WEBMASTER NOTE: This is the unedited transcript of the Industry Roundtable Re: CSA Consultation Paper 33-403 - Statutory Best Interest Duty for Advisors and Dealers on June 25, 2013 which we received directly from the transcriber. We are posting the transcript in this form to make it available as soon as possible.

CANADIAN SECURITIES ADMINISTRATORS

AUTORITÉS CANADIENNES EN VALEURS MOBILIÈRES

ROUNDTABLE DISCUSSION RE CONSULTATION PAPER 33-403 STATUTORY "BEST INTEREST" DUTY FOR ADVISORS AND DEALERS

DATE: Tuesday, June 25, 2013

HELD AT: Ontario Securities Commission
22nd Floor, 20 Queen Street West
Toronto, Ontario

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INTRODUCTIONS:

CHAIR: Good morning, everybody. I think we should get started. We used up the whole time for our investor panel so we want to leave enough time to get everybody's input.

So I'm Debbie Foubert, Director of the Registrant Regulation Branch at the OSC.

So let me just start by reading the standard disclaimer. The views expressed by CSA Staff during this roundtable are our own and do not necessarily represent the views of any of the commissions that comprise the CSA.

So thank you for joining us this morning to participate in our industry roundtable. To start off, I'd like to introduce the rest of the CSA team with me here at the table. Felicia Tedesco, Jeff Scanlon, and Alizeh Khorasanee are from the OSC, and Stéphane Langlois is from the AMF.

We also have individuals on the conference line from the other jurisdictions. So we have Lindy Bremner, from the B.C. Securities Commission; Bonnie Kuhn, from the Alberta Securities Commission; Sunny Udembach (phon), from the Securities Division of the Financial and Consumer Affairs

Authority of Saskatchewan; Chris Besco (phon), from Manitoba; and Jason Alcorn from New Brunswick.

OPENING REMARKS:

CHAIR: So before we begin, I want to just address a few preliminary matters. We have a number of observers in the room today, which include Staff from the OSC, from IIROC, from MFDA, from OBSI, the Ontario Ministry of Finance, and also the press.

Also, once we begin the interactive portion of the roundtable we will have two wireless microphones that will be brought around to you by OSC Staff, so please raise your hand and we will get the microphone for you as soon as possible. Also, we are having this session transcribed, so when you make your comments, please identify your name and the organization you are with.

Finally, we know that you guys have a lot of questions, and we want to hear them, but if we run out of time today, please be assured that CSA Staff will be here after the formal close of the meeting as well as you can send us an e-mail at the e-mail address that you registered for these roundtables. We will give you that information at the end so you don't have to worry about it right now.

I think that covers the preliminary

matters, so let's move on to opening remarks.

OPENING REMARKS OF CHAIR:

So, as you know, the CSA Consultation Paper 33-403 was published on October 25th, 2012. We received over 90 comment letters, and I can assure you that these letters have been reviewed and analysed by CSA Staff. We appreciate that it takes a lot of time to write these comment letters so we thank you for your input.

This is also a very complex area that requires careful consideration to determine the right approach for Canada, and we want to ensure our standards are appropriate for Canadian investors and Canada's capital markets.

While the paper describes a possible "best interest" standard for the consultation purpose, let me assure you that the decision has not been made whether a statutory "best interest" standard should be adopted, whether another policy solution would be more effective, or whether our current framework is adequate.

Today's session is the second roundtable on the subject. We have one more scheduled for July 23rd. Therefore, no decision will be made until the consultation process is complete.

Our agenda for this morning's roundtable will be as follows. Jeff will provide a brief background on the presentation of the "Best Interest" Project. Then we will be going to focus our discussion on two themes: the potential benefits of a "best interest" standard, then the potential competing considerations of a "best interest" standard. Each theme has four topics which we would like to explore with you, and then after that we will provide a wrap-up and a conclusion with some closing remarks.

So with that, if there are no questions at this point, I will turn it over to Jeff, and he will start the background presentation.

BACKGROUND:

MR. SCANLON: Thanks very much, Deb. Good morning, everyone.

Before I begin, I guess I just want to point out to you, if you haven't noticed, that yesterday afternoon we were able to post the transcript from the investor session on June 18th. So I encourage you to take a look at that session.

The benefit of having these sessions transcribed is that they provide wonderful transparency to our consultations. Now, of course, sometimes it maybe can be a little too transparent, and by that

I mean, you know, when I was thinking about the last session I had this distinct recollection that I was an incredibly articulate and urbane speaker and I was able really to summarize the most complex concepts into the pithiest of phrases. I was soon disabused of that notion when I looked at that transcript, and it seems to be that it's really touch and go if I can speak with any kind of grammar at all. So transparency is good, but maybe sometimes it's a bit awkward. So I just wanted to leave you with that.

Now, in terms of background, I just want to very briefly talk about the current statutory framework. I know this is discussed at some length in the paper so I'm not going to spend a lot of time on it.

The current, sort of overarching cornerstone duty is for advisors and dealers to deal fairly, honestly and in good faith with their clients. Married with that, of course, is the suitability standard, which has as its foundation the know-your-client, the KYC, and the KYP elements of that.

In terms of conflicts, we expect advisors and dealers to identify and respond to conflicts by avoiding them, managing them, and/or disclosing them, depending on the circumstances. Of course, there is a variety of other requirements, a number of them. Obviously, I won't get into them here, but some of them are mentioned in the paper.

So that's obviously just a very quick snapshot of the current regulatory structure.

In terms of a fiduciary duty, a fiduciary duty in its simplest sort of articulation is really the duty to act in the client's best interest, and the paper explores that and tries to flesh out how the courts have teased out some principles to give meaning to that phrase, whether it's the duty of loyalty or the no-conflict rule or the no-profit rule or what have you. Again, further detail is provided in the paper.

The paper also identifies some of the factors that courts look at when they're trying to determine whether or not in the case of an advisor-client relationship, which is not per se a fiduciary relationship, there is a fiduciary relationship. They look at some of the factors, again summarized in the paper and on the slide, having to do with reliance, discretion, trust in the advisor, et cetera.

So that's a bit of background on

fiduciary duty. In terms of the international reforms, what we're seeing in the U.S. is that SEC staff has recommended the adoption of a statutory, uniform "best interest" standard for investment advisors and broker-dealers in the U.S. There has been no rule-making to date, and it's unclear at this point whether there will be rule-making.

The U.K. has had a qualified "best interest" standard for a few years now, but they have passed their RDR reforms that came into effect in January, and there's a number of elements of those reforms, including categorization of advice into independent and restricted advice and a banning of commissions from product providers to the advisors.

In Australia, the future of financial advice reforms has as really a central component the introduction of a qualified "best interest" standard accompanied with a ban on commissions, similar to the U.K. model.

The EU is also exploring, although they're still in early days in terms of their development of proposals of MiFID II, but they're toying with ideas of categorization of advice with independent and restricted advice and the possibility of maybe having to not take commissions from product providers if you categorize their advice as independent.

So that's a very quick snapshot. What I do want to leave you with -- and certainly we heard some of the comment letters express some concern that there may be sort of a knee-jerk reaction to what was going on internationally. I think what we want to just reinforce with you is, you know, just because some jurisdictions have a certain scenario or certain starting point, we may not have that same starting point, and we are mindful of that issue. So if this is the right solution for Canada and the right solution for Canadian investors and Canada's capital markets, you know, I think they're instructive as test cases, but we realize we're looking at this within our own context.

Very briefly, to try and sort of anchor the debate of fiduciary duty/"best interest" debate in Canada, we articulated a "best interest" standard in the paper, so I just want to briefly go over that standard. It really just says that the advisor, when providing advice to retail clients, has to act in their client's best interest. By "retail client", we define that as anyone who is not a permitted client. So, for instance, that would mean individuals who have net financial assets of less than $5 million. There are other elements, and they are described in the paper.

Again, we noticed in the comment letters there were a number of letters that identified a number of concerns, saying essentially -- for instance, some of the concerns were there's not one best investment or this could mean that the advisor is the guarantor, some of these concerns. I guess I just want to provide some comfort that I think we acknowledge that there would not be one best investment under a "best interest" standard. The advisor would not be the guarantor for the client. I think this is well-established certainly in the common law currently under fiduciary duty.

Investors also wouldn't necessarily be recommended the cheapest product. I think that was another concern that was expressed in the comment letters, and we understand that concern.

Really, if what investors are looking for are the best risk-adjusted returns over the time horizon that the client has in mind, the cheapest product may be the best investment, but it might not be. So we're mindful of that concern as well that was expressed.

The last point here is dispute resolution mechanisms. We did not address those mechanisms, so we, in talking about a statutory "best interest" standard, didn't contemplate changing any of the dispute resolution mechanisms. So I just wanted to make that clear up front as well.

And then, finally, I just want to quickly go over some of the more recent regulatory reforms that securities regulators and the SROs have been working on in the last couple of years.

One is the Fund Facts forms, and they're coming online fully next June with the obligation to provide the Fund Facts document within two days of purchasing a mutual fund.

Then, IIROC and the MFDA put through their significant reforms and enhancements to a number of areas of their rules, the CRM reforms, where there were, for example, enhancements to the suitability triggers and clarifications on conflicts and strengthening of those conflict rules.

More recently, too, there have been the CRM 2 reforms that a lot of you obviously know about and have been involved in consultations on. So those are coming online shortly, and there's a phased-in implementation that most of you know about.

And then, some of the policy work that has not yet been finalized but you know we are working on are the mutual fund fees work, and we had a great roundtable on June 7th I know some of you have attended. We had a great discussion. The transcript is up there for that session as well.

And then there's the work from last November where we proposed the use of OBSI as the dispute resolution provider of default for advisors and dealers.

So that's a very quick snapshot of what we're up to in terms of regulatory reforms. Again, I want to give you some comfort that we understand that one of the concerns that was expressed in the comment letters was that there is a lot going on, and certainly we're aware of that and we are mindful of that as we turn our minds to the advantages and disadvantages of going with the statutory "best interest" standard.

So that's really what I wanted to do by way of background for this session, and now I think I want to start the interactive portion of today's roundtable. How we have done it, we have identified two themes for the purposes of today's roundtable. So before the break we're going to talk about four topics that relate to potential benefits of a statutory "best interest" standard.

POTENTIAL BENEFITS DISCUSSION:

MR. SCANLON: So the first topic is the most principled foundation. The concept here is that if a fiduciary duty or "best interest" obligation is the place at common law to ensure that...you know, if there's the requisite vulnerability and reliance and discretion of the advisor, if that's sort of the policy rationale for having a fiduciary duty at common law, when you look at some of the studies that have been commissioned both by regulators and also by industry, in a lot of ways it looks like that's the relationship that exists for many if not most retail investors in Canada. It looks like there is the requisite trust and reliance, and if not necessarily the technical discretion, there is by virtue of reliance almost de facto discretionary power on the part of the advisor.

So in some ways it doesn't seem necessarily inappropriate to have a statutory "best interest" standard if that's really the nature of the relationship today with clients.

This was the point incidentally that really resonated, I think, with the investor groups at the investor roundtable. They sort of articulated it in a pretty clear example. They said, you know, consider the current regulatory framework and consider that as a house that's been around for a while.

Perhaps you could make changes to the house, you could do some renovations, you know, upgrade the kitchen or put down some new hardwood, but they had the concern that really it was a soft or unstable foundation and really this is a foundational issue and you have to start with the right foundation. So that's what we heard at the investor roundtable.

The second topic has to do with the effectiveness of disclosure of conflicts. So as I mentioned and you all know, the rules essentially are, for the most part, pretty principles-based around conflicts. Essentially, they have to be avoided, managed or disclosed.

Now, there is, I think, a concern on the investors' part that disclosure may not be the most effective way to deal with conflicts. Investors may not have the skillset to be able to meaningfully take that disclosure and alter how they interact with their advisor.

So I think a question we have for this group is: Do you think that investors are well positioned to take disclosure from their advisor about conflicts and to sort of incorporate that into their decision-making process as they deal with their advisor?

The third topic, "From Suitable to 'Best Interest' Investments", this is a concept that also came up in the investor session, and really the concept here is -- as we all know, we have the current suitability standard, and investors, I think, feel that we need to move from a suitability standard to a standard that ensures that clients are getting investments that are in their best interests.

But you know what? I think there are some challenges, operational and others, of how you might go about doing that, and some other jurisdictions have approached that in different ways. For instance, Australia has sort of done its own approach with their "best interest" standard, but I think we want to explore some of the challenges of that and we'd like to get your thoughts on how that might work and what are the challenges of being able to do that.

I think also we'd like your thoughts, too, on how it might work in the context of the various registration categories that we have for the firms because we know that's a challenge as well.

Then, finally, the point on information/literacy asymmetry. A number of commenters on the consultation paper identified a concern -- you know, one of the possible benefits the paper identified of a statutory "best interest" standard was that it might help mitigate the effects of that imbalance or asymmetry. But some of the commenters said, well, you know what, it might actually exacerbate some problems. It might result in investors distancing themselves or pulling back from the relationship with their advisor if they feel their advisor is "on the hook".

