Kenmar Associates
The Voice of the Retail Investor

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Kenmar Associates Comment Letter

Use of Business Titles and Financial Designations 13-0005, Jan. 8, 2013
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Kenmar Associates is pleased to comment on referenced Consultation .For years we have been concerned about misleading Rep titles/designations , the related regulatory approach and the adverse impact on retail investors. We are delighted to see IIROC addressing this issue.

IIROC research reveals that the vast majority of investors who participated in their focus groups could not recall the business title of their advisor. This matches our experience as most retail investors do not do much due diligence on their financial advisers. An exception is HNW individuals who do extensive research before selecting a financial adviser. Similarly, IIROC found that recall of what financial designations their representatives held was limited. IIROC also research found that investors were divided as to how important business titles and financial designations are to entering into and maintaining a relationship with an advisor. This should be expected. CSA research has found that an alarming number of retail investors lack financial literacy and BayStreet proofing skills. Most retail investors are over confident and as history and research shows, don't know what they don't know . According to IIROC findings,some investors viewed titles/designations important while others viewed them more sceptically, with some suggesting that investment industry training and educational requirements are not as rigorous as those of other "professionals". Kenmar experience has been that complainants and seniors especially believe that business titles and financial designations do have some strong influence on investors and are used to instill a sense of trust and/or to imply a particular expertise or skill. Many falsely believe that the advice and financial planning business is regulated and that advisers have a fiduciary duty.

In the absence of government regulation, retail investors assume their "adviser" is trained, certified and held accountable in providing professional financial planning. The sad fact is that most "advisors" are acting as salespersons with no regulatory requirement to provide financial planning or indeed, any particular advisory service. This huge regulatory gap is what the CSA and IIROC appears to finally be trying to close. [A 2012 OSC IEF study concluded " ..Two-thirds of investors know little about their advisor when they enter into a relationship with that advisor. Only one-third gets to an advisor through a referral. The most common way to get an advisor is to have one assigned by a bank or financial institution. Investors trust this assigned advisor, because they trust their financial institution to do what is best for them..."]

Our experience with titles and professional designations is clear. We have found the business titles of "Advisor"and "Vice President" to cause undue trust in the adviser. We have expressed concern that the title "Advisor" implies the individual is technically competent and a fiduciary when in fact the true nature of the relationship is more akin to buyer-seller. This is very prominent in the case of mutual fund sales .The title "Vice President", as in the infamous Markarian vs. CIBC World Markets case on the other hand, is perceived as creating the impression that the individual is someone senior at the firm and the title may induces reliance and trust on the part of the client. We certainly agree with IIROC that titles which imply specialized expertise with senior issues (e.g. "Certified Advisor for Senior Investing" should be of major concern because they target a vulnerable segment of the market and there does not appear to be a generally recognized and uniform standard that must be met before someone can identify themselves as possessing specialized knowledge in this area. These individuals invent designations implying that they have special expertise in assisting seniors in structuring their investments in such a manner as to reduce income taxes, avoid probate fees or generate steady income with minimal risk. In our view, descriptions and titles used on the registrants signs, business cards , written communications and in advertising should not mislead the public about the proficiency and qualifications of the representative providing services or advice.

Over the past few years we've seen a dramatic growth in titles that imply a specialization in helping seniors (55+) invest their life savings One or more words such as "senior," "retirement," "elder," or like words is combined with one or more words such as "certified," "registered," "chartered," "advisor," "specialist," "consultant," "planner," or like words, in the name of the certification or professional designation is designed to deceive. It's generally recognized that seniors with attractive nest eggs are an especially vulnerable segment of investors and that's why they are targeted. It is good to see IIROC recognize that seniors are more responsible for their retirement than ever, and thus the consequences of financial abuse of seniors are more serious than ever before. According to a 2011 report from the Ombudsman for Banking Services and Investments,individuals over the age of 60 generated approximately 53% of the complaints investigated (70% of senior complainants are retired). For many of these individuals, the financial harm they suffer from bank or investment firm abuse is magnified by having fewer years to make up the losses and fewer income or job opportunities. In mid-January we issued an Investor ALERT asking Seniors to carefully check the credentials of individuals holding themselves out as "retirement Experts","senior specialists ", and the like.

