have the complaint reviewed by OBSI (or the dispute resolution service in Québec) if it hasn't been resolved to the client's satisfaction within a prescribed period of time.

What will change?

Under the CSA proposal, an investigation by OBSI will have 2 stages. The Request for Comment provides an overview of the proposed dispute resolution process in the form of a clear and easy to understand flow chart. Key elements are summarized below:

- **Stage 1 - Investigation and recommendation.** During this stage, an OBSI investigator will investigate the complaint using an "inquisitorial process" and will provide the parties with a draft recommendation. In general terms, this approach involves an investigator, in an independent and impartial role, taking an active part in investigating the facts of the case before making a recommendation. The parties will have an opportunity to comment on the recommendation and reach a settlement. If a settlement is not reached, the investigator will finalize the recommendation.

  Initially, the recommendation is non-binding. However, the recommendation would be deemed to be a final decision that is binding if:

  1. the client does not opt out of this process and there is no formal objection to the recommendation, and
  2. a set period of time elapses without either party taking specified action.

  If a party makes a formal objection to the recommendation before it becomes a final decision, the investigation will proceed to stage 2.

- **Stage 2 – Review and Decision.** During this stage, a more senior OBSI decision maker becomes involved. The decision maker considers the objections to the recommendation applying the "fairness standard" and the "essential process test". While in stage 1, the investigator would only follow an inquisitorial process, at this stage the decision maker would decide which elements of the dispute resolution process are essential to achieving as "efficient, quick and understandable" a process as possible in resolving the dispute in a fair manner. This could range from processes that are inquisitorial

to those that are adversarial. Following the review, a final decision is issued. If a firm refuses to comply with a final decision, the decision may be filed as a court order.

How final is a final decision?

It's a bit confusing. A client cannot reject a final recommendation (in stage 1) or a final decision (in stage 2) once either becomes binding. However, during stage 1, a client can:

1. abandon the process or commence litigation; or
2. take steps that would result in the recommendation not becoming binding and moving to the stage 2 review process.

A final decision in stage 2 is binding where a specified period of time has passed and if the complainant did not trigger the review, the complainant has not rejected the decision or otherwise withdrawn from the process. There is no statutory right of appeal, though judicial review would be available in appropriate circumstances.

What else is being considered?

The proposed amendments would prohibit firms from using terminology for internal services that implies independence, such as the title "ombudsman" or "ombudservice". The CSA continues to develop an oversight regime for the identified ombudservice that balance independence with a need for robust monitoring and response by securities regulatory authorities.

So, what do you do?

As always, consider whether you agree with the proposals and engage with the regulators by providing comments if you do not. Comments are most effective if you not only point out where you disagree with the proposals but also suggest an alternate solution. If you don't wish to submit a comment letter on your own, consider providing your views through your industry advocate (IIAC, PMAC or IFIC, as examples) which may have set up taskforces to discuss this consultation. Comments on the consultation are due by the end of February.

Having said that, it is important to note that the trend globally is for independent dispute resolution services to have binding authority. In our experience, it is thus important to focus on also reviewing and if needed, improving your own internal complaint handling processes.

1. First, focus on making sure that your team is well versed on their KYC, KYP and suitability obligations. Perhaps additional training would be helpful, and a reminder that good documentation is critical.
2. Second, review your internal dispute resolution process. Perhaps you can reduce the number of complaints that are referred to OBSI by reviewing and clarifying your internal processes.

AUM is here to help with reviewing your policies and procedures; reach out to an AUM lawyer for assistance.

In Brief

Snow and Settling – CSA Finalizes Changes to Trade Matching Rule

Earlier this month, the Canadian Securities Administrators (**CSA**) finalized amendments to National Instrument 24-101 *Institutional Trade Matching and Settlement*, which we wrote about most recently in our August bulletin here. The amendments facilitate the shortening of the settlement cycle for equity and long-term debt market trades from T+2 to T+1, which will occur on **May 27, 2024**, and the amendments are expected to come into force on the same date.

The amendments: **(i)** change references to T+1 from T+2; **(ii)** change the ITM deadline as mentioned below; and **(iii)** change some times for data reporting by clearing agencies and matching service utilities. As a result of comments received, the institutional trade-matching deadline will be 3:59 a.m. ET on T+1 (the **ITM Deadline**) instead of noon on T+1 in the current Instrument or 9:00 p.m. on T as originally proposed.

The exception reporting requirement to file Form 24-101F1 *Registered Firm Exception Reporting of delivery-against-payment or receipt-against-payment (**DAP/RAP**) Trade Reporting and Matching* (phew) will also be permanently repealed. Finally, the CSA added a reference to cyber resilience for matching service utilities, for their core systems supporting trade matching.

CSA Releases Results of Frosty Annual Systemic Risk Survey

The Systemic Risk Committee of the Canadian Securities Administrators recently released results from its second annual systemic risk survey provided to market participants. This year, the survey was completed by 489 investment dealers and portfolio managers between October 16 - November 7, and had a 48% response rate. Of note, almost all respondents had an increased or unchanged concern about the stability of the Canadian financial system from last year. Perhaps unsurprisingly, concerns centered around household debt, high interest rates, the housing market, the geopolitical environment and cyber vulnerabilities.

Important Reminders

Annual Exempt Trade Reports for Investment Fund Issuers - Avoid Frostbite

If you haven't yet turned your mind to your annual exempt trade reports for investment fund issuers, now is the time. As noted in last month's bulletin, investment funds relying on specified prospectus exemptions under National Instrument 45-106 *Prospectus Exemptions* must file by no later than **January 30, 2024**. The introduction of SEDAR+ this year means that even more time is required to properly complete all the forms and calculate the filing fees. We would be pleased to help you with this process – please contact us as soon as possible if you anticipate requiring assistance.

In addition, for firms registered in Ontario under the *Securities Act* or the *Commodity Futures Act*, or relying on exemptions from registration, your capital market participation fees are due **January 2, 2024**.

BLG Resource Corner

Our colleagues at BLG have provided the following insights we thought might interest our readers:

- M&A trends for Canadian asset managers: BLG's observations and insights looking ahead to 2024
- Coming January 2024: Employer payroll deductions and updated CRA guidance for remote work arrangements
- Modern slavery and supply chain transparency in Canada: How to report
- Major changes are coming to Canadian competition law
- New insights from Kraft on the "necessary course of business" exception to tipping

For more information, please visit the BLG website.

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