It was interesting. At the investor roundtable, you know, the sense I got certainly from most of the investor groups was that they didn't feel this, in fact, is what would happen, that in practical terms there wouldn't be that kind of disengagement that some commenters had expressed.

So those are the four topics that we would like to talk to you about this morning before the break having to do with potential benefits. So I think you've heard me talk for long enough.

So at this point, as Deb mentioned, we have got a couple of microphones that will be circulating, and so we really would like to hear your comments on these issues.

Just a reminder. I know it's a bit awkward, but every time if you could for the benefit of the transcriber state your name and your organization.

COMMENTS FROM THE FLOOR:

MS. DE LAURENTIIS: Good morning. Joanne De Laurentiis, the Investment Funds Institute of Canada.

Can you just put that page back where you had the questions? Just the first topic.

MR. SCANLON: OH, with the principled foundation?

MS. DE LAURENTIIS: Principled foundation, yes.

First of all, may I say that I want to commend the CSA for taking the approach of issuing a discussion paper. I think that's a very good approach. It certainly, I think, engages all of us and makes us think about the kind of research and analysis that we need to do. So my kudos to all of you.

I think on this issue the question really turns on the legal definition. I think there are a number of lawyers in the room because, as you say, we all agree that the best interest is what we are looking for for the investor. That's what the investor -- we've designed our rules in order to achieve that objective.

But as I have read all of the submissions and as we have thought about this, it really comes down to the legal definition, that it somehow creates perhaps confusion as to what is meant by "fiduciary standard", and in every case -- you know, now we have a clear understanding as to where, what conditions exist around what a fiduciary standard is when that condition exists. If we just say it's a blanket definition, how do we interpret that, how do we apply the rules; you know, what does it actually mean? So I think it does turn perhaps on a technical question of the legal meaning of it once we embed it into a statute as a statutory requirement.

MR. SCANLON: You know what? I mean, I take your point. It's a fair point that we do want to be clear about what it is we mean exactly, but certainly at the investor session, from their point of view, I don't think they would agree with you. I mean, I don't think they would say this is a technical, legal point. What is it about even the concept, with some uncertainty at the edges, let's say, around best interest, and why is that a problem in terms of trying to incorporate that as a statutory rule?

I understand that there are some challenges with it, but sort of fundamentally I think investors get nervous when they don't hear that a lot of commenters are supportive of it because I think they certainly -- from their point of view, they hear it in the advertising - at least, that's what they say - and they hear it from their advisors that their advisors are acting in the client's best interest. So I think that's maybe where they're coming from. So I don't know if that's helpful or not.

MR. POND: Hi. My name's Robin Pond. I'm with the Canadian Advocacy Council. The Canadian Advocacy Council advocates on behalf of CFA societies across Canada.

We take the view with this that if you are a CFA charterholder you're already there. The Code of Ethics and Standards of Conduct of the CFA Institute require all CFA charterholders to act in the best interests of their clients. So we don't see a problem with this.

I would rush to, I think, say the same thing as the previous question, which was that the devil's in the details. What sort of documentation is required to prove you've acted in the best interests? Is the onus going to be on the advisor or on the party that feels they are injured to prove they didn't act in the best interests, et cetera?

But from the general point of view of should there be one, we do not see the problem with it, quite honestly. It is the relationship that I think most people going to an advisor in Canada already think they have, which is what some of the research showed, and quite honestly, with the information asymmetry disclosure transparency will only take you so far, and, well, we really do think this is the proper standard.

Now, we also don't necessarily think it should be just for retail investors or why you would set a -- and I'll ask. Why just limit it to one category of investor? Should you not act in your client's best interests if they have $6 million? That sort of thing.

Also, there do have to be, obviously, definitions put in place in terms of more limited mandates for an advisor.

Clearly, if it's execution-only, this would not seem to make sense or apply. If you have a limited mandate, if you are just offering a certain type of investment product, for example, you wouldn't be expected to know about all other investment products, just what you are offering.

So the devil is in the details, we would think, and there are a lot of definitions to work out and a lot of process in terms of how it's proven, but at the end of the day, we applaud you for the suggestion and think it's the right standard.

MR. SCANLON: That's helpful, Robin. I have one follow-up question. I mean, I think you're right that the details are important and everyone needs clarity to understand so that there's no misunderstanding either by clients or their advisors about whatever standard it is that we end up with, but, I mean, what are your details? You say it's part of the Code, so when you refer to a "best interest" standard what does your organization mean by that?

MR. POND: Well, there are other standards in the Standards of Practice that I would think support giving a "best interest" standard; for example, that all investment advice has to have a written basis, that you have to have documented the reason for an investment is really part of the standards -- I'm greatly paraphrasing, but of the Standards of Practice. So those sorts of things.

But I do understand the lurking fear when you're acting as an advisor in terms of what if I've acted in the best interests of the client but things didn't work out, the investment didn't do well? What is the magic level of documentation to prove that the process was appropriate? And I don't think the Standards of Practice have it at that level.

MR. MARSH: Thank you. My name is

Andrew Marsh. I'm president and CEO of Richardson GMP here in Toronto. We're an IIROC-licensed, independent wealth management firm.

The first question I have is for the room. How many people in this room have actually worked as advisors in their career? Five or six.

So I would like to encourage you guys when you've had your roundtable with clients, you're having your roundtable with industry participants, I suggest you have a roundtable like this with advisors. I myself have worked as an advisor for 14 years prior to becoming a management stiff. I can tell you, speaking on behalf of advisors in Canada, there's a lot of really, really solid professionals who work extremely hard for the best interests of their clients.

My suspicion is that if you asked most advisors on how they conduct themselves they assume a "best interest" standard. I encourage this panel to ask more advisors than industry participants and add that to your list. Thanks.

MR. JAFRY: Zahid Jafry, with Onus Consulting Group.

I just had a follow-up question for Robin. I actually agree with you. The CSA Institute does a terrific job. They have an investment policy statement which is very comprehensive, which is on CFA Level 3. People learn how to write a proper blueprint of the investor/client relationship.

What I would say is the CSA is an independent entity, and wouldn't you think that the clients of every retail investor would qualify for what benefits the clients of CFA charterholders?

MR. POND: Yes.

CHAIR: Can I just go back to Andrew?

I mean, I want you to understand that this isn't saying that we think that the advisors out in the field doing the actual contact with the client are doing anything that is not acceptable, right? I mean, we understand that they're out in the field, they're working with the clients, they have the relationship, and they want to do the right thing.

You're saying that we should have a roundtable just for advisors? We thought that we opened this session to all industry, so how do you think we could get the advisors actually to come in and talk to us?

MR. MARSH: Free lunch.

CHAIR: Like a real estate open house, right?

MR. MARSH: For sure. We are all hungry for free lunches these days.

I'm not saying that you're insinuating that advisors are bad at all. What I realized when I tried to make my way through some of the submissions and the letters that were written, they were written by a lot of lawyers, they were written by a lot of people who have never dealt with real people with real money. So I'm not sure some of the submissions that I read in my mind truly speaks for what an advisor stands for. That's my only point.

And I do think a free lunch would bring a few people in.

CHAIR: Not breakfast? We have got breakfast.

MS. PAGLIA: My name is Laura Paglia. I'm a partner at Torys, and I represent a lot of advisors in my practice in the defence of litigation and regulatory investigations. I just want to pick up on something that Mr. Marsh said.

Firstly, I agree that most advisors would agree, not dispute, and certainly try to act in the client's best interest. I also agree with Mr. Marsh with respect to the context of this discussion. It is highly legalistic in nature. As a lawyer, my concern, when I see all of these good intentions in the room, is the way we're using the words.

In Canada, "fiduciary obligations" means something very specific in the investment industry, so our starting point at law is we have an advisor, we have a client. All the relationships are different. We are going to start with principal and agent and work from there, and we are going to determine, based on the facts, what the reliance is in any given fact scenario.

I may be oversimplifying when I say as a matter of law what I think you're proposing is instead of starting at point A let's start at point Z, and at the beginning let's assume the opposite. Let's assume detrimental reliance, and you argue it out of there, which is literally reversing the case law on its face.

Now, I don't know if that's actually the intention here, and I'm not altogether sure that that's actually been considered, but that's what this is in fact doing.

My concern is when you have an industry that wants to be compliant and wants to act in the best interests -- and I can tell you, representing advisors, they say "best interest" all the time. If you say to any given advisor on any given day, "Do you have an obligation to act in the client's best interest," they say, "Of course. Of course I do. I try to do that every day."

Now, do we mean good faith? Do we mean doing the right thing? Do we mean not churning, not overcharging, finding a suitable recommendation? We mean all of those things, but the labels we're trying to put on that in this discussion is a concern. It is ignoring the case law. I won't get into the granular, but there are already plenty of places in statute and in the regulations where you could find that wonderful intention that nobody is disputing.

MR. CHARLES: Bill Charles from Investors Group.

I was also in the field for 18 years before also going into management. I think from an industry standpoint, from a dealer standpoint, from an advisor standpoint obviously we all want to act in the best interests of clients. There's no doubt.

The question is: Although it sounds altruistically positive, how do you define the 'very best product' on behalf of the client? Is it cost? Is it variability? Is it return? Is it suitability? This is a very, very nebulous position to take, and, quite frankly, discussion and conclusion can only be assessed after the fact.

I mean, for example, you look at someone who is planning for their retirement and taking a long-term notion on their investments. Obviously, they should have a greater mix of equities in their portfolio. That makes sense long term, but it also exposes themselves to greater variabilities and volatilities.

That being said, we go through a bear market, and the client now says, "How is that in my best interest? Look at where I'm at today." All of a sudden there's a debate that exists when clearly the strategy for above-average, long-term, after-inflation rates of return should be a greater percentage in equities. The client can then debate how is this in my best interest because of the volatility and the variability of those investments.

So when I look at the paper, I don't really see a gap between the current standard and a best interest duty, if you will. You know, at the end of the day, the current standard states that advisors need to act fairly, honestly and in good faith to clients. In doing so, that already implies a high standard of duty. I think the courts have already imposed a high standard on advisors. Over and above all this, you have SROs having a detailed system and rules in place for suitability, conflict of interest, dispute resolution, et cetera, et cetera, governing the sale of mutual funds, and there's a requirement amongst dealers to have comprehensive compliance procedures in place as well as supervisory procedures in place to ensure that suitability is met, KYC is met.

So I think at the end of the day there's not a lot of difference between the current standard and the standard that's proposed.

MR. SCANLON: Thanks very much, Bill.

I just have one follow-up question or comment for you. I mean, we heard that message in a number of comment letters, and I understand where it's coming from. Certainly, the standard we have now, suitability with acting fairly, honestly and in good faith, it's a fairly robust standard.

I think one of the elements around suitability that I think investors point to, trying to identify maybe that gap that might exist, is they point to the KYP process. What they point to is the fact that arguably KYP imposes no positive obligation on advisors to sort of put anything on their shelf. Essentially, it's up to the advisor or the firm that the advisor works for to put whatever it wants on its shelf. That could be incredibly broad. It could encompass more or less the "universe of products", but it could also be extremely narrow or it could be narrow in terms of proprietary products.

So I think that's one example of where investors might see there being a bit of a difference, a bit of a delta between someone who walks into, let's say, a mutual fund shop that has proprietary products exclusively and -- you know, could there be a better mutual fund product out there I think is sort of one of the points they bring up.

I don't know if you have any comments on that.

MR. MOULSON: Hello. I'm Peter Moulson from CIBC. I was an advisor in the legal sense, never with retail investors, and I'm now in compliance.

It's a good question you're asking. I think it was something that was in our comment letter back with the enhanced kind of KYP obligations on firms.

We have a number of dealers within our ambit, a full-service retail brokerage firm. When that KYP obligation became front and centre we've actually tightened the reins and started to limit products on our shelf for fear of potential liability of unsuitable products getting into the pipeline.

When I read the best interest proposal, it sort of imposes an opening-up of that sort of framework that we have put in place to try and meet the "best interest" standard, and I think that's actually counterproductive.

When firms take a closer look at the entire universe of products that are out there and put in place controls to try and limit products that we feel aren't really suitable for any investors - there are a few of those - we're taking a view that these are not in the best interests of clients. It would be unfortunate if we were second-guessed after the fact by not having made some of those products available under a "best interest" standard, and I think that's an unforeseen consequence perhaps of that standard being imposed.

MR. GRAD: David Grad, Primerica Financial Services.

Listening to some of the comments, I mean, the question is: What's broken? I've heard the comment, you know, this is already in place, this is already happening, this is going to reflect it. We are now hearing we are turning it on its head, we are going from prove it to work backwards. We're heading from we're trying to protect the client by not putting everything on the shelf; well, now everything has to be on the shelf. Dealers that don't offer everything, maybe only offer mutual funds.

So the question really becomes: What are we trying to change? We obviously are changing something. We're not just going to be codifying what is already in place. If it's already in place and it's working fine, what are you doing? You're obviously changing something. Being a lawyer by training, it all becomes legal issue, and it all becomes legal debate, and it all becomes very costly to the industry. And who is protected and how are they better protected at the end of the day?

That really becomes the question. Why move forward if something's not broken? If something is broken, what's broken, and how are you fixing it with that?

