

Spring is in the Air

Although you wouldn't know it from the recent weather, spring has sprung, the tender shoots of new regulatory proposals are beginning to appear, and everyone is swept up in the urge to clean house. This month, we will tell you about the Ontario Securities Commission's new Seniors Strategy, changes to the regulatory framework for syndicated mortgages, and the Ontario Government's consultation paper on financial planners. The OSC has released a decision reminding us why it's important to come clean about past misconduct when applying for registration, and the Financial Consumer Agency of Canada (FCAC) is taking a broom to the dusty corners of the big banks' sales practices.



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1. OSC Publishes Its Seniors Strategy

As we noted in our November 2017 [Bulletin](#), financial sector regulators are increasingly concerned about seniors because, as a class, they are at greater risk of cognitive impairment and/or social isolation and therefore particularly vulnerable to financial exploitation. On March 20, the Ontario Securities Commission (OSC) outlined its action plan for seniors in [Staff Notice 11-779 Seniors Strategy](#) (Notice).

The Notice summarizes research relevant to the financial lives of older Canadians as well as recent, regulatory and industry initiatives undertaken in Canada and globally to address the needs of seniors. It then sets out the OSC's action plan, which includes the following:

- Introduce a requirement for registrants to make reasonable efforts to obtain the name and contact information for a client's "trusted contact person", who may be reached if there is a concern about the client's behavior or transactions in the client's account;



In Brief

Ontario Government Consults on Regulatory Framework for Financial Planners

As we reported in our November 2017 [Bulletin](#), the Ontario Government intends to change the regulatory framework for financial planners. On March 15, the Ministry of Finance published a [consultation paper](#) ("Consultation Paper") seeking feedback on its proposals to:

- Restrict the use of the title "Financial Planner" to those individuals holding a recognized financial planning credential;
- Prohibit the use of titles similar to "Financial Planner" (such as "asset management planner", "investment planner" or "wealth planner"); and

- Through a safe harbour or similar mechanism, enable registrants to place a temporary hold on disbursements from a client’s account or make disclosure to a trusted contact person when they reasonably believe that:
 - financial exploitation or fraud has occurred, is occurring or will be attempted; or
 - a client’s judgment may be impaired;
- Provide guidance to registrants on effective communications with clients as they age;
- Address registrants’ use of confusing and misleading titles, designations and marketing practices;
- Strengthen the Ombudsman for Banking Services and Investments (OBSI);
- Work with other regulators and organizations to design policies and programs to help seniors in areas such as powers of attorney and privacy laws; and
- Enhance its outreach and education programs, including through the development of “white label” forms and educational materials that firms can adopt and deploy to their representatives and clients.

The Notice does not set a timeline for any of these initiatives, but it does indicate that the OSC will report on its progress in one year. Importantly, the Notice also indicates that staff “expect that registered firms and their representatives will review and develop ways to improve their own practices with respect to older investors.”

We will continue to monitor developments in this area. Please contact your usual [AUM lawyer](#) if you would like us to help you develop or enhance your policies, procedures and account documentation to address the needs of vulnerable clients and/or prepare for a compliance review focused in this area.

2. Regulatory Framework for Syndicated Mortgages is Changing

In the spring, Ontario investors’ fancy lightly turns to thoughts of real estate. And where investors go, so too go the regulators. We aren’t surprised, therefore, to see both the Canadian Securities Administrators (CSA) and the Financial Services Commission of Ontario (FSCO) outline changes to the regulatory framework for syndicated mortgages.

A. CSA Proposal

On March 8, the CSA published for comment [proposals](#) to enhance investor protection and increase harmonization in the regulatory framework for syndicated mortgages. The proposed amendments will affect *National Instrument 45-106 Prospectus Exemptions* (NI 45-106) and *National Instrument 31-103 Registration Requirements, Exemptions and Ongoing Registrant Obligations* (NI 31-103). In particular:

- The existing prospectus and registration exemptions for securities that are syndicated mortgages (the “Mortgage Exemptions”) in Ontario, Newfoundland and Labrador, the Northwest Territories, Nova Scotia, Nunavut, Prince Edward Island and the Yukon will be removed. This will bring the regulatory framework in these jurisdictions into alignment with the rest of Canada.
- The private issuer prospectus exemption (Private Issuer Exemption) also will be removed for distributions of syndicated mortgages.
- As a result of these changes, exempt distributions of syndicated mortgages in Canada will have to rely upon another prospectus exemption, such as the accredited investor exemption (AI Exemption), offering memorandum exemption (OM Exemption), or family, friends and business associates exemption (FFBA Exemption).

