FSCO Issues Draft Guideline on Fair Treatment of Consumers

April 17, 2018

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- On April 3, 2018, Ontario's provincial financial services regulator, the Financial Services Commission of Ontario (FSCO), released a consultation draft of Superintendent's Guideline No. 01/18: Treating Financial Services Consumers Fairly (the "Guideline").
- While FSCO has had a longstanding focus on consumer issues, the Guideline is intended to clarify its expectations with respect to provincially-regulated financial services organizations, including (among others) insurance companies, insurance agents and agencies, credit unions and caisse populaires, loan and trust companies and mortgage brokers ("Licensees").
- Specifically, the Guideline is intended to promote public trust by ensuring that Licensees fully understand FSCO's expectations respecting the "fair treatment" of consumers. Those expectations – which are set out under eight headings – extend beyond compliance with legal requirements to the establishment of a consumer-focused business culture that meets consumer needs at all stages of the product cycle.
- Because the Guideline outlines a large number of expectations, including a number of material new expectations, it will be important for all Licensees to begin to develop a compliance plan pending the finalization of the Guideline. It should be noted that the Guideline allows for some flexibility in applying the expectations to Licensees' unique circumstances. **Comments on the consultation draft will be received until May 8, 2018.**

Context

In relation to the insurance sector, the proposed FSCO guidance is merely one example of an accelerating global shift in regulatory focus from principally on solvency regulation to increasingly on market conduct regulation. As the worst of the global financial crisis continues to recede, insurance sector regulators around the world are intensifying their focus on market conduct behaviour and the expectation that insurers and distributors will treat customers fairly throughout the life cycle of the product, from initial design and pricing through to claims settlement. This effort is perhaps the most advanced in the UK, in part as a result of issues arising from widespread mis-selling there of creditor insurance products (there known as payment protection insurance, or PPI). The same regulatory effort is advancing in Canada, despite the absence of any analogous scandals here. At the nationwide level, the Canadian Council of Insurance Regulators is similarly engaged in developing guidance outlining its members' expectations for fair treatment of customers by insurance companies and distributors.

Application of the Guideline

It is important to note that FSCO's expectations, as described below, apply to *all* Licensees, including those with little or no direct contact with consumers and to those offering products of all levels of complexity. Recognizing the diversity of FSCO's Licensees, the Guideline takes a "principles-based" approach, providing general rules that each organization must apply in an appropriate way to its own circumstances. To ensure that the expectations are applied in a realistic way to smaller licensees and licensees offering non-complex products, a "principle of proportionality" is acknowledged. Thus, for example, a sole proprietor licensee would not generally be expected to create extensive written policies and procedures, but it would nevertheless need to have "appropriate internal controls in place to ensure and demonstrate it has met the treating consumers fairly principles". Where licensees work together to provide a financial product or service, or where they work with non-licensed third-party contractors, they are expected to ensure that all of those involved understand and comply with the principles set out in the Guideline.

Legal Status of the Expectations

Where FSCO's expectations are consistent with existing statutory requirements, they are mandatory. Those expectations that exceed what is strictly required under existing legislation are guidelines which, while not having the force of law, will nevertheless establish standards that may be highly influential in future FSCO evaluations of the performance and conduct of Licensees.

The Expectations

1. Fair treatment of consumers should be a core component of a Licensee's business governance and culture.

The Guideline emphasizes the importance of achieving the right "tone from the top". Thus it is the responsibility of a Licensee's ownership, senior management and directors to establish what FSCO refers to as a "treating consumers fairly" (TCF) culture. In proportion to their size and the complexity of their business, licensees should design, implement, communicate and monitor compliance with codes of conduct, policies and procedures that "reinforce" the TCF culture and which are publicly available (at least to the extent that they relate to access to information and complaint processes for consumers). Moreover, the Guideline notes that Licensees within organizations have an obligation to comply with that organization's TCF policies while also stating (as already noted) that TCF policies and procedures should be incorporated into outsourcing contracts with third parties.

Examples of specific action items arising from the "core component" expectation include scrutinizing day-to-day business decisions for TCF compliance and monitoring the effectiveness of policies and procedures, including by soliciting consumer feedback.

2. Licensees dealing with consumers, or designing financial services or products for consumers, are expected to be especially diligent.