When you look around the world, the one thing that troubles me is that they're always qualified standards. Now we're going to start debating about how we're going to qualify the standard, and now you're breaking down what you've tried to build up because you're going to be qualifying it, and we are going to debate until the end of time what those qualifications are going to be. I think those qualifications already exist in the environment that we are currently in. We've brought in all these compliance standards. The courts have already set up what their view of the standards are. We have dealers who I'd probably say 99.5 percent of the time are acting in the best interests of clients. You're talking about a small number of people that may be rogue, and they're always going to be rogue. When you look at the business environment, everybody's got a different view of you should be in bonds, you should be in mutual funds. There's always going to be a difference of opinion. How do you codify what is somebody's best interest?

MR. SCANLON: I guess this comment has come up in the course of some of the comment letters; you know, what's broken? I guess I just want to point to the fact that the paper does identify five areas of concern that we have with the current regulatory structure.

Again, I mean, I think it gets back to investors are concerned that suitability, for instance, as a starting point doesn't assume anything about what the advisor has to consider necessarily. It's really sort of more focused on the back end than the front end, right? So they could get advice, they could get recommended a product that might be suitable for them, but there might be a better product out there for them whether because it's a cheaper product, and therefore, the returns over the long term might be better, or because it might not be cheaper, but it might be more suitable in terms of a better match for the risk tolerance and their investment objectives or what have you. So that's one element.

Of course, then there's the expectation gap. We haven't really talked about that too much today, but certainly, investors seem to be under the impression that advisors are acting in their best interest. Even if it means that their advisors would make less money on a given transaction, by far most investors in Canada have the belief that their advisor will put them in a product that could mean less compensation for their advisor, so I think it's a very strong belief on the part of the investors.

Now, I think it's a reasonable comment to say, well, just because there's an expectation gap, that in and of itself might not be sufficient to warrant introducing a statutory fiduciary duty, but when you look at again the studies commissioned by both regulators and industry that reinforces how much trust and reliance that Canadian investors put on their advisor - and the industry studies have been very forceful in trying to demonstrate the value of advice and how much investors rely on their advisor - when you couple that with sort of some of the information asymmetry imbalance, I think it's not unreasonable to consider that statutory "best interest" standard is an appropriate response.

But clearly, there are some challenges, and we're trying to work through those. So it's not obvious, I think, for the CSA that there are no problems. I think we are trying to grapple with those.

MS. ALEXANDER: Michelle Alexander from the Investment Industry Association of Canada.

I guess one of the issues I have with the paper - and you touched on it just now, Jeff - is that there's a suitability obligation which would therefore mean that the advisor would put the client in something that's suitable but not necessarily a better investment that's out there.

One of the gaps I found in the paper was there was oftentimes a look at suitability separate and apart from the duty of honestly, fairly, in good faith. When you put those together, and hearing from our members time and time again, those two obligations, suitability, know-your-product, know-your-client, the duty to act honestly, fairly and in good faith, would therefore in almost every situation help the client be put in the better investment. Whether there are two that are out there that are suitable, if there was one that is better for the client, those duties together would lead the client to get the right choice for that client.

Also, in terms of the client's expectation of a fiduciary duty, I think if you ask most clients out there if there is a duty to act honestly, loyally, and in good faith, they would probably say, "I don't know." So part of it involves educating clients as well as to what advisors owe them right now.

MR. SCANLON: That's a fair point. I understand that point.

I think, though, fundamentally... I would be curious to take a look at, say, some of the pleadings that advisors make in the course of disputes with their clients. I'm not totally convinced that necessarily they will interpret their suitability obligations as robustly as you suggest in terms of working fairly, honestly and in good faith. This was a theme that came up. Actually, at the investor roundtable, one of the stakeholders said, you know, take a hard look at some of those pleadings; these are argued very narrowly and often how advisors -- and, again, these are obviously in situations where relationships have broken down. These are not models of good client/advisor relationships.

But I think there is a concern. How it gets argued is that it is a very narrow duty. Suitability can be interpreted narrowly, and often is, in the context of disputes.

Again, I think investors would just go back to this issue, that fairly, honestly and in good faith I don't think requires you to put anything on your shelf. And some of those issues could be structural. For instance, mutual fund dealers, if, in fact, it turns out that there is an ETF that might be a better product, I mean, mutual fund dealers today structurally they can't provide that to their client. So, I mean, we're mindful of that. That's, I guess, my thought on that.

MR. COSTELLO: Thanks, Jeff. My name is Keith Costello, and I head up the Canadian Institute of Financial Planners, and we are an organization that represents probably about 6,000 planners across Canada.

Obviously, most of our members start from comprehensive advice, so they're very easy and they do, once again, hold themselves out for best interests of their clients. So from that perspective, we would support it and have no problem at all.

But I do think with CSA in June there are so many regulatory issues going on, what you should be achieving for in our recommendation is clarity to the end investor and the advisor. All our members are trying to do their very best. I think it's a co-operative relationship between the investor and advisor. You know, I just attended a Financial Literacy International Conference, and investors have responsibilities, too.

My concern then becomes, when you start going down to limited advice and product sales, that you start qualifying, as my colleague said, and it becomes confusing to the investor.

In our submission, one of the concerns we also have, and we wrote this in every submission to the CSA, is -- and perhaps you're going to do this. I know the answer will be we're trying to show leadership. But keep in mind, there are a lot of retail investors that are served by people outside securities registrants in the insurance industry and by accountants, and we need a consistent consumer experience so that if I go to see my advisor or planner then I can be sure, no matter what their business model, what part of the industry they're in, there's a consistency. Maybe that's through Consumer Affairs in the legislative area, but this is the biggest concern we see in this proposal and when you start breaking down the details, that we're not adding confusion, that we're adding more clarity. Thank you.

MR. SCANLON: On that point, I guess I just want to point out -- and I think in your comment letter you explained how I think you went out to your membership with a survey.

MR. COSTELLO: Yes, we did.

MR. SCANLON: Yes, that's right. And you had six or so questions tailored in addition to the questions that were in the consultation paper.
I recall that point. Your comment letter was a good one.

From our point of view, though, what we struggle with is the jurisdictional issue, of course, right? That comment was a fairly common comment in a lot of the comment letters. The phrase that is often used is "regulatory arbitrage", and whether or not -- you know, if the standard of conduct in the securities regulatory context is increased, you know, if some of the other areas, like insurance and banking, maybe don't meet that same standard that there might be a flow of clients outside the securities context.

So you know what? I appreciate the comment. We struggle with the jurisdictional issues. I mean, we can only control what we can control, which is the securities house. I take the point. But we need to balance that against the obligation to ensure that we have the right standard for the securities context. If it happens -- and we often are in conversation with some of our regulatory peers in those other sectors. We can't force them to do anything, and we often discuss these issues with them, and so we do the best we can on that front.

Before we take one more question, does anyone on the phone have any questions at this stage from the CSA?

VOICE ON TELEPHONE: No, thank you.

MR. SCANLON: No, I guess not.

MS. DE LAURENTIIS: Just a couple of points, Jeff.

So first of all on the product shelf, I think the one thing we need to remind ourselves is that we do have a pretty robust regulatory regime that covers products. So taking mutual funds as an example, the investment strategies that portfolio managers can utilize, disclosure around risk and so on, there's a fairly robust regulatory framework around that, so I think we can assume that products are essentially built in a pretty positive way because they do have to take into account a number of issues including risk. So I just remind us of that so when it comes to the shelf it isn't just products aren't being put there that we don't know anything about. As Peter has pointed out, you know, the dealer certainly has an obligation to ensure that those products are suitable for the clients that the advisor and network attached to that dealer is serving.

Then, I think on the issue of asymmetry, information asymmetry, I think clearly that exists because the advisor has more information than the investor, but I think we have identified a number of solutions for that. One of those solutions is in the preparation and the now soon-to-be-distributed plainer language documentation. The Fund Facts is going to be a tremendous document for investors who buy that product because a full page and a bit is dedicated to detailed cost disclosures, exactly where does that MER go. As your paper has identified, cost is one of the considerations that the advisor should take into account.

So I think we need to give that initiative time to mature, to get out there and be utilized and used, and then I think we can assess again whether we have improved, whether we have narrowed the gap between the level of information that the investor has and the kinds of questions that the investor is asking the advisor. So I would just remind us of those initiatives.

Of course, through CRM 2 the other important element we're going to be adding is at the end of the year the investor is going to have a statement that says this is what you earned - you know, this is what your advisor earned for you, put another way - this is what you paid. I think it will certainly create in that investor a number of questions, am I satisfied, am I getting the right return, was it suitable for me, to have the kinds of conversations that I think we are trying to increase between advisors and investors.

MR. METCALFE: Steve Metcalfe from Mackie Research Capital. I'm a portfolio manager there.

Just a couple comments. The first one, to define the difference between "suitable" and "best interest". I think a lot of people said that will be an absolute nightmare. For us, it's kind of like describing the difference between white and off white and eggshell white. I think it will be a hard time.

But what I really wanted to say is I manage money for some charities, some small endowments and some community foundations. If we are going to go down this path of defining this as "best interests", I don't know why the cut-off is $5 million. So I'd like to know the justification behind that. I manage money for some foundations; they have between 7 and 20, and some of them have relatively unsophisticated boards. So why is this not across the board, and what's the justification for that?

MR. SCANLON: I think at this point we tried to just describe what we thought might be a reasonable starting point for the discussion. I mean, the best way to summarize our thinking on that is that we figured there could be a reasonable argument out there that individuals or entities of a certain financial wherewithal would have the sophistication or at least the financial resources to be mindful enough to know the risks of dealing with an advisor and could enter into a best-interest relationship by contract, if they wanted to, but if they didn't want that kind of relationship we figured it could be a reasonable way to address, allowing some of those more sophisticated parties...

I mean, whether or not that is the right approach obviously we're still considering, but there was some consistency, of course, with how some of the securities rules -- we have some of these thresholds, whether or not accredited investor thresholds or even in some of the thresholds around suitability where permitted clients have the ability to waive a suitability analysis, for instance.

So that is just some of our thinking just by way of background.

MS. KEGIE: Hello. I'm Sandra Kegie. I'm the Executive Director of the Federation of Mutual Fund Dealers as well as the Executive Director of the Association of Canadian Compliance Professionals, so I hear a lot about compliance issues, obviously, over the years.

I agree with the comments, a lot of the comments that have been made this morning summarizing what's really broken.

I disagree with carve-outs. I think if best interests is warranted then it's warranted for everybody, period. Why should anybody be disadvantaged? And it doesn't matter how much money you've got. Money does not equal brainpower. One might assume it, but I think you would assume it incorrectly.

I'm concerned about a couple of things, and I'm going to break it down to real simple terms. The Mutual Fund Dealers Association rules already contemplate best interests. It's in their Rules. In their enforcement actions, in their client complaint processes, they're looking for best interests.

When I asked a lawyer several years ago - I'm not a lawyer by the way - bottom line, what does "best interests" mean to the advisor, what will it mean in practice, they went to a whiteboard and drew a big a dollar sign, and that was the bottom line. Had nothing to do with practice or anything else. What it had to do with was if the client has a complaint and the dealer doesn't resolve it, the advisor doesn't resolve it, OBSI doesn't resolve it and they go to court -- and I'm assuming, I may be wrong, but this "best interests" would be resolved at court because if it already exists in the regulatory arena this is what we're talking about. And in court the client is not culpable, not by any percentage, and there's no ability for any kind of negotiating the settlement based on the client having partaken in the decision-making or anything like that.

So I think to the gentleman's point about bringing advisors in, it might be worthwhile to have that conversation, to discuss what it really means to them.

And it speaks to arbitrage, and you might wonder, and not in a good way, why would a mutual fund advisor, for example, in order to get away from this move all of their business to insurance, because if the dollar sign really is the bottom line for him and a client sues, which is a nightmare, and he loses, he loses everything. That's why he would move. That's it.

MR. DE GOEY: My name is John De Goey. I'm a financial advisor with Burgonvest Bick Securities Limited, and the views I'm about to express are my own, they're not necessarily shared by Burgonvest Bick Securities Limited. I want to be clear about that.

Three or four weeks ago we had the panel with regard to mutual fund fees, and one of the people on the panel made a comment with regard to 100 percent of all net new money was going into 4- and 5-star funds. And then he said, "And that is as it should be." It struck me as being remarkable evidence of information asymmetry. Jeff, you were saying how people need to disabuse you of your capacity with regard to grammar? Similarly, I think people and investors need to be disabused of things that have taken hold, in some cases, 25, 30 or 35 years ago, which is the suggestion that past performance is a reliable indicator of future performance. It is categorically not. It has proven to be a non-reliable predictor in every study of every kind in the past 25 years, and here we have the head of a company saying that it is as it ought to be when 100 percent of all net new money goes in based on past performance, which is not reliable.

That is an egregious example of a misrepresentation and hypocrisy, but beyond that, it is the sort of thing where -- when Keith Costello said that clarity is an objective, I agree completely. We need to be clear, and we need to have it so that the advisors who, when they give advice, not only do so knowing their client, knowing their product, and fairly, honestly and in good faith, but also that they do so in a way which recognizes evidence, facts, things which are not in dispute.