So what are the consequences of deceptive designations? We see portfolios that are not designed to match KYC, utilize costly financial products, are tax- inefficient and are far too risky. We also see real errors in advice regarding tax deductibility of RRSP loans and blatantly wrong advice on TFSA's. There has been mis-selling of leveraged and reverse ETF's more out of incompetence rather than malfeasance. This flawed advice of course impairs nest egg portfolios over time. Bad advice for seniors can be life-altering. We also see a correlation between representatives that use deceptive titles and other malpractices. This includes churning, unauthorized trading, and document adulteration. Although we don't have academic research to back it up, we find that those who deceive on titles/designations appear to be more likely to be involved in stealth advising, off book dealing and controversial referral arrangements. It boils down to a question of character and ethics.

We agree that dealer policies and procedures should include guidance on what business titles and professional designations may be used and any restrictions or prohibitions in this area. We feel that to maintain some semblance of control titles must be centrally approved. We expect that these policies and procedures will be integrated into training modules ,clearly communicated to the dealer's representatives and enforced by the firm. Greater transparency on business titles and use of financial designations add to investor protection for potential and existing clients, particularly the more vulnerable and less sophisticated ones. Additionally, dealers may wish to:

(1) adopt a definition of "elderly" person that is practical and client specific;
(2) identify certain investments (e.g., Life Cycle Funds, SPACS , CFD's) that trigger a heightened review by management when sold to a senior investor;
(3) restrain Reps from targeting seniors in their advertising;
(4) ensure that account information for seniors is regularly reviewed and updated – in person;
(5) assign Reps to clients that recognizes the different needs of retirees and pensioners

We would like to see IIROC provide a website listing of the most commonly used designations in a manner similar to that of FINRA in the U.S..IIROC might find it useful to amend investor brochures and other related materials to highlight the titles/designations problem. We have also asked in the past that settlement agreements should always include the title and designation of respondents. This would help in the research of how serious this problem is and would expose the issue to public scrutiny. Additionally, since "Free lunch" seminars are integrated with title misrepresentation,we recommend a clampdown on these seminars as an integral part of this initiative.

The criteria to be used to approve the use of a financial designation cited appear reasonable: (i) a rigorous academic curriculum; (ii) an emphasis on ethics; (iii) a continuing education requirement; (iv) a method for determining the individual's current status regarding the designation; (v) a public disciplinary process; and/or (vi) been issued by a reputable or accredited organization. We would add to the list a robust public complaint handling process process (see Appendix I for Kenmar criteria).This is important. For example, in the case of the FPSC (the CFP designation) our research found the process rudimentary with certain important deficiencies yet this designation is often said to be the Blue Chip of the emerging professional advice industry. It is interesting to also note that there are about 17,500 CFP's in Canada with 41% working on commission, 14 % working on fee +commission , and 30% working on Salary,+bonus/or commission. Just 7 % are fee only, 8 % are salary only. To the extent

sales commissions skew advice recommendations, it is to that extent even strong title usage control criteria can be nullified. That of course is the elephant in the room surrounding the use of the word "Advisor". [We note that in fiscal 2010-2011, FPSC spent just $27,715 on Enforcement but marketing and consumer affairs consumed $990,283]

We'd also like to see an item added to the criteria regarding a method for checking an "advisors's disciplinary history with the licensing authority. This, coupled with IIROC and CSA databases, would provide a more complete picture. Additionally, IIROC should clarify what it means by " a public disciplinary process". One last point and it is an important one. It was the famous scientist Lord Kelvin that said *"When you can measure what you are speaking about, and express it in numbers, you know something about it, when you cannot express it in numbers, your knowledge is of a meager and unsatisfactory kind; it may be the beginning of knowledge, but you have scarcely, in your thoughts advanced to the stage of science."* The same applies to the profession of financial advisor. We are of the firm conviction that the true professional advisor measures the results of his/her recommendations. Even if a dealer Representative meets all the title criteria , he/she must be willing and able to report portfolio performance. When investors get to see realized account returns , the client-advisor relationship will be raised to a new level. We rank the priority of personalized performance reporting very high and encourage the IIROC to fast track a rule requiring it through the regulatory system.

When a dealer continues to use misleading titles, we expect IIROC will impose appropriate sanctions and fines. As an ancient investor advocate once said " There are no speed limits without cops".