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- Create a central database of financial planners that consumers can search.

The Consultation Paper outlines six criteria for recognition of financial planning credentials relating to education, exams, the need for a code of ethics, and a requirement to have a disciplinary process.

The consultation period runs until April 16, 2018. AUM Law will monitor developments in this area. Please [contact us](#) if you would like to discuss the initiative in more detail.

• **OSC Leaves Regulatory Fees Unchanged for Next Two Years**

The Ontario Securities Commission (OSC) is funded by fees collected from market participants and typically re-evaluates its fees every three years. On March 15, the OSC [announced](#) that it will leave its fee rates unchanged for the next two years. In making this decision, the OSC took into account higher than projected revenues for the preceding three years, capital markets growth assumptions that are lower than actual growth in the past few years, and the need to make critical investments in data and information systems, enforcement tools, other technology, and facilities rehabilitation. The OSC expects to draw down on its cash position in 2019 to fund these initiatives.

- In Ontario and other jurisdictions where the Mortgage Exemptions currently apply to syndicated mortgages, market participants that are in the business of trading syndicated mortgages will need to determine whether the registration requirement applies to them. The proposed changes to the registration exemption will take effect one year after the proposed changes to the prospectus exemption to give market participants time to register as required.
- Consistent with the current approach in British Columbia for syndicated mortgages distributed under the OM Exemption, the proposed amendments will require supplemental disclosure tailored to syndicated mortgages. In addition, mortgage brokers involved in a distribution of syndicated mortgages will have to provide a certificate to investors that the offering memorandum does not contain any misrepresentations with respect to matters within the broker's knowledge and that the broker has made best efforts to ensure that matters not within its knowledge do not contain a misrepresentation.

The comment period on the proposed amendments closes on June 6, 2018. Please contact [AUM Law](#) if you would like to discuss the proposal in more detail.

B. FSCO Changes for Syndicated Mortgage Transactions Take Effect July 1, 2018

As we noted in our November 2017 [Bulletin](#), the Ontario Government plans to amend the *Securities Act* to transfer regulatory oversight of syndicated mortgage transactions from FSCO to the OSC. In the meantime, it has [amended Regulation 188/08 Mortgage Brokerages: Standards of Practice](#) (the Regulation) so that brokerages which deal with non-qualified, syndicated mortgage transactions will have to meet expanded requirements beginning on July 1. In general terms, non-qualified syndicated mortgages are more complex, higher risk products that might not be suitable for the average investor. Under the new requirements, mortgage brokerages that deal with such transactions will have to:

- Collect and document information relating to the potential investor's or lender's financial circumstances, needs and risk tolerance;
- Undertake and document a suitability assessment for each potential investor or lender;
- Collect and document expanded disclosure information;
- Observe a \$60,000 limit on non-qualified syndicated mortgage investments over a 12-month period for investors or lenders who aren't part of a designated class that meets higher income and asset tests; and
- Report written complaints received by the brokerage about non-qualified syndicated mortgages to FSCO's Superintendent of Financial Services within ten business days.

New forms covering the prescribed information to be collected and/or disclosed will be made available in June. [AUM Law](#) can help your firm develop or revise your policies, procedures and documentation to implement the new regime.

3. The Cover-up Can Be Worse than the Crime

[Re Psihopedas](#) reminds us that it's never a good idea to provide incomplete or inaccurate information about past misconduct to the regulator. In this case, a firm applied to the Ontario Securities Commission (OSC) to register Maria Psihopedas (Ms. P) as a mutual fund dealing representative. She disclosed on *Form 33-109F4 Registration of Individuals and Review of Permitted Individuals* (Form F4) that she had pleaded guilty to two counts of fraud in 1996 and been sentenced to two months of community service but did not disclose that she had been sentenced to 80 days of imprisonment.