It is proven that cost is a more reliable determinant of long-term performance than past performance is, and yet 100 percent of net new assets are going in based on past performance and ostensibly, therefore, by definition, not based on cost.

So if we simply disabuse people of things that are incorrect in the first place, we would be able to make better, more enlightened and more client-interested investment decisions.

So I guess what I'm saying is, first off, obviously disclosure as it currently stands is not working at all. Disclosure of and by itself, that's what's broken. But beyond that, I think if we could actually -- I would dispute what Michelle Alexander said. She said when you combine KYC, KYP and all those things you get to those things where we are already there. We're not. The story that I just shared with you proves that.

MR. SCANLON: So, John, when you were talking about trying to ensure that people understood that past performance is no indicator, are you talking about educating investors on that? Who are we talking about educating?

MR. DE GOEY: And advisors and mutual fund company presidents and pretty much -- and the media. It seems as though we have been using disclaimers to that effect for 25 years, and it has absolutely no impact on people's decision-making. That proves to me that it's not working. So we need to do something differently, and perhaps this is it. But obviously, when you ask what's broken, the current system of disclaimers and disclosures is broken.

MR. MARSH: The conversation we are having this morning is indicative of what's broken, in my mind.

We're talking a lot about fiduciary standard as it applies to advising retail clients, and so far everybody's complaint or challenge with it is with regard to selling products. In my mind, that's part of the problem. We have to stop talking about selling products. We have to start talking about the process of wealth management. When you go through a process of wealth management, I would echo the gentleman at the front from the planning side. When you go through a comprehensive financial plan or a wealth plan, when you use strategic asset allocation, the ultimate product means significantly less, and so we're all kind of protecting our fiduciary responsibilities here by focusing on product sales. That's part of the problem. We have to stop talking about selling products, we have to stop being salespeople; we have to start being true professional advisors with a focus on the process of wealth management. Thank you.

MR. DiNOVO: My name's John DiNovo. I'm an Approved Person with Banwell Financial. I don't represent their views. I'm also a financial planner.

I'd like to pick up on a couple of things John said. One is just because a fund has four or five stars doesn't mean it's not a good fund either. I think you'd agree with that. There's a lot more work and research that goes into selecting a mutual fund if you decide to play in that arena.

I think the bigger, overriding problem is lack of professionalization of advice or a standard. There's a number of things I'd like to bring to bear on that, and one is to this gentleman's point, that we're not focused on the overall process; we're focused on products.

I think when we look at what's come down the tube from regulators a lot of the problem can be put in your hands because you've set the very foundation for that kind of an environment, a product-, a transaction-based environment where you're just focusing on trade by trade. Clearly, it's not working.

I was here at the Investor Roundtable because I do represent investors. That was one of the things that I heard, is that you're not taking a holistic view of things. I think you've got to consider whether the Ontario Securities Act is the right instrument for executing on this bigger public policy issue, and if it's not in the public's best interest to execute using that instrument, then you have an obligation to go beyond that and lobby the government to get more co-operation across different government agencies to implement something that does do the right job. And I don't think you're hearing that.

I think you are intent on moving ahead in your small domain in the hopes that everything will work out, and I think the consequences of that could be disastrous. When the gentleman asked, put up their hand, who here has actually given advice and been accountable for outcomes for their clients, there's very few people in this room that have done that, and I didn't see any of your hands go up. I think that's truly unfortunate that you don't embed in your staff people who are doing the job.

I suspect most of you are lawyers or accountants. I don't think you would like to see investment professionals running your societies or your standards councils or whoever regulates you. I just don't think it's appropriate, particularly because you have really no idea what is engaged. You see everything through the window of enforcement, which is a very limited subset, but it does speak to some of the systemic problems which you don't seem capable of reflecting back on yourselves.

Clearly, to John's point, we have embedded in the suitability standard past standard deviation as a progenitor of risk, as a way of indicating what future risk will be, and you've done that with no shame whatsoever, and this is the standard. This is the standard that's been created in the industry, approved by CSA, and is being implemented by SROs today with no allowance for forward-looking knowledge, opinion on various market interventions and their impacts on markets.

There's a lot that is wrong with this thing right now, and I think what I haven't heard and haven't seen in the discussion paper, and I'm not sure why, is why you haven't been looking at just what the current situation is that's given rise to this.

I think the other thing is, speaking to the fellow from the CFA Institute, if -- there are two things I've noticed here. One is that -- and this is another point, but, Jeff, you said how there is a de facto discretionary relationship when in civil law you're found to be a fiduciary. I might argue that the majority of my clients, I would be in that position; they rely entirely on my advice.

But if you look at a recent CSA paper that restricts people from actually performing in a fiduciary capacity, they restrict it to people with very intense training in securities analysis, which may not even be appropriate for people like myself who are referring off that securities analysis to a professional portfolio manager, and yet I still choose to operate in a fiduciary capacity. But if I was to do so purely, I would be in conflict with the suitability rules that are out there on an on-going basis.

So somehow or another I have to juggle this. You're looking at me as though this is brand new, but this has been said to you time and time again, and you've refused as a group, as a commission, to do anything about it, and I don't know why. So let's get back to very, very fundamentals, and figure out what's going on here.

The other thing is if you want to get away from -- you still talk about product shelf and so on and so forth. Well, does the concept of a dealer even have a place if you're putting your client's interests first? Because, you know, we have mixed obligations right now. We have an obligation to our dealer to comply and to keep them in business when, in fact, maybe those compliance standards aren't suitable or in the best interests of the client. This has never been addressed candidly by commissions.

So we talk around these subjects, but we refuse to get to the core of it. I put the onus back on you, (a), to recruit staff with industry experience that's relevant to the topics that you're dealing with, and (b), to actually bring in -- there's a lot of reasons why certain people don't come forward. I would have loved to do an in-depth - and I started one - presentation or submission on this, but when I looked at my costs it would be about $30-, $40,000. I don't work for a big bank, I have a limited number of clients. When I went to them and asked if this was in their best interests, they said, "No, John, I want you to spend your time working on our files, not on this grand public interest, because we can't really afford to have you do that for us," because it's ultimately them that would be paying for it.

So, in summary, I just think there's a lot of stuff that hasn't been said in the submission papers. I think you should absolutely go out and do whatever you have to do to have discussions with so-called advisors in the field, and there's a whole range of business models and ideas and understandings.

But I'd like to finish on the last point of definition of "fiduciary". I think you're setting yourself up for a huge disappointment in the public domain. When an investor sees "best interest", their automatic assumption is that this is going to be the best possible outcome that I can possibly experience; they're not looking for a condition.

I think what we can best hope for -- and as the gentleman said, you can only determine that in hindsight. So if I sell an individual the more expensive mutual fund and it turns out not to be as good as the cheaper ETF, for example, how is any judge or anybody in their wisdom going to know what the process was at the beginning to determine whether that extra cost of management was worth paying for?

I mean, yes, you can document it, but then you create a whole industry of basically protecting yourself, and it takes resources away from delivering what you have with your resources to deliver the best that you can to that particular client.

Lastly, going back to Robin's thing with the CFA, one of the things with -- if you are in a discretionary situation, which you're saying we will be because clients will rely on us 100 percent, one of the CSA standards I believe, Rob, and it may be you can correct me if I'm wrong, is that you have to treat all your clients equally and fairly. The only way you can do that is with discretionary authority. And not only that, it will serve to reduce the costs of execution on their behalf.

Again, circling back to the recent CSA report on why you don't allow certain registrants to become portfolio managers, which is really the only registration available to people who want to give that kind of advice on an independent, fiduciary basis, you've eliminated a whole -- probably 90 percent of the industry who isn't in a position, nor wants to do individual securities analysis as opposed to fund manager analysis or ETF analysis, which clearly is a whole different specialization. In some cases, from the CFAs I talk to, they're not as experienced in it as I would be who's been doing it for 30 years, for example. So --

CHAIR: Can I just... I want to address the point about the clients, right? So at the Investor Roundtable the investors know that they have a responsibility; they are not just washing their hands of anything saying, "Oh, that's what my advisor told

me." They appreciate the fact that it is a two-way conversation. So the comments that the clients are just -- you know, 'we will just put it all back on the advisor' is not correct. It was acknowledged in the Investor Roundtable that they will participate.
I mean, they are making decisions as well. So I think that we need to sort of temper that to say that, yes, investors are part of the discussion and they are taking responsibility for the action as well.

MR. DiNOVO: I respectfully disagree --

CHAIR: That's fine.

MR. DiNOVO: -- because the investor representatives there, you have to look behind on who they actually represent and what sort of consultations they've done with their -- with their -- who they...

Like, FAIR, for example, has no investor outreach.

CHAIR: No.

MR. DiNOVO: You know, I can go around the table. I think CARP has done some work, and they have a fairly mature group behind them who have probably got more experience than average. But I can tell you as an advisor there are many people who rely a hundred percent on the advice that's given to them, much to the horror of the Investor Advisory Panel who recently discovered this, probably because they didn't have any advisors on the panel to inform them that, yes, this reliance does already occur at a very high level.

It seems that the whole focus of the industry is to put the liability on the investor in any case by giving them disclosure that's not very helpful. I mean, there has been research done on the simplified prospectus in the U.S. that says there is no difference in outcomes from disclosure. The Fund Facts is the same thing. The industry all focused on delivery, and they haven't focused on the quality of outcomes that results from this. I think you're all hiding behind this veil of lack of empiric evidence to support these notions.

As I said, I could spend $30- or $40,000 worth of my time going into this more deeply disturbed, but I'm deeply disturbed of the number of issues that you choose to deflect or focus on which are really fundamental to this whole exercise.

MS. KEGIE: I just have one quick comment, that I agree with you, that I think clients will be engaged in discussion, and as soon as they lose money they didn't hear anything from anybody.

MR. SKWAREK: Hi, I'm Ed Skwarek from

Advocis.

I have two points/questions just to raise. The first is going back to the regulatory arbitrage issue. Moving past that, looking at this from a practical outcome for the consumer, how is the consumer benefitting when they're buying a product from a financial advisor, products from a financial advisor, yet in one sector the products that they're buying they're being held to a statutory fiduciary standard, other sectors are not? Because you see products increasingly converging in terms of their style and type. So I just see this as leading to increased confusion for financial advisors, because we have to find solutions that are going to cut across the sectors. In conversations I have had with regulators on the insurance side, they're saying they're completely happy with the current standard, and they're not fully engaged with the securities side on the on-going debate, which I was a bit surprised about.

The second point or question I'd like to raise, then, is what other solutions are available to enhance the consumer outcome, because I think everybody in this room agrees they're only in business because of the consumers, so we want to enhance consumer outcomes, but what other options are available that may cut across these sectorial divides?

To John's point, do we look at the professionalization of financial advice? That way we are moving outside of just the discussion on the securities sector, the banking sector or the insurance sector. I think these are the sorts of issues we have to start discussing more broadly as opposed to narrowing the discussion too quickly in terms of the statutory fiduciary standard is the answer on the securities side. I think we have to first open it up more broadly, consider other alternatives, make a decision as an industry, including the regulators of course, other stakeholders, and try to determine what's the best step forward that will lead to a better outcome for everybody.

CHAIR: So that is the second half of our roundtable, so I'm glad that you brought up that because we are interested in alternatives and a discussion on other actions. So we will talk about that in the second half, but can we focus back on possibly potential benefits? Is there anything left that people have comments on? Because we will take a break before we go to the second half.

MS. STEIN: Hi. I'm Lori Stein from Periscope Capital. I'm a lawyer/compliance person, so

I just want to put my comments in context. I've never given advice myself.

But it strikes me when we're talking about what this best interest duty would mean and the concern that it would be misinterpreted, also the comment that a lawyer drew a big dollar sign on a whiteboard, which I agree with but in a different way, I think about the way that my firm - we're an alternative asset manager - has implemented the best execution obligation. What the best execution rule does is it gives a whole list of factors that a firm can consider when selecting a broker to execute a trade - not just the price, but a whole bunch of other things.

You know, it took five years at least for the regulators to come up with that list of all of those factors that could be considered, and they did that by way of industry consultation.

So you look at that list, and then you figure out what's the market price of execution, what's a reasonable cost to do a trade, and then if you're going to pay more for the trade than the reasonable cost that most dealers are charging, that's when you have to document your justification for why, what on that list of factors made you choose the more expensive broker.

To me, as an advisor -- or as a client, I think I would expect my advisor, if they're choosing a product, to at least look at two or three different products that have the same objectives and similar strategies, look at the price of those products, and if they're going to chose the more expensive product they should have a reason. There should be a reason in that big list of reasons that they can choose from why they went for the more expensive product. And the reason obviously should not be, "The trailer fee was better."

I think that ultimately that's the dollar sign that a lot of people are talking about. I think that when clients get upset it's not because they expect their advisor to be able to have the foresight to know a year later which product is going to perform the best, it's that they expect the advisor not to put their own interests ahead of their client's interest when choosing the product.

When I was first training my portfolio managers on how to implement this best execution process and that, yes, they do have to document when they choose more expensive execution, they thought it was so annoying and it was going to be so much work, but ultimately, we have come up with a list of, like, eight different reasons, they choose a reason, and it doesn't happen that often that they pick the more expensive execution. So we have created a process that works.