Titles the tip of the iceberg

Financial planning is not regulated in Canada except for Quebec. In Québec, according to both the general civil law and the *Securities Act* (Québec), registered dealers and advisers are currently subject to a duty of loyalty and a duty of care and must act in the client's best interest. The 1994 reform of the *Civil Code of Québec*{31} (the **Civil Code**) led to the introduction of these standards for specific legal relationships, namely, the administration of the property of others, the contract for services and the mandate. In addition to remaining subject to the general regime of contractual liability under the Civil Code, the relevant doctrine and jurisprudence indicate that a relationship between an adviser or a dealer and a client is governed by the rules underlying those legal relationships (the determination of the applicable rules depends on the nature and scope of the relationship). In any case, a duty of loyalty and, at a minimum, a duty to act in the best interests of a client as well as a duty of care are provided for in sections 1309, 2100 and 2138, respectively, of the Civil Code:http://www.osc.gov.on.ca/en/SecuritiesLaw_csa_20121025_33-403_fiduciary-duty.htm Quebec appears to recognize that the advice industry needs better oversight. This approach may be where we finally end up since the advice business is inadequately covered by most contemporary provincial Securities Acts. There may be a need for a separate Act for Advisors just as there is an Act for professional engineers. There is a difference between portfolio management and financial planning.

In the U.S, the CFP Board has recommended that the Consumer Financial Protection Bureau (CFPB) establish a rating system for professional certifications and designations by identifying qualitative and quantitative standards, based on best practices for certifications, against which certifications and

designations can be evaluated. The rating system would rank designations from the highest tier to those that are so deficient that their use in marketing is presumptively misleading or deceptive. The CFPB would then communicate the rating system through an educational campaign to educate older Americans on how to use the system to evaluate the financial designations. The CFP Board suggested that CFPB could use the standards upon which the CFP certification is based-an accredited certification program that requires substantial education and experience, a fair, valid and reliable exam that measures competencies for the standard of practice, continuing education required to maintain competencies, high professional and ethical standards, and a rigorous enforcement process that includes revocation of the certification, evidence that revocation is implemented, and public notice of disciplinary actions-as the model for the types of criteria that should be used to evaluate financial service designations. This is food for thought by Canadian regulators as well.

Several U.S. States have taken positive steps to deal with misleading seniors titles. For example, the state of Missouri concerned about individuals that claim to have specialized knowledge of senior investors' needs but had no such expertise, began to implement changes to address these concerns as far back as 2006. So called "Senior Specialists" was labeled as as a top threat for Missouri investors in 2006, 2007, and 2008. After assisting in national efforts to craft regulatory solutions to the misuse of senior-specific designations, the State amended Missouri state regulations to prohibit such misuse. The regulation that took effect in 2009 made it clear that using a senior specific certification or designation to mislead a senior investor is a dishonest or unethical practice under Missouri securities laws. http://www.sos.mo.gov/securities/MIPC/SecuritiesReport_ProtectingSeniorsLifeSavings.pdf

In 2008 ,the North American Securities Administrators Association (NASAA) developed a Model Rule **NASAA MODEL RULE ON THE USE OF SENIOR-SPECIFIC CERTIFICATIONS AND PROFESSIONAL DESIGNATIONS"** that could, with some tailoring, be adopted by Provincial /State Securities regulators. We would like to see each Province formally adopt this Model rule as part of securities legislation (although some argue that the Competition Act already provides equivalent protection). This would be supportive of the IIROC initiative (and hopefully a parallel MFDA initiative).

Securities regulators will also have to clamp down on unlicensed "advisers" that are not under the cognizance of the SRO's. Cases like Earl Jones, an unlicensed advisor, in Quebec , which involved mostly seniors, shock retail investors given that he operated freely in plain sight for over 20 years.[We note that IIROC did deal with one aspect of this infamous Ponzi scheme http://www.iiroc.ca/Documents/2012/48ab27d7-004d-43f1-8264-454109367eee_en.pdf] .The impact of this misrepresentation was so large that a study was launched. The study put together by seven seniors calling themselves the Earl Jones Fraud Assistance Information and Assistance Service, guided by the West Island Resource Centre (WICRC) and funded by the Quebec Ministry of the Elderly, reveals a broad range of problems for the 161 victims of Jones's Ponzi scheme, which bilked them out of almost $77 million. The study reveals a cornucopia of psychosocial problems the victims are currently facing, from financial to mental health issues. And though the crime is perceived as a Montreal West Island one, fully three-quarters of the victims live elsewhere, some in the Montreal region, others outside of Quebec and Canada. http://www.thesuburbannews.ca/content/en/4435

Summation

Kenmar support the IIROC initiative on the control of registered Representative titles and designations. We have made a number of recommendations that we believe will enhance investor protection. We leave the tough question of what constitutes " financial advice" within the IIROC environment for another day. The issue is growing in importance as clients move from the accumulation phase of their investing life cycle to the distribution phase (RRIF's et al).

