

COMPULSORY DISCLOSURE FOR RETIREMENT VILLAGE MANAGERS

May 2008

Investment Advisers Disclosure Obligations

Retirement village managers and other sales employees will be affected by the new laws introduced in February 2008 which changed the disclosure requirements for investment advisers and brokers.

The Securities Markets Act 1988 ("Act") now prohibits an investment adviser from giving investment advice to a member of the public, unless the person receiving advice has first received a written statement containing information about that adviser.

So, the questions are:

- Who is an investment adviser? and
- Is that person giving investment advice?

Investment adviser and investment advice

An investment adviser is any person who, in the course of employment, gives investment advice to members of the public.

Under the Act, investment advice is any recommendation, opinion or guidance given in relation to acquiring or disposing of (or not acquiring or disposing of) securities including occupation right agreements.

This means that:

- any recommendation, opinion or guidance given to an intending resident in relation to an occupation right agreement generally constitutes investment advice under the Act.
- any village manager, sales manager or any other retirement village employee who gives advice in relation to an occupation right agreement will most likely be an investment adviser.

Exclusions

A village operator is excluded from having to make disclosure, because it is an "issuer" of the securities (issuers are excluded from the disclosure requirement under the Act).

Also, mere guidance as to procedure (e.g. how to fill in a form) will not be investment advice. There is, however, a fine line between procedural guidance and the making of a recommendation. In our opinion, it is prudent for operators to assume that their sales employees will be giving investment advice.

General information about the adviser

Before giving advice, an investment adviser must provide a written disclosure statement to an intending resident.

The disclosure statement must include information in relation to any qualifications of the adviser that are relevant to the giving of investment advice, including:

- the nature of the qualifications;
- when those qualifications were obtained; and
- a brief description of the extent to which the adviser has kept up to date the knowledge gained in obtaining those qualifications.

The disclosure statement must also include a brief description of the adviser's experience as an investment adviser and whether the adviser:

- is a member of a professional body;
- has professional indemnity insurance;
- has facilities for resolving disputes with clients.

Finally, the disclosure statement must disclose if the adviser has (in the last 5 years) any criminal convictions or has been:

- prohibited from managing a company;
- adjudged bankrupt; or
- expelled from, or prohibited from being a member of, a professional body.

The types of investment an adviser gives advice on

The disclosure statement must state the types of investment the adviser gives advice on. For example, if the adviser only gives advice in relation to a particular village or villages, this must be stated.

Fees and remuneration

The investment adviser must, in the disclosure statement, give certain information about fees and remuneration including:

- the nature and level of any fees that intending residents will be charged for the provision of the advice (in most cases there will be no such fees); and
- whether the adviser will or may receive a commission or other benefit from the village operator in connection with advising intending residents.

Interests and Relationships

The investment adviser must provide information in the disclosure statement about any interest or relationship which is likely to give rise to a conflict of interest, including the amount or rate of any commission and from whom such commission has or will be received.

Other requirements relating to disclosure

The disclosure statement must state when it was prepared and the name, address and business telephone number of the adviser.

The disclosure statement and any additional information provided must not be deceptive, misleading or confusing at the time that it is provided.

If there has been a material change in any matter that must be disclosed, the document should be updated.

Investment Brokers' Disclosure Obligations

Under the Act an investment broker is prohibited from receiving investment money from a member of the public, unless that person has first received a written statement containing information about the broker and the money handling procedures of that broker.

An investment broker is any person who, in the course of employment, receives investment money and is able to apply such money to any purpose.

Village managers, sales managers or any other retirement village employee who in the course of their employment receive money directly from residents and who must transmit the money only to the village operator or the statutory supervisor, will not be investment brokers and should have no disclosure obligations under this part of the Act.

The village operator itself is also excluded from this disclosure obligation, because it is an issuer of securities under the Act.

Compliance with the Act

The Act provides that every person who is aware or ought reasonably to be aware of his or her obligations under the Act and who fails to comply, commits an offence and is liable on conviction to a fine not exceeding \$100,000 in the case of an individual or \$300,000 in the case of a body corporate.

Contact Us

The information in this newsletter is necessarily general.

Please feel free to contact us for more information about any of the matters raised in this newsletter or about any other matter relating to your retirement village or the Securities Markets Act.

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