This is just on the area of product selection, but I think that that kind of documentation process could be helpful, and it could be really an easy way for clients to understand the process because that's what any client does when they're shopping for a car or shopping for anything. They look, they compare a few, and they pick one, not necessarily the cheapest one, but when they're not picking the cheapest one there's another reason.

CHAIR: Actually, a couple of comments have come up regarding the expense of implementing a "best interest" standard and that it's going to be dollar signs. So can we explore that a little more? I mean, I think your comments about is it the impact of trailing commissions... I'm sure there's more to it. So what is that? What is the concept, more dollars?

MR. POND: This, I think, gets at it tangentially. A couple of people made the very valid comment that if you really want to help the client you focus on the entire process and not just the product.

This, I think, ties in with the mutual fund fees paper because part of the big issue here is that a lot of people are being compensated through products and not for doing the process. It's that disconnect that I think is setting up the focus on the product, and that...

Well, let me put it this way. What's broken or what will change if you put in this standard? I would imagine that certain incentive programmes, such as, for example, a volume incentive where I'm compensated more for putting the next client in the door in the same product as the last five I've sold, that would be tough to justify under a "best interest" standard. I think at the end of the day this does tie in very directly with compensation structures, and a "best interest" standard, I would think, would focus more on process and would ultimately have to unbed the compensation of the advisor from the specifics of the product because you've got to get rid of those conflicts of interest. If you are really dealing in the best interests of the client, you've got to get away from, well, here's three products, and presumably your list doesn't include, "I get paid more if I put them in this one." Thanks.

MR. DONALD: Hi. My name's Mark Donald.

I'm just an observer here. I'm writing a paper on the subject so I thought I'd just address one or two points I've heard over the last couple of minutes and over the last week or so from last week's discussion.

I'd like to talk a little bit about the issue of terminology that's used. It's a simple point, but I think it's an important one. I noticed in the paper that was issued there was talk of both a "fiduciary" standard and a "best interest" standard.

Now, the problem I have with that was in talking to certain legal practitioners over the past little bit in the course of my writing I've had some practitioners make a very clear distinction between the two, or try to make a very clear distinction between the two. To be perfectly honest, I don't see it. I see a "fiduciary" standard and a "best interest" standard as one and the same thing. But the very fact that legal practitioners and lawyers are having that debate I think is a problem for the CSA and a problem for the OSC.

If before we even get to the practical solutions of the problem we're already having a fight over terminology, I can already tell you where the litigation is going to go on this subject. You're not going to have a practical solution for retail investors. You're simply going to get defence lawyers having fights over this sort of terminology, and I think that's doing everyone a disservice.

So the one thing I would suggest is I think the OSC, the CSA, you guys owe it to yourselves to really try to get your terminology down. I know the last thing you want to do is bring the lawyers into this too much, but I think we really owe it to ourselves to do that or you're going to have a lot of sort of trench warfare fights before we get to the practical solutions.

MR. COSTELLO: Thank you, Jeff.

It's kind of a follow-up question, but I wanted to summarize some comments. First of all, I do respect, working in an administrative body, the limits of your jurisdiction, and then I know it's not an easy job and I wouldn't want to have it, but good luck.

But I think the themes about helping the investor and the simplicity and making it better is important because, again, we're getting five letters a week now on this. I wanted to go back to the regulatory arbitrage because I think it's really important. I think what you've struck on here -- when I started in the industry 15 years ago, and I did work for the industry and I worked with the regulators, and I was always confused; you know, an advisor, a registrant, dealer, and your client... I couldn't understand it.

What I think you're doing here today is one of the most important issues ever you've brought up. You have all these CRMs and all these other initiatives coming all over the place top down, but starting at the end client relationship and then working back up -- now, John DiNovo, my colleague, he brings up some really good points, and I'm glad to see the passion for the investor coming to the industry, John. Thanks for coming. But what I really mean is that we want to make sure this is done right because I think you're on to something. It starts with the end client, and then you make all the changes up the food chain to get it down to the end client.

And our members totally support that, but I have members waiting to say, look, can you ask them at this thing, please, how do we get the joint form involved in this so we have some commonality?
I know you're restricted by securities, but I think -- you know, where do we write letters to get the joint form, because I think it's really, really, really important as more and more through the insurance sector

and other sectors this advice is going through. And our members have a problem because they're doing both. Our members do all type of business models: fee for service, they're in mutual funds, they do securities, they do insurance, and they do, you know, just general, non-sales financial advice, and they find it very difficult. Where do I put my hat out if I'm doing this, doing that?

So I agree with what you're trying to do, but let's make sure we take our time and we do it right because I think you may have happened upon one of the most important things you've done as a commission in years. So I wish you the best.

MR. SCANLON: I think maybe we have time for one more quick comment, sir, before the break.

MR. MARSH: I just wanted to make a comment that Jeff had made on the compensation side. Again, speaking for advisors, I believe the best advisors out there - and there's a lot of great advisors - are more fee-sensitive than their clients are. The best advisors will explain to their clients what their options are and what the costs are and how they get paid, very transparently and very openly. I just wanted to make that comment. There are no secrets in the best advisors. They're more fee-sensitive than their clients are.

MR. SCANLON: Okay, I think we have reached time, and we are trying to stay on schedule. Thanks, everyone. We had some great comments, great discussion. So let's break and reconvene in 15 minutes at 10:45.

--- Recess taken at 10:30 a.m.

--- On resuming at 10:45 a.m.

CHAIR: We will get started again.

Felicia Tedesco will go through the second set of questions, and then we will open it up to the floor again for questions.

POTENTIAL COMPETING CONSIDERATIONS:

MS. TEDESCO: Okay. Thanks, Debbie.

We had a very interactive, informative first half, and we are sure that the second half will be just as interactive.

So we would like to now focus the discussion on some of the potential competing considerations from a "best interest" standard. In some degree, we have already gone there because many of these topics are interrelated, and so while the first part of the discussion was more focused on benefits, it invariably went to some of the issues and competing considerations with imposing a "best interest" standard.

We did hear from commenters that some adverse consequences could result, and we just would like to continue to explore, get your thoughts on that.

So the first theme that we want to focus on in the second half is the legal certainty of the relationship. Again, we did touch on this in the first half. But this theme relates to -- right now commenters have said that there's little legal uncertainty around the standard of conduct today, and a "best interest" standard would, in fact, create uncertainty. This would happen because it ignores the common law approach that currently exists. It also would create uncertainty as to how the statutory and the common law duty would then interact.

So with respect to this concern, we want to explore how can we mitigate that or how can we address it, what kind of guidance would be helpful. We had a bit of a discussion on this on the best execution prior to the break. One individual said how they had put a process in place that they are finding useful. So in regards to this standard, we would just like to explore from you what would be helpful because, as someone mentioned in the first part, the devil is in the details.

Moving on to the second theme of the second half is the negative impact, potentially, on advisor services. Some commenters, we have heard, have stated that there will be a negative impact on services. This would happen in that the higher standard would restrict access, would restrict choice of product, and would result in making advice more expensive and, therefore, less affordable to certain individuals.

I want to touch briefly on this theme. It's also in the paper. There have been many studies, but I'll just quickly highlight two. One was the SIFMA study, and another one was an academic study from Texas Tech by a Michael Fink. Interestingly enough, those studies reached opposite conclusions. One suggests that there would be all of these adverse consequences, and the other one suggests no, in fact, there would not. So we would like to explore what potentially you think the impact would be in Canada; for example, what account size would make it too expensive, and how would you make the determination that costs would have a negative impact on advisor services.

We also want to focus specifically on costs. We have heard that commenters feel that this is going to impose a real financial burden on advisors, so we'd like to discuss what the drivers are of those costs, what does the industry need from us to get a better approximate on increases so that we can better assess if there in fact will be a negative cost impact, which, we have heard, will ultimately be passed on to the investor.

Finally, the last competing consideration would be the effect on capital raising. Again, we have heard through the commenters that imposing a "best interest" standard will have a negative impact with respect to capital raising. So, again, we'd like to further get your thoughts and better understand this concern. And we'd like to open the floor again.

COMMENTS FROM THE FLOOR:

MS. PAGLIA: I'm just going to start with the legal certainty of the relationship because that was my submission, that the law is clear as to where a fiduciary obligation lies and doesn't.

Not to repeat what's already in my written submission, the application of that law is where the challenges lie. So there were some comments this morning on suitability and is suitability really enough and when does suitability happen.

First of all, by way of suggestions,

IIROC, by way of example, recently came up with a CRM model that is very heavily focused on suitability, and it's moving away from the date of purchase or the product of purchase, and it does recognize that most of the investment advisory business in Canada is now moving toward a fee-based approach and that there is an obligation on the advisor to look at the way the investments are performing post-purchase.

I raise that because a lot of the practical, every day challenges are already being responded to by the SROs and the industry. Let's give that some time to run its course before we add another layer of what I'm going to call 'confusion', because though the law is clear, how it is applied in any given fact circumstance is where all the back-and-forth happens.

There was reference this morning to some pleadings and the way suitability is pleaded in the defence. Whatever plaintiff's lawyer said that has pleaded it very broadly in his claim. So let's not overly rely on litigation and the way lawyers argue their respective spots.

Suitability is an example where the investor is saying this wasn't suitable to me "because I lost money". It's unsuitable when they lose the money. If it went down, therefore it was high-risk, therefore it was wrong, therefore it was not what I wanted. Typical. Typical response by investment advisor? "No, I told you you could lose your money. This is why I recommended it. We talked about it all the time. It happens. Who would have thunk it. These were my reasons. I can't predict it. I did the best I could with the information I had at the time."

That is a very common dispute.

How does this help that dispute? Because to the investment advisor -- and I appreciate we all care about the investing public. My clients, the investment advisor, I've seen this devastate lives. I've seen it take away livelihood, I've seen it become all-consuming, I've seen good people trying to do good things get crushed over what are differences of opinion and nuances sometimes in business relationships. And I am concerned that this raises a level of over-regulation to what we are already on.

The regulators are aware, the industry is aware, the industry participants are trying to comply. I don't think we need more direction on this. I think we need to focus on implementation and selectiveness when something truly went wrong based on a particular fact scenario.

MR. KAZAZIAN: Good morning. My name is Vicken Kazazian, and I work for Sun Life Financial, and I lead Sun Life's advisor salesforce.

So, first of all, thank you very much for making this available to us, the opportunity to comment. Very much appreciated.

Very complex topic. I didn't realize how complex until I came here and listening to all these perspectives, but very, very important obviously.

So I'd like to focus my comments and maybe a suggestion, if you want to consider. I want to focus on the value of advice and the importance of making advice available to clients and Canadians.

So I talk to lots of advisors, obviously, across the country, and I travel, spend a lot of time with advisors, and I can tell you that there's a lot of concern and confusion out there; In fact, many of them wondering if they should stay in the business. Obviously, that worries me and concerns me in terms of making advice available to Canadians at such an important time when people are making those conclusions about retirement, what they're going to need, and so forth. So this is a very important topic, very timely as well.

So what I'd like to mention is seeing

what's happening in other jurisdictions where some of this is coming in, you know, some of the information coming out at this early stage, you know, makes you stop and ponder and see, you know, have they got it right?

So my suggestion would be -- you know, with CRM 2, point-of-sale, some of these that over the next three years we have to implement, there are huge changes already that have taken place, and I know that it's consuming a lot of time/energy to make sure we get it right. What my suggestion would be is let's see how it plays out in other jurisdictions where some of these are happening, learn from that, implement what we have today, and then see, okay, what additional things do we need in order to make it right? I think, with everything that's going on, to put something else on top of this will create problems in execution in getting in right.

So my suggestion would be let's do this in a prudent way, a thoughtful way, let's see how things that we're working on today get implemented, executed, look at the results, see what's happening elsewhere, and then decide what are the next steps.

So that would be my comments and suggestions on this point.

MS. DUBINSKI: Alana Dubinski, Stonegate Private Counsel.

A couple of points I wanted to make. The first one really is on this notion of "best interest" and "suitability". I think it's important to recognize both these concepts, in my mind, are point-in-time exercises. Whether you want to call it something that's suitable for the client at the time you meet them or something that's in the best interests of the client when you meet them, it may not be in their best interest six months from today, a year from today, ten years from today. So whether it's best interest or suitability, it's always going to be point-in-time, and you can argue that it was suitable at the time or it was in the client's best interest at the time.

So how do you deal with the issue where it may not be down the road? And that's, in hindsight, where we run into the issue.

If you talk to any satisfied investor, the one common thread that they will all give you is that the reason they're satisfied is because they have constant communication with their advisor. So if you have an advisor - again, doesn't matter if you call it "best interest" or "suitability" - that sells you a product once or makes a recommendation once and never talks to you again, you're never going to be able to satisfy that client down the road if something wrong happens because the communication wasn't there, they're not knowledgeable of what's going on throughout the process, and all of a sudden they look at their statement, they're unhappy because the returns are down, and now it's not really a question of suitability or best interest; it's performance. It's really what they're angry about.

So the issue here is communication, not on best interest or suitability, because we can all argue and prove that maybe at that point in time we have met that test.