Investor advocates believe that payments from product providers to financial advisers - such as sales commissions, trailers and volume grids - are creating entrenched conflicts that title controls alone cannot address. This conflict is the root cause of title inflation and a host of other nasty sales practice. The U.S., U.K. and Australia are taking concrete steps to improve the regulation of those dispensing advice. In Canada , so-called "advisors" owe clients recommendations that are suitable . A high Management Expense Ratio (MER) Deferred Sales Charge fund may be suitable but it certainly isn't necessarily in the investor's best interests. As one cynical investor recently said *' Trust everyone, but shuffle the deck"*. This cynicism reflects poorly on Canadian investor protection.

It's past due the time that Canada, and the provincial regulators, takes similar action to ensure that those who are providing advice and selling increasingly complex financial products are held accountable as fiduciaries. A fiduciary can be defined as a person who owes a duty of good faith and loyalty to another person. The fiduciary occupies a position of trust and confidence to that person and undertakes to act on their behalf. A person will be in a fiduciary relationship with another when that other is entitled to expect the fiduciary will act in that other's interests to the exclusion of the fiduciary's interests. If core issues were addressed , investors would be better protected. Misleading titles would likely disappear from the scene.

As an aside , some investors and investor advocates complain that they came across this Request for Comment by chance. We again take the opportunity to ask IIROC to consider the establishment of a funded Investor Advisory Panel to ensure the voice of the retail is heard and not lost among a blizzard of industry Comment letters.

If there are any questions , do not hesitate to contact us.

Sincerely,

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Appendix I Kenmar-- Elements of a robust complaint process for certification Entities:

The entity should receive ISO 17024 , *Conformity assessment -- General requirements for bodies operating certification of persons,* accreditation from the Standards Council of Canada or equivalent accreditation from an accepted Standards or Government Body.

The elements of a complaint system include but are not limited to clarity, accessibility,communication, fairness , timeliness , transparency and accountability.

Clarity : There should be a plain language complaint handling brochure explaining the the process end-to-end. Reasonably good models for this would be the ones in use by IIROC or OBSI. The inclusion of a process flowchart with expected time lines is helpful.

Accessibility: The complaint process should be well publicized . It should not take considerable time for the complainants to figure out that there is a complainant handling body for licensee's . Access is critical to the success of any complaint The following core elements of access should be considered:

(a) The right to complain to the licensing entity should be adequately publicized by using multiple locations, such as in Codes of conduct, at trade shows, web site, Engagement Letters, Newsletters and during client-adviser meetings. Access documents should be available in both Official languages. It may also be necessary to make the schemes key materials be available in in Braille or large font, and in audio format depending on volumes.

(b) The process must pro-actively promote itself so clients become aware of the existence of the scheme, thereby improving accessibility of the process. There may be some classes of complainants or disputants who, for geographic, language or other reasons, are not accessing the complaint process in proportion to their use of financial or credit products and services. The scheme's outreach program should actively promote its existence, particularly to those complainants that are under-represented in the composition of people who should access the scheme.

(c) Complainants should have direct access to the entity via FAX in addition to letter,online and email . The complaint intake protocols must be robust to ensure the integrity of the system. This includes understanding the complainant issue, being able to offer a language of choice, and if appropriate referring them to other authorities (law enforcement, SRO's privacy, human rights) .

(d) A formal provision to assist complainants to draft and lodge their complaints or disputes should be embedded in the licensing entity operating policies in particular if the client is handicapped in any way, is a senior with special needs or a language or a literacy issue is involved so that they may participate effectively. Without such assistance, seniors , the unsophisticated, recent immigrants etc. may abandon otherwise legitimate complaints against designation holders.

(e) The complaint process must actively work with ethnic communities . In a multicultural society such as Canada's, access should be opened up to include languages other than English or French based

on local demographics. In some case, interpreters may have to be provided by the entity .