In addition to the existing statutory requirement that Licensees whose positions bring them into direct contact with consumers meet certain proficiency requirements, FSCO expects Licensees involved in the design of consumer-focused financial products and services to have "regard to the needs of their target market", including (for example) effectiveness of distribution methods and risks that the product could pose to a particular market.

Specific actions relating to this expectation include regular involvement by Licensees in professional ethics programs and assessment of the performance of the product or service vis-à-vis market needs (e.g. by pre-launch stress-testing or post-launch marketing).

3. Licensees are expected to promote financial services and products in a manner that is "clear, fair, and not misleading or false."

The Guideline states that product information offered to consumers must always be:

- Clear about risks, exclusions and limitations of the product;
- Easy to understand, with plain language wherever possible;
- Up front about important statements or warnings; and
- Based on the consumer's needs and circumstances.

Disclosure may be governed by statute, but where it is not, industry best practices should be followed. Information should be provided when it is most useful to the consumer and those selling and advising on the product should be trained not to sell the product outside the market for which it was intended. The same rules should be applied to financial products and services that are offered online and, in general, both online and print marketing materials should be developed with a "consumer lens" and reviewed by the financial product's creator.

4. Only suitable products should be recommended, with regard to the consumer's finances and personal circumstances.

FSCO's fourth expectation is one of the most consequential. For example, it includes the recommendation that, except in simple transactions, Licensees document whether the consumer's intention was simply to purchase a specific product or whether advice or recommendations were sought (including an acknowledgment that advice was declined, if that was the case). More broadly, FSCO recommends a three-step process for ensuring that products meet genuine consumer needs:

- Understanding the products thoroughly, including with Licensees' own due diligence about their risks, exclusions and limitations;
- Getting to know the client, including with respect to financial sophistication, needs, life-stage priorities, risk appetite and ability to afford the product (a process that should be documented); and
- Conducting an analysis to understand the consumer's objectives and needs.

Licensees whose roles are not consumer-facing, but who have responsibility for the product, should monitor the suitability of the advice that is given about the product. This includes providing continuous training programs and monitoring mandatory education "to make sure their employees and intermediaries distributing [their] products are aware of market trends, economic conditions, product innovations, and changes to the law".

5. Conflicts of interest should be disclosed and managed.

The Guidelines identify a number of significant expectations in relation to conflicts of interest. While some of these are already legal obligations, FSCO refers to a number of situations in which conflicts commonly arise, including:

- Receipt of incentives, commissions, etc., relating to selling services or products;
- Profiting at the expense of the consumer;

- Having clients whose best interests are in direct conflict; and
- Relationships that may be perceived as affecting the objectivity of one's advice.

Licensees should create a conflict of interest policy and communicate it to all directors, officers, employees and intermediaries who distribute their products, as well as to third-party contractors.

Conflict of interest situations can be managed by disclosure, e.g. by providing the consumer with a list of companies or markets that the Licensee represents. Licensees should also ensure that incentives take TCF into account by avoiding the promotion of particular products and de-emphasizing sales volumes. FSCO recommends that Licensees conduct conflict audits with respect to product offerings and commissions.

6. Licensees are expected to treat their consumer relationships as ongoing, until all obligations to the consumer have been fulfilled.

In addition to legal requirements to maintain records of claims handling procedures, FSCO expects Licensees to provide information to consumers throughout the duration of their relationship, including information about the consumer's obligations, information about how to make claims and how to resolve disputes and information about contractual changes during the life of the product, including, notably, information about "corporate or legislative changes that may affect the consumer".

7. Licensees should have policies and procedures in place to handle complaints in a timely manner.

While complying with legal requirements with respect to complaint procedures and record-keeping, Licensees must provide consumers with unresolved disputes with a "final position letter" that sets out additional steps the consumer may take. Even where a Licensee is not obliged by law to participate in an independent dispute resolution mechanism, it is expected to consider establishing an alternative dispute resolution system for the benefit of consumers. Ongoing monitoring of complaints-handing processes is also expected.

8. FSCO expects Licensees to prioritize privacy protection and to inform consumers of any privacy breach.

Licensees must comply with applicable privacy legislation, including consent requirements with respect to the use of personal information (including credit reports) and notification requirements with respect to privacy breaches. FSCO also expects licensees to have policies and procedures in place with respect to the security of personal and financial information in their records and to have a risk management program in place to deal with cybersecurity issues.