So the rules and the regulators have to focus on this on-going dialogue that should be happening, and I would argue that it doesn't matter if it's a fee-based advisor or a product-based advisor; it's that on-going relationship/communication that's critical to ensuring that clients get value for their money. And how we structure the rules around that, I'm not sure.

The other point I think I want to make is what's really scaring everybody is the notion of fiduciary duty and this confusion between "fiduciary standards" and "best interest". I would like to suggest that maybe we should not try to lump fiduciary duty with best interest. If the focus is on best interest, I would encourage you to move away from this issue of fiduciary standard. Simply defined, what is "best interest"? What you think "best interest" should be, define it and not try to make it fiduciary. "Fiduciary" will be fought out in the courts. If there was a fiduciary standard or relied-upon fiduciary standard, that gets fought out in the courts. But in terms of the rules and the regulations, if you want to move to a "best interest", don't try to muddy the waters with "fiduciary standard". Keep those two issues separate and apart, impose a "best interest" standard, and define what "best interest" is.

MR. SCANLON: I just have a question for you as you brought up sort of the on-going nature as being a really important element of whatever we do. So I think we had a comment earlier saying that IIROC suitability enhancements I think are an attempt, at least, to do some early work at trying to extend the life and have triggering events for certain kinds of situations when suitability assessment has to be reassessed.

Now, in your opinion, that may not have

gone far enough, and I guess I'd like your thoughts on that.

Then, the other question I have: Is in the paper we contemplated that -- well, the way we described the "best interest" standard is that it would be an on-going duty except for EMDs, exempt market dealers, and scholarship plan dealers. I think the concept for or our thinking as to why we articulated it that way was because our understanding is that that relationship is often very much transaction-based and it may not be the best approach to impose sort of an on-going duty.

So do you have any thoughts on those two points?

MS. DUBINSKI: Well, I guess to that question, it's hard for me to comment on what's happening on the IIROC side. I'm on the PM side. I have been on the IIROC side, and, quite honestly, I've never seen a lot of difference between both.

What I have seen is that those clients that complain the least, that are most satisfied, whether you're a dealer or you're a discretionary portfolio manager, are those that have, again, on-going dialogue with advisors. It's advisors who reach out to clients on a regular basis, who have face-to-face meetings with their clients on a regular basis, and can then understand when a change is necessary in their portfolio, et cetera, et cetera.

I think in terms of how you mandate this on-going dialogue, that's a little bit difficult for me to comment on because really it's about someone's...I could say character or the way they do business. Good advisors just do business that way, and advisors that don't do that end up with the issues. So... Hard to say.

MS. KEGIE: To that point, I agree with you; good advisor work that way. But it doesn't guarantee that a client isn't going to complain because, frankly, I've heard stories from so many advisors over the years where a client complains and will say...because they lost money, period; that's what it comes down to. "I've lost money; now I'm complaining, because it can't be anybody's fault except for the advisor's." They will tell you in conversation they've never met the advisor. They've known them for 25 years, they've never met them, they've never signed a piece of paper. Nothing. And, of course, the advisor comes up with 25 years' worth of paper. So clients are moved, are motivated to do a lot of things. So you can't generalize, I think.

E&O insurance will be impacted, the cost of errors and omissions insurance for advisors and for dealers, if a fiduciary duty is put into place. All you have to think about is your own home or car insurance and your reluctance to make a claim because automatically you think your insurance is going to go up. And that's exactly what's going to happen here. And you won't need to have to make a claim first. They'll look at the industry as a whole and blanket the increases -- the premiums will increase.

The other issue is discretionary trading. John DiNovo brought this up to me one day in a conversation about this. If you find that a -- say, for example, a portfolio manager moves out of a fund and is replaced by somebody else that you don't know and you're not comfortable and so you want to get rid of that fund from all of your client's holdings. You can't do that in the mutual fund world because mutual fund advisors don't have discretionary trading. So you would have to go -- you've got 500 clients? You would have to go to each and every client individually and make that change, and it's impossible to do. With everything else that they're doing, it would just be impossible.

So unless you've got discretionary

trading authority, fiduciary duty is not going to work.

MS. DE LAURENTIIS: I wanted to bring out a couple of points around alternatives to moving to straight fiduciary standard because there is a number of constructive things. When we discussed this around the IFIC table and drilled down to where were some of the issues arising, where were some of the concerns that were arising...and I think they've been identified here again today, but around the know-your-client, know-your-product and the risk issue, so if we take those three key areas, which are really fundamental in the role of the advisor to deal with, then what we have looked at and what we considered and discussed is that there is probably room for clearer guidance to both the supervisors who are supervising the advisor and the advisors themselves so that those issues can be better understood, better communicated to the investor.

So I think we need to think about the interim steps that can be addressed rather than sort of a move all into a fiduciary standard where certainly the legal certainty of that relationship, I think the questions have been raised quite eloquently around that, but there are ways to address some of the gaps that we're seeing, some of the concerns that we are seeing. And there, I think we would encourage that the

CSA is to have a much more in-depth SROs around what are those particular gaps, where are those particular issues raised, and what could be strengthened or changed.

MR. DE GOEY: Andrew, in the first half this morning, said that in his view over 99 percent of advisors are basically decent, hard-working, responsible people. I strongly agree. I think it's extremely rare to find someone who is not that. And I heard this morning in the first half again three or four or perhaps even more people say that, for all intents and purposes, they're already acting as if the standard were in place and they are acting in their client's best interest and they are de facto fiduciaries even if they are not statutorily obligated to be so.

As such, when I look at number 6 and number 7, the impact on the services and the impact on costs, I cannot possibly imagine how there could be any, which is to say if people are already acting as though they are fiduciaries, then the services they provide will be identical and the cost of those services will be identical. I cannot see how anyone can say that we're doing all this already and then it's going to have a big change on our costs or on the services we provide. If we're doing it already, then we're just doing it under a different framework, but everything else is identical.

MS. TEDESCO: To that point, we have had a lot of discussions and we have heard that while the current framework, the KYC, KYP, suitability, conflict disclosure, the whole host of rules functionally are equivalent, which is -- I guess I'm agreeing with you.

So then I have a hard time reconciling how costs could so exorbitantly increase. Presumably, there will be a marginal increase; there always is when there's a policy change. At some point it levels off, but at what point... Like, I'm with you. I guess I'm wondering why would costs increase so significantly if the majority of people are saying, well, we are acting in their best interests already, and presumably, there are already processes around every process, internal control at firms anyway, in terms of compliance.

MR. DE GOEY: So I agree with you. They shouldn't, they cannot, and if they do, then some of the people who have made submissions to you today have been disingenuous in what they have said in the first place because they say that we're going to keep on doing it the same way. Now, if it costs more to do it differently, then 'doing it differently' means that they weren't doing it the same way and they were disingenuous to begin with. But if it's the same way all the way, it shouldn't cost anything more or less.

MR. CHARLES: Today, we are talking about best interests of clients. The paper seems to suggest that there's a gap, a gap between the public expectation of "best interest" and the current standard.

Our view is that that gap disappears when clients fully understand how extensive the duty actually is. You know, interestingly enough, the OSC Investor Advisory Panel issued a survey, and the survey seemed to support the claim that investors see the need for a "best interest" standard. Yet, when you dig deeper into that survey, that conclusion, seems to me, was based upon one leading question, and the question was: It's unclear whether "best interest" standard applies to financial advisors. But that question did not explain the current obligations in place and the duty to act fairly, honestly and in good faith.

And when I look at that, I believe it is misleading respondents to believe that the current regulation is inadequate or non-existent. Let's face it. We are in a very, very well-regulated industry.

So perhaps when I look at that, the best solution is education - education and also letting current initiatives like CRM 2 and Fund Facts take hold before we make changes. That way, it also gives us time to assess reforms in other countries, like the U.K., and determine how they're working.

We know that study after study after study shows the value that advisors bring and the impact that they make. The OECD studies show that in Canada -- Canada has one of the best elderly poverty rates in the world, we have one of the highest income replacement ratios in retirement in the world, and that's mostly because of Canadians' reliance on financial advisors. The Pollara study from 2011, the Ipsos-Reid study, the CIRANO study show that those with advice have two to four times more assets than those who don't. They also have double the participation rates in RSPs, RESPs, TFSAs, and so on. Canadian advisors add huge value to Canadian investors, and anything, anything, that disrupts that advice or potentially destroys the relationship between advisors and investors needs to be weighed very, very carefully. And that is in the best interests of clients.

CHAIR: I'd like to get back to the issue of costs, though. I know Laura had comments on costs.

MS. PAGLIA: Just on the costs, I agree with the comment that if we are doing everything right anyway there shouldn't be any additional costs. The costs is because you're using the word "fiduciary" and fiduciary-like language to mean something else.

IIROC has used "best interest" language, by the way, for years. In its enforcement proceedings, in its enforcement guidelines, they say "best interest" all the time. They've tried to unravel it by saying 'but we're not implying a fiduciary obligation at law'. You're using the "F" word and "F" word language, and it means something to judges and lawyers in disputes. That's the cost.

The liabilities that you are opening up investment professionals to in the way that this will be interpreted by my ilk and my profession on both sides of the fence and those who decide those disputes whether it's at, quite frankly, the OBSI level or in a courtroom, that's the cost.

I think what people in the room are saying: We're already trying to do the right thing. I say "right thing", you say "best interest", somebody else says "good faith". We're all talking about the right thing, we're talking about doing the right thing. But you're using buzzwords that have different implications at law.

MS. WALRATH: Hi. Adrian Walrath, with the Investment Industry Association of Canada.

With respect to costs, I agree with what Torys just said. I think you have to work backwards from assuming the amount of liability that firms potentially have. So even now if advisors are going over and above what they're required to do for suitability and now under enhanced suitability, they still aren't actually in a fiduciary relationship. So even if they're doing what's in the best interests, or whatever you want to call it, for their client, if there is a suit, it's still suitability. So it's not that they need to have in place a whole new IT system to capture information above what IIROC is requiring or above what the CSA is requiring.

But if you're saying that enhanced suitability isn't enough, that they have to do something that's beyond that to determine what the best product is, which we don't know what that means yet, they're going to have to create a whole compliance system to determine above what they're doing and capture it so that they can show that they did it.

So they might be doing it now, but they don't have a system necessarily to show that they're doing it, so there will have to be a build for that, there will have to be documents for that, there will probably have to be supervisors for that, there will have to be training for that.

So I don't think people are being disingenuous when they're saying they're doing that, but do they have an entire system in place to demonstrate that they're doing that, to show in a lawsuit when they're working with people who we wouldn't now consider vulnerable, that doesn't have the discretion...you know, the advisor doesn't have the discretion; they may be working jointly. So now when they're making advisor decisions the client has input, but in law, as a fiduciary, the client doesn't actually have responsibility for their input. We need to figure out a way, what are you going to do in those circumstances where the client made a decision about something, but if it goes badly it's just on the advisor. You know, what are you going to put in place for that?

So there are going to be definitely significant costs because you have to assume the worst case scenario, that you're going to be sued by your client. So you don't want to have to necessarily think that way, but you have to work backwards.

MS. DUBINSKI: I'd like to echo the comment and be a little more specific to say if you try to impose this fiduciary standard you will turn the industry into a CYA exercise. This will become a CYA exercise where the interest of the client is not being served, but every firm out there, once this rule comes in, will say, 'What do I need to do in my paperwork to document everything, to tick off all the checkboxes, to make sure that if you, client, come back to me that I will have proof that I've done everything I possibly could to save myself and to save myself from any litigation,' is I think the cost that really will happen.

So, for example, firms today with the implementation of CRM 2 are now talking about all the additional IT enhancement, statement enhancements, changes, et cetera, that are going to made to comply with those rules.

Now, with the fiduciary standard, you're going to have firms now looking at their KYC application forms. Every process, every meeting with a client will become a papering exercise that will not focus on what the client is telling you and the relationship, but it's going to focus on checking off the boxes to make sure you've met every single one of these little bits so that in case you get sued you've got yourself papered up to the full extend.

I think that's where the issue is. It may not be an immediate cost, but it will be eventual, and it will cost because now a savvy lawyer will say, 'Oh, you lost money? Well, guess what, there's this fiduciary standard here now so because it's so arbitrary, because we can prove somehow that it wasn't met, let's go ahead and take it to court.'

CHAIR: But let me counter that right now because portfolio managers, the firms, already have a fiduciary duty. The CFA Institute already imposes a fiduciary duty on members. So let's put that in --

MS. DUBINSKI: Because you have to put those two together, sure. They have an implied fiduciary duty and they also have discretionary trading, and that, I think, was some of the comments that we heard, is you're imposing a fiduciary standard on a dealer without the discretionary authority to make these broad changes to be able to say, 'I think everybody needs to get out of the market now, it's in their best interest,' yadda-yadda, and off they go and place the trades, and it's great for the client's portfolio.

So you can't have one without the other.

I think there's some validity in that argument.

MS. CORDEIRO: Julie Cordeiro from the Portfolio Management Association of Canada, also known as PMAC.