(f)) Scheme documents should comply with plain language principles, ensuring that information is easy to access, user-friendly, practically relevant and disseminated at key stages of the complaint resolution process.

(g) The entity's complaint scheme must formally allow the parties to exchange files electronically.

Communication : There should be good communication during the investigation cycle. Complainants should not have to make numerous inquiries as to the ongoing status of the complaint. Complainants should be updated periodically during the investigation process.

Responses to complainants should not avoid the main issue , be superficial or dismissive. Professional entities require an effective root cause analysis regime to identify the root causes of consumer issues . A *substantive response* should be defined-it should include a plain language articulation of the complaint,(s) , key files,documents and records used in the complaint investigation, the standards against which compliance is being measured, a clear statement of the facts of the case, the rationale for the decision, the loss calculation methodology applied (if applicable) and the options available to the complainant upon receiving the response letter .

Fairness: Fairness can be best achieved by a combination of activities, such as the following:

(a) Disclosing to the parties in advance ,the criteria used for recommendations or determinative decisions , if the investigation will stop the statute of limitation time clock,and the amount of time complainants will have to appeal a entity's conclusions (we recommend at least 45 days) ,

(b) Applying advisory or determinative methods (e.g. loss calculation methodology) according to publicly disclosed procedures that are made available to the parties prior to initiation of any investigation. Such procedures and their application should provide the complainant with full, fair and equivalent opportunity to participate in any methods, and should ensure that any recommendations or decisions are based on valid evidence and arguments presented to the investigator ,

(c) Adopting and disclosing Conflict-of -interest policies and Codes of Conduct for management , personnel and dispute resolvers,and only assigning investigators where they can be relied upon to be objective and unbiased,

(d) Formally allowing Complainants the right to appoint INTERVENORS to support them through the complaint process,

(e) Clearly communicating ,a priori, to complainants the investigator’s scope of authority and assuring via supervision that any recommendation or determinative decision is within the scope of that authority,

(f) Ensuring that any documents made available to one party are made available to the other ,

(g) We recommend that the acknowledgment letter must be sent to a complainant within five (5) business days of receipt of a complaint. The initial response to the complainant should consist of the following: the contact information of the individual handling the complaint; an assigned complaint identifier number,a statement that a client may contact the above noted individual for a status update; an explanation of the internal complaint handling scheme; a reference to an attached copy of an entity-approved complaint handling process brochure and a request for any information reasonably required to resolve the complaint. Any decision and reason not to commence an investigation of a complaint should be fully documented and maintained in accordance with traditional complaint record retention requirements.

(h) In no event should a complaint to the FCAC , a provincial securities commission, SRO or to police be a reason for the entity not taking on a complaint case or opening a file.

(i) Confidentiality restrictions , if any, must not restrict a client from initiating a complaint with the regulators/ police or continuing with any pending complaint in progress or participating in any further proceedings.

Timeliness: Entities should publish cycle time standards so complaints have an idea of what service level to expect. The scheme's continuous improvement plan should work to reduce cycle times.

Transparency : Entities should have documented , publicly available policies and procedures for:

- the orderly intake of complaints/ disputes
- fully investigating complaints
- responding to complaints in a substantive manner within established time limits
- capturing , analyzing and utilizing information about complaints and, public disclosure, at least annually, on the functioning and performance of the complaint handling scheme. This would include comprehensive statistics including the number of complaints , the disposition of the complaints (including those rebuffed) and the nature of complaints . Complainants want to see what % of complaints result in real sanctions .Other information should include cycle time performance, complainant demographics, compliance with key scheme metrics , Case studies , the results of any client satisfaction surveys, and a narrative overview of the year by the Executive responsible for Complaint handling and Enforcement.

Full Panel Hearing proceedings should be made public. The MFDA/IIROC approach is a good benchmark as to level of detail and content expected.

Accountability: There should be a policy requirement that at key steps of the investigation , complainants should be informed of the status of their complaints and the next steps involved in the process . This is a very important element to retail consumers. Investigation should proceed even if there is civil litigation. It could very well be that other clients are being victimized while the investigation is in suspension. This would enhance the integrity of the profession of advice giving. We recommend that entities introduce an bi-annual independent audit of compliance with complaint handling rules and an annual complainant satisfaction survey.