

Best interests or conflict of interest?

MARGARET O'SULLIVAN DISCUSSES THE NEED FOR REGULATION
TO ESTABLISH A 'BEST INTERESTS' STANDARD FOR CLIENTS

ONE ISSUE THAT has been brewing for too long, but is now coming to a head in wealth planning, is the regulation of those who provide financial-product sales advice and financial planning services – often offered under the nomenclature of estate planning or retirement planning advice. There is a lot of movement afoot as many jurisdictions, including my home jurisdiction of Ontario, other Canadian provinces and the US, grapple with how best to regulate those who offer such services, given the lack of a modernised, comprehensive legal framework for doing so.

One of the burning issues is whether or not a statutory 'best interests' standard should apply. In many jurisdictions, there is at present no express statutory obligation for those who provide financial-product sales and advice (as opposed to portfolio managers), and financial planning advice, to act in the client's best interests. In many jurisdictions, financial planning as an activity is not subject to a general regulatory framework; often, the provision of financial-product sales and advice generally is subject only to know-your-client and suitability requirements.

BEST INTERESTS

Following the lead of Australia, the UK and the US, some jurisdictions are now considering adopting the 'fiduciary rule'. The Trump Administration, however, has now ordered a review of the rule and its implementation; it should have come into effect in April 2017, but has been delayed. Meanwhile, many US financial institutions have decided to implement the best interests rule anyway, as they recognise that client expectations demand it. In the US, the rule would apply only to advisors for retirement accounts and aims to prevent conflicts of interest where clients are pushed to buy investment products for which the advisor receives commissions.

In Canada, the major banks are under attack in a controversy that has recently arisen over aggressive sales tactics, including the allegation that bank employees, including tellers, sometimes presenting themselves as advisors, push products on clients to meet strict sales targets. Calls have been made for a parliamentary inquiry on the banks' sales practices.

An overarching concern is that many clients have the expectation and belief that the financial advice and financial and estate planning services they receive are based on their best interests, with no understanding that their advisor may have a

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conflict of interest and may not be providing objective advice, in particular where their compensation is a commission or other financial reward based on sales.

UPHOLDING THE STANDARD

The best interests standard, derived from the law of equity and fiduciary relations, is one that we, as trust and estate practitioners, are well acquainted with. One of the fundamental requirements of a fiduciary is not to place themselves in a position where their self-interest might conflict with the duty of loyalty to act in the best interests of their client or another person to whom the duty is owed.

The category of fiduciary includes lawyers, accountants, directors, agents, public officials, partners and others. Such professionals are well schooled in the fiduciary obligation owed to one's client: there is a key difference between providing objective advice based on a best interests standard and 'making a sale'. The societal basis for creating the professions is to place important and essential work into a protected class where the interests of the person receiving the service must always come first and the rough-and-tumble, *caveat emptor*, profit-focused rules of the marketplace should not interfere.

Australia is far ahead in creating a modernised regulatory approach whereby conflicted advice is banned. In March 2017, the Australian Securities and Investments Commission released updated guidance on disclosure and conduct obligations for advisors.¹ It includes detailed examples of how the best interests standard applies in particular client situations – e.g. advice on the purchase of an insurance policy, mutual fund or other financial product.

A robust regulatory environment that protects investors and those receiving financial advice and financial and estate planning services is more important than ever, as ageing baby boomers are in, or fast approaching, their retirement years. Requiring complete transparency is basic and only fair. The need for individuals to have independent, objective financial and estate planning advice, which has a profound impact on a person's important life decisions, and often on future generations as well, is critical for society in general. In providing such advice, clarity, transparency and a well-regulated legal framework are needed now more than ever.

¹ bit.ly/2pkulOf