So I want to thank, I guess, Laura for identifying very clearly what the elephant in the room here is on the cost issue, and I think she said it very eloquently. At the end of the day, there's a risk of liability, and I think that's what gets people most anxious. And it's not only the risk, but it's the cost associated with that liability.

I wanted to share two observations with this group this morning just on some work that PMAC has done in terms of lawsuits, complaints and that sort of thing among portfolio managers in Canada.

Earlier this year, we commissioned a report, we worked together with Investor Economics, and we surveyed 135 registered portfolio managers on their complaint experience over the last five years. What we found was that less than 5 percent, both on the private client and the institutional client side, had experienced complaints whereby they needed to use an external source to resolve that complaint, whether it escalated to a court proceeding or whether it was a dispute resolution service provider that was required.

That was actually very consistent with the findings on the insurance side in terms of claims, both on the financial institution bond and the E&O side; so very, very little complaint claim experience.

When we asked these firms why they thought that was, the most consistent response was because the relationship they have with their client is guided by a fiduciary standard. I think that's interesting because I think people are very worried about the sort of increased exponential cost that's going to somehow arise if this is now coded in statute.

I wondered on that point, actually, whether in the other provinces in Canada if there has been an increase because, as you clearly pointed out in the paper, there is a statutory, fiduciary duty in some of the provinces already in our country, and whether there was a sort of higher litigation experience in those provinces.

And then finally, if I may, there's also been a lot of comments on suitability and pleadings with regard to suitability assessments and all of these things, and I thought it was interesting that in the OSC's results that were published last month, I believe, on your suitability sweep, of the portfolio management firms that you reviewed, only two out of 42 were found to have suitability deficiencies.

So again, it sorts of leads me to -- well, I guess it's more of a question: Is there really an issue with how firms are interpreting the suitability obligation in light of those results? Perhaps you could comment on those. Thank you.

MR. SCANLON: I think you raise a number of interest points in your comments, certainly about the litigation experience in some of the other jurisdictions. We're not always in the best position to -- we are obviously aware, some of our CSA members are aware of some of the litigation in their jurisdiction, but we don't always get to see these issues because it's not always public, some of the cases aren't reported, so it's not always -- we don't have the best insight as to how some of these cases where there is a "best interest" standard in the Act or Rules in the context of a managed account, how that plays out.

I do have a question, though, around -- and we haven't really sort of gotten our teeth into it yet. It ties back, Julie, to your comments and, Lori, to your comments. I think in your paper, Lori, you had talked about -- and I may be not quite getting it right, so please just bear with me here.

There has been a lot of talk about the dramatic increase in liability/fiduciary duty. I'm mindful of the setting and the venue so I don't want to get into an extremely detailed discussion around mitigation in the context of fiduciary duty, but, I mean, a lot of commenters have made the statement that investors get essentially the same kind of restitutionary damages under tort whether it's negligence or negligent misrepresentation. So what is it exactly about a fiduciary that will lead to such increased costs from a sort of legal liability point of view?

MS. PAGLIA: I think I can answer both points in one answer.

The portfolio management model is a fundamentally different model than investment advisory, and because it is a fundamentally different business model it is subject to a fundamentally different compliance regime and a fundamentally different client/advisor relationship.

So you hire a portfolio manager, the client has zero say, zero. We sign off on a managed account agreement, the managed account agreement says the portfolio manager can do A, B, C in these percentages. The dealer would risk-rate all the securities, and it would be watched every day to mathematically fall within the contents of that managed account agreement, period. Period. Client has no say.

So you hire a portfolio manager if you don't want any involvement in your investments whatsoever, and as long as that portfolio manager or the dealer and that portfolio manager are of the view that those investments have been managed within the contents of that mandate, done. It's done. Fiduciary obligation fulfilled, period. I mean, it's that cut and dried, except when it isn't, and then on the odd time, on the odd time, you will get a complaint and you'll go to court, and it's essentially saying that these securities were incorrectly risk-rated or conversations, God forbid, actually happened between the portfolio manager and the investor, which tends to go awry and the investor wanted something else.

That's what the litigation is about.

Investment advisors are talking to their clients all the time. They're trying to make their clients happy. These clients are having input into what they say. It's less mathematical and, therefore, you have more disputes about what was suitable than what the client wanted.

When it comes to a damages perspective,

what the court is always trying to do, and they have multiple ways of doing it, is putting the investor back in the same position had the breach not occurred. Theoretically, it entitles the investor to a higher level of damages if there's a breach of fiduciary duty. In my view, that is a theoretical right because when you go through -- and we could have a whole other roundtable discussion as to how investors get their money back and how that's calculated. But when you go through the various approaches that the courts do take, it essentially lands in the same spot, subject to mitigation and contributory negligence, and those two concepts get confused a lot.

If I hire a portfolio manager and I've signed off on that managed account agreement, what the court expects me to do, if I'm not happy as an investor, is cancel that managed account agreement, fire that portfolio manager, sell everything, and go somewhere else, period. That sounds like a big deal, but at law you actually have very low obligations as far as contributory negligence and mitigation are concerned.

If I have an investment advisory relationship, you know: What questions did you ask, what did you want to know, what was more of the back-and-forth? When you knew this was going down, why didn't you give instructions to sell? When did you give those instructions to sell? Was it reasonable for you to hold to see if you could recover? It becomes much more of the nuanced analysis that forms every single part of the analysis of that relationship at law.

So contributory negligence, damages, how all of that's assessed, it's all part and parcel to the way that wholly and completely different business model is assessed and why you see more litigation on that end of the fence.

CHAIR: Can I ask, what about the discretionary managers in the broker-dealers, so there are people who are able to provide discretionary managed advice in broker-dealers?

MS. PAGLIA: That's right. They would have to sign a managed account agreement, and they would be subject to a wholly different compliance regime.

CHAIR: So there's already broker-dealer firms that have that model where people are providing the advice in the firm currently.

MS. PAGLIA: And versions of that model. So there would be -- and this is very common for bank-owned dealers. You have investment advisors selling managed products, so they are selling products that are managed by portfolio managers. They're recommending the product, but they're not actually conducting the trades that comprise the product. So what do we do with them? I would say they're investment advisors, and the test is: Did they recommend the right product?

But what I'm saying is there are hybrids now, you see hybrids developing because of these kinds of discussions that are happening.

MS. ALEXANDER: I also just wanted to build on some of Laura's points, that there are some fundamental differences between managed and non-managed accounts. One, it's the type of client that you're dealing with in a managed versus non-managed account.

Typically, in a non-managed account, often in a non-managed account, those clients are more transactional-based. They're seeking access to the capital markets rather than seeking advice. What we heard from our members is in the managed accounts the types of products are far more limited in terms of what the advisors are allowed to use in terms of permissible products. So that includes generally less riskier products, such as new issuances, structured products.

Other types of products of that sort are often very, very limited in managed accounts. So the risks, therefore, of imposing a fiduciary standard on a non-managed account where you have clients who are more transactional-based and often looking more for those riskier products increases the liability a great deal for firms.

MR. DE GOEY: I am both an IIROC registrant and an associate portfolio manager, which is to say I offer both managed and unmanaged services to my clients. Where it's managed, I'm a fiduciary, and where it's not, I am not -- or, at least, I am not necessarily.

This gets me to the idea of the paper. The paper suggested that the question of whether or not a fiduciary relationship exists can only be determined after the fact, depending upon the sophistication and reliance; that is, case by case, client by client.

So first off, one of the reasons why I moved to become an associate portfolio manager is because I wanted to offer my clients the option of working in a fiduciary relationship and to have that certitude if that was their choice. I was indifferent because, as other people say, I'm essentially doing it all anyway. So why would I care.

But when you get to the costs, what it means is -- my understanding is that whenever there's a dispute before the court, the first half of the lawsuit is spent in this peeing match about whether there was or was not a fiduciary relationship in place. If we have a fiduciary relationship in place at the outset, all of that and all the costs associated therewith disappear in a puff of logic because we know automatically that if there's a fiduciary standard in place we don't have to spend any time in front of a court going back and forth, 'yes, there was,' 'no, there wasn't,' 'yes, there was,' 'no, there wasn't.' We agree at the outset that there was. I think that's an important benefit that I haven't heard yet.

MS. PAGLIA: That is not a benefit to the industry. That's a detriment to the industry.

MR. POND: It may be a benefit to the investor.

MS. PAGLIA: Right.

MR. DE GOEY: But it's a benefit in terms of the lack of certitude that people are saying this will resolve the lack of certitude benefit -- benefit insofar as there is no longer any dispute or question as to whether or not a fiduciary relationship is in place. That is known in advance. There is certitude.

CHAIR: Actually, that's the comment that came up at the Investor Roundtable, too, because they said that when you go to litigation, right, the first part is spent on -- a lot of process is spent on whether or not there's a "best interest" standard applied, and then once they pass that hurdle, then it goes on. So that was a comment that was made by investors, saying that, okay, if we have the "best interest" standard then we don't have to litigate that component, we can get on to the matters of the case, the particular case.

MS. PAGLIA: Then, you don't have to litigate at all. That's what it is.

UNKNOWN SPEAKER: Just write a cheque.

MS. PAGLIA: Right. Because, I mean, then by and large you don't have to litigate at all. So there is a benefit to a plaintiff's lawyer in assuming a fiduciary obligation. Yes, litigation is shorter because there's certainly less to argue about because, yes, you've gone multiple steps in assuming liability. That's the practical result.

CHAIR: Right. But I think with Julie's comments regarding the PMAC study about PMs, there wasn't the --

MS. PAGLIA: For PMs.

CHAIR: Well, that's right. But there are discretionary managers within the broker-dealer model as well, right?

MS. PAGLIA: But there is no -- let's not confuse. "Broker-dealer" is an American word; It's not our word. So investment advisors who are non-portfolio managers, there's a certain set of legal principles. Portfolio managers, nobody is arguing that they are subject to fiduciary obligations. There's been no argument in that regard. So whether you are working for what Americans call a "broker-dealer", if you have discretionary authority you are a fiduciary, period. So we're already there.

MS. BURGESS: Hi. Sian Burgess from Fidelity Investments.

I just wanted to say that I've been at various fund manager firms for 22 years, and I was surprised by the comment that there are so few lawsuits against portfolio managers because, of course, there are so few lawsuits against portfolio managers. In my whole career of 22 years at huge fund companies, I can count the number of lawsuits against us by investors on two hands.

It's because the advisors stand between

us and the clients. Generally, they're smaller clients with smaller accounts. The larger accounts of portfolio managers have lots of other recourses. They can walk away.

So I think if you want to reduce your costs and you want to have a fiduciary duty standard, you need to be very, very clear about what it means. So you will have very complicated legal analyses done around did they meet their fiduciary duty, what does a fiduciary duty in this case.

Look at the Supreme Court of Canada cases. They go on for 100 pages to figure out whether there's a fiduciary duty that applied to a particular client. Do all facts and circumstances mean that they met their fiduciary duty?

If you want to limit the costs, make sure you carefully define what it is you mean, give very, very clear guidance, and I would suggest to you that you don't leave it in the hands of the clerks at OBSI or the OSC or the MFDA or IIROC to decide on their own did this advisor meet its fiduciary duty because it's too complicated. So give everybody the roadmap, if you're going to do this, and define it and limit it carefully, and then you will avoid some of the costs that you're hearing about.

MR. MARSH: I think the point that I would make is all the things we are talking about from increased costs and everything, it's already happening. We're already covering our ass like you wouldn't believe. We're already making 500 calls when we want to make a change, and 480 of those calls we make are to a client who says, you know, "Why are you calling me? Why don't you just make this change?"

So the advisors that have been around, that have proven that trusted relationship with their clients - and I'm speaking from an IIROC perspective - they're naturally being told by their clients to become discretionary, they're naturally being told by their clients with those 500 calls. Those costs are already higher because one person can't make 500 calls; that advisor's had to hire three associates to help.

Costs are already increasing. It's happening over the last 20 years.

So Richardson GMP, we've got probably a third of our 16 billion in assets that are in discretionary portfolio managers through an IIROC channel. We think that the lines between IIROC and ICPM firms are blurring and have been for some time because clients want it. Advisors that have proven themselves, that are seasoned professionals, it's the natural evolution of their professional development to become PMs.

We have actually become certified as a fiduciary organization, but it only applies to our discretionary platforms, our PM platforms and our separately managed accounts platforms. Anything else, you're transactional, and the clients are choosing to be involved in that decision whether they see it that way or not.

From a cost perspective, I think we have to look at a little bit of perspective over the last 20 years and then as an industry we have to look at the future because a lot of what we've talked about this morning is today.

When I started out as a rookie advisor in 1990, I shared one computer with three other guys. That's how much of an investment my firm had to put into supporting me and my role advising my clients at the ripe old age of 25.

As the last 20 years have progressed, our firms have had to provide computers for everybody, printers for everybody, financial planning software, better reporting internally, automated account opening, online account access. The demand for service from our clients and from our industry has naturally driven us to a higher professional standard, it's naturally driven us to increasing costs, also to cover our ass because we have become so litigious. And yet, we have most of our clients saying, "Why are you calling me? Why can't you just make this change?"