The OSC's background check turned up the prison sentence as well as the fact that, in 2015, she had not disclosed either her conviction or her sentence to the Financial Services Commission (FSCO) when she had applied for an insurance license. FSCO, however, had agreed to register her after she disclosed her conviction to her then-employer.

After OSC staff recommended that her application for registration be refused on the grounds of lack of integrity, the Director of the Compliance and Registration Branch (Director) gave Ms. P a chance to be heard before making a decision. She submitted that she didn't remember serving jail time and that she hadn't intended to mislead the regulator. The Director did not find the applicant's explanation credible. Taking into account Ms. P's conduct in relation to her application, the Director concluded that she wasn't

confident that Ms. P would “uphold the principles of integrity and act in an honest and responsible manner.” Accordingly, the application for registration was refused.

We think it is quite possible that Ms. P’s application would have been accepted if she had candidly disclosed the sentence imposed on her for an offence committed over 20 years ago. It is clear, however, that the Director attached a great deal of weight to Ms. P’s recent pattern of non-disclosure to FSCO and the OSC. Case law (e.g., [Re John Doe](#), [Re M.H.](#), [Re Pyasetsky](#), and [Re Couto](#)) supports the view that intentional non-disclosure will most likely result in a refusal of registration on grounds that the applicant lacks the requisite integrity.

This case also serves as a reminder that firms should take steps to check that the information provided to them by their employees for inclusion in regulatory filings is accurate and complete. Firms and individuals should expect regulators to conduct background checks that include criminal records searches as well as research into publicly available information such as filings with other regulators, websites associated with the firm/individual, and public social media activity.

With lawyers who have worked in senior roles for securities regulators, AUM Law can offer our clients insights into the regulator’s decision-making process. We also have extensive experience helping firms and individuals draft registration packages, prepare for pre-registration interviews, and participate in hearings before the Director. Please [contact us](#) if you would like assistance with such matters.

4. Federal Consumer Watchdog Gives Big Banks a “Needs Improvement” Grade

On March 20, the Financial Consumer Agency of Canada (FCAC) published a [report](#) (Report) on its review of the six, big Canadian banks’ sales practices. The banks are subject to federal consumer protection legislation overseen by FCAC. Although the agency did not find widespread mis-selling during its review, it concluded that:

“... retail banking culture encourages employees to sell products and services, and rewards them for sales success. This sharp focus on sales can increase the risk of mis-selling and breaching market conduct obligations. The controls banks have put in place to monitor, identify and mitigate these risks are insufficient.”

In our view, the standards applicable to the sale of financial products should be consistent across financial products sold to consumers regardless of whether they are sold by federally regulated or provincially regulated financial institutions. This very issue was at the heart of the debate a few years ago about the appropriate regulation of federally issued principal protected notes (PPNs). Unfortunately, it appears from the Report that not a whole lot of progress has been made to date to level the playing field.

Looking to the future, however, the Report includes recommendations for how banks should better manage their sales practices risk, for example by ensuring that their compensation strategies motivate employees to work in consumers’ interest. FCAC also has indicated that it is investigating alleged breaches of market conduct obligations and will take enforcement action where appropriate, that it is planning to enhance its supervisory framework to ensure that banks adopt appropriate controls, and that it is planning to improve its consumer education materials.

AUM Law will monitor regulatory developments in this area. Please contact your usual [AUM lawyer](#) if you would like us to assist you in developing, assessing and enhancing your policies and procedures governing sales practices.

AUM Law primarily serves the asset management sector, with specific expertise in the regulatory and investment fund space. We strive to provide the most practical, forward-thinking advice and services, using a business model geared to efficiency, responsiveness and client service excellence. We are pleased to send you this summary of recent developments that may affect your business.

This bulletin is an overview only and it does not constitute legal advice. It is not intended to be a complete statement of the law or an opinion on any matter. No one should act upon the information in this bulletin without a thorough examination of the law as applied to the facts of a specific situation.