So looking to the future, I think we have to consider demographics. We are all sick of talking about demographics, but we have to ask ourselves: Does the next generation trust us as much as their parents or do they trust us less than their own parents did? My bet is the next generation trusts us less, partly because of the economic storms that we have partly created, mostly in the States, and those economic storms are going to get more violent and more frequent. That leads to a confidence crisis.

I recently read a report that currently 60 percent of all investment decisions are now made by women. Later in that report, it surveyed those women, and they rated financial advisors just below used car salesmen.

So should we be held to a higher standard in our industry? Absolutely. We deserve to be. Our clients are asking for it, and I think that a client who asks for a discretionary relationship so that they don't have to hear from you when the portfolio manager changes, they're automatically saying, "I trust you." Trust equals fiduciary standard. I think that's what our industry has to focus on. But I do believe there's a difference between that discretionary trust and someone who chooses to be in a transactional role where they're dealing with a salesperson/advisor, and I think we have to think about those distinctions. Thanks.

CHAIR: So I do want to say we do want to get to a question on titles, regarding clarity around titles. We would like input on people's thoughts on the whole titling structure of the industry that we currently have.

MR. SCANLON: Just to add to that, as you sort of start to think about how to comment on that, I mean, Andrew, I think it ties in in part with what you just said and a lot of the comments we have heard this morning in the sense that there are a lot of different business models, there's a lot of maybe different expectations, both clients and advisors frankly, and to what extent or how important is the titling? Because that is certainly a very important theme that was covered off in the investor session.

I know some of the SROs -- in particular IIROC has taken a look at titles a little bit more closely, but I think we would like your thoughts on how important are titles, from your point of view, to help address some of the issues we have talked about.

MR. POND: I'll take a first swing at that.

Yeah, I think the titles are very, very important, and IIROC has been struggling with that. We would take the view that anything with the word "advisor" in it should be held to a "best interest" standard.

I realize the discretionary/non-discretionary issue. The problem is it does seem to blur where, whether discretionary or non-discretionary, you're a trusted advisor, and in the mind of the investor it appears that they already think you are acting in their best interests, and therefore, arguably, you should be acting in their best interests.

We would probably argue that if you're not going to be held to a "best interest" standard your title should be "salesperson". In other words, it needs to be very, very clear that this person isn't acting in your best interests, they're just there to sell you something. And if you can -- and it's very, very difficult, but if it's possible to make that distinction, then sure, if that's a salesperson, why would I as a reasonable person expect them to be acting in my best interests?

CHAIR: Any comments on that?

MS. WALRATH: I think with the non-discretionary -- we keep talking about not acting in someone's best interest. We're just pretty much assuming that the client isn't contributing in any way, I think.

I think that people in my generation are becoming more informed and want to be more involved. I think just blanketing over the discretionary/non-discretionary area is doing a disservice to the client. I don't understand how they're going to have a greater input into the relationship but then also not have any responsibility for their input.

So when people are talking about the salesperson/non-salesperson, I don't think that's necessarily fair. I still think the advisor might be trying to act in what we say "their best interests", but it doesn't mean that they should have a fiduciary standard imposed because that person might not have that actual reliance.

So I think we really need to look at the different business models and not just say because someone isn't putting someone in a discretionary account that they're just a salesperson and they're not trying to put the person in a suitable product or trying to put the person in the best product that they have available to them. So I don't think we need to kind of be as negative as this discussion is going with certain advisors. I think we have to recognize the industry and the broad range of business models within the industry.

MR. SCANLON: So, Adrian, I just have one follow-up question. I mean, I appreciate your sensitivity to using an advisor and salesperson kind of approach to titling, but what about some of the other jurisdictions, you know, like in the U.K. where they've taken an approach of "independent" and "restricted"? And I think the EU is contemplating a similar kind of approach where I think there's an attempt to try and communicate in the title that if there are any restrictions or any narrowing or, they use the term in Australia, "scaling" of the advice. I mean, do you think that is a principle that makes sense in how we approach titles?

MS. WALRATH: I'm interested to know how that's going to play out because Australia's is just coming into force and the U.K.'s just came in not that long ago in terms of how many people are going to call themselves completely independent, how are you actually supposed to do that; you know, if a hundred products, you can consider yourself to have the full range of products? I know there's thousands available. So at what level can you actually not be considered limited? I would assume most people are limited. Or is it only if you only sell proprietary products you are limited but if you have a shelf with different companies available and you have enough of what you consider, or whoever puts a number on it, then you can be considered independent or...

I don't really know how it's going to play out so I'd be interested to know how that works.

But I also know that in the U.K. some of the new studies are showing that people are not getting advice anymore. There are people dropping out of those spaces or they're only going to high-net-worth clients. So they might not even want to go the limited route; they're just taking the high-net-worth clients and going -- sorry, they're going the limited route, but they're just going for high-net-worth clients because they're saying it's what's worth their time.

So I think we need to kind of give those two jurisdictions more time to play out how those things are actually working and how effective they are for the clients. I don't think at this time we can kind of comment that they're effective. They're interesting ideas, but I don't know how they're working yet.

MR. CHARLES: I think we have to be very careful here, very careful not to paint a wide brush and also to manage that we're not managing to the lowest common denominator here. We already talked this morning about the value that a lot of advisors bring and the difference they make to clients' lives. As a financial planner, you sit down with a client or prospect, you look at where they're at now financially, devise a number of options, alternatives, strategies and ideas to significantly improve their financial life, put it together in a written financial plan, and then, based upon that, recommend the appropriate suite of products and services to implement that plan.

Whether you're using a discretionary product or associate PM or PM, it's not the difference. The difference is the value that you put into it, and many advisors have different models, and I think we have to respect that it doesn't matter what model you're in; you can make a significant difference to a Canadian's financial well-being regardless of the model we are in, and I think we have got to be very careful not to manage to the lowest common denominator here.

MR. COSTELLO: Good you asked that question. It opens up another can of worms.

I think titles and I think the IIROC initiative -- title is based on competency, and then you have the fiduciary duty which is based on your standard of care. I think they work hand in hand, and I think the various levels of titles and the competency you have achieved should restrict what business you do and your competency to do that. And then you throw in standard of care; it probably kicks in at a certain title.

So we do have a lot of titles in the industry that really mean nothing. They may describe what you're doing or trying to do, but are you qualified to do that? So I think it's an important component, and if you tie them together it will add much more credence to the debate.

I support IIROC, what they're doing. I think you have to demonstrate you have the competency to help the client, and then here's my standard of care and I'm willing to stand by that test.

MR. SKWAREK: Maybe a point of clarification or maybe somebody can explain it to me if

I'm mistaken here.

We were discussing somebody who is just in sales, and then the question was asked: What about what's happening in the U.K. or other jurisdictions, where we talked about restricted versus, let's say, independent?

My understanding, and correct me if I'm wrong, but under RDR just being restricted does not mean you're just in sales. The standards were raised for everybody in the U.K. whether they were restricted or not. So I don't think equating what happened in the U.K. with what we're talking about here, sales versus managed or a higher standard, is actually applicable. So that's the first point I would make.

The second point I would like to make is when we talk about titles it is confusing for consumers out there. But a financial advisor is a financial advisor. Within the realm of financial advisors, people can then do further specializations, and that's fine, and that's something that they should be very proud of and can be promoted in terms of why people should use them as a financial advisor.

But when we're talking about standards, I don't think we should be saying somebody is in sales versus somebody is a financial advisor because consumers need financial advice. This goes to the point that a few other people have made here about the value of advice. If we see there's value in advice, if it furthers broader government public policy, then we shouldn't be excluding a certain group of consumers who may be looking for a cheaper sales option versus the actual need for solid financial advice.

MR. SCANLON: So I guess I can respond to your comment about the RDR reforms. I think you're right as far as it goes, and I don't think we were trying to make an apples-to-apples comparison. It's just that was a different approach in how those regulators thought that that kind of disclosure-based approach in the titles might help consumers understand what kind of advice they're getting.

To your second point, part of the challenge is -- look at exempt market dealers, for instance. In some cases, in many cases in fact, they're often selling one issuer of securities, and that one issuer is often a connected or related entity to that EMD. So I mean, we're talking about highly restricted advice and sort of dealings in that kind of situation.

We have done some work in it, in the EMD space, and I think a lot of clients understand who they're dealing with, but some clients, depending on what kind of exemption they're taking advantage of -- let's say the $150,000 exemption. I mean, if you walk in and you rely on that exemption, unless you have the wherewithal to know who you're dealing with...and that person may be using a title that may not be totally evident as to what they're actually doing with that client. So it's just an issue that we're trying to grapple with. But I appreciate your comments.

MR. SPIEGEL: Hi. My name is Jeff Spiegel. I'm here from Norton Rose Fulbright.

I'd like to thank you for the opportunity. I appreciate that the discussion about titles is important, but I want to bring it all together with the discussion about terminology generally and wanted to ask the regulators. We were talking about the definition for "best interest" or "fiduciary duty".

I want to ask: What is being contemplated in terms of a carve-out within that definition? The reason I'm asking is because we've talked about costs before, and we always need to be thinking about costs in the context of titles and in the context of the terminology for best interest because although certain litigation might be shortened and the process would be expedited by having a bright-line definition of that duty, we don't want to redirect all those costs just into the pockets of plaintiffs or pockets of more entrepreneurial class-action lawyers who have their own incentives for bringing things to court.

So we want to protect investors, but we don't want to open up the floodgates for unnecessary litigation. Within the definition of "best interest", will there be a carve-out to say there won't be a cause of action just because an investor lost money or just because they didn't receive a phone call every couple of months from their advisor, you know, finding out up-to-date information, or whatever the case is, so that we don't get more knee-jerk and entrepreneurial claims that really we don't want?

MR. SCANLON: I mean, I think at this stage, and as we have said in the paper, no decision has been made. Of the critiques we've had of the paper, one of them is not that we didn't ask enough questions.

You make a fair point, and it's certainly a theme that we've heard today. I think it's crystal clear that to the extent we move forward with a statutory "best interest" standard a lot of guidance would be helpful. I think Ms. Burgess had made that point really clear most recently.

So we understand that point. To the extent that we move forward with a statutory "best interest" standard, we understand more guidance is probably better, and to the extent we can give guidance, especially around trickier situations, stickier situations where it may not be totally obvious how you operationalize it, that would be something we would look at. But we're at a stage now where we're in consultations and we haven't decided our way forward, so I think it's premature at this point.

MS. COWDERY: Hi. It's Rebecca Cowdery from BLG.

I just wanted to make a statement, listening to all of the conversations. One of the comments that came through in our comment letter but also in many other comments is to let the client relationship model work its way through because I think some of the things that people have said today can be solved if the client gets a better picture of the relationship that they're getting when they're going to a particular advisor, to a particular dealing firm versus a portfolio management firm. I think that's very important, is to make sure that the original purposes of the client relationship model are actually being fulfilled because I'm not sure that they are today.

You know, the disclosure that was originally proposed back in the fair-dealing model in 2004, I'm not sure that has been properly translated by dealing firms and by portfolio manager firms. So I would just urge the OSC and the CSA to keep in mind the original purpose of the client relationship model.

I'd also suggest that you go back to the fair-dealing model to a very good little discussion, I thought, about a graduated licensing system. It recognized that everybody in this business provides advice of some sort, but people do it differently and there are different proficiencies.

One thing we haven't actually talked about today is when you're talking about everybody at the end of the day providing discretionary advice, not everybody has the same level of knowledge, level of proficiency, level of professionalism.

So I just suggest that the CSA go back to that 2004 paper and look at the graduated licensing system. Maybe that's something that can be relooked at and solve some of these problems because I think at the end of the day this whole business about talking about best interests, fiduciary responsibility, I think it is fraught with difficulties, and I think you can achieve your objectives with other initiatives.

MR. SCANLON: I think we might have time for one last quick comment. Otherwise, I think we may go ahead.

MR. DiNOVO: I'd be interested to hear from Stéphane Langlois because Quebec has already addressed this titling issue is my understanding, to some degree. We are already in that world there, I assume, to some degree. You restrict title, and you restrict designations, and so on and so forth. So I'd be curious to know what your experience has been.

I respect what Rebecca said in terms of the fair-dealing model. I think that should be the basis of how we move forward. There are those three primary types of relationships. CRM, hopefully, will pan out in the form of an advisor prospectus and maybe an advisor fact sheet that lays it all out for you. You know, that goes more towards what they've done in the U.S. with the RIA model.

I think nobody has refuted my assumption that you cannot have a fiduciary relationship without discretionary management. Sandra, to my right, has given a perfect example. You want to make a change in 500 portfolios; you have to do it serially under most registrations except for the PM registration. I think you've got to look seriously at opening that up because -- and if you do disagree with me, I'd like to hear the counterargument because I don't think you can act in any one client's best interests without doing it to the exclusion of another client. Typically, you work your way through your clients from your best clients to your... You know, you may never get to the other ones. And that's the fact of our industry right now.

MR. SCANLON: You know what? We do want to wrap it up. I mean, I think what you have identified is a challenge with the "best interest" standard.

I am aware of some case law, at least one case, Secord, where there was a situation where there was not discretionary management and the court did find there was a fiduciary duty. So courts, even today, at common law will find fiduciary duty in some contexts without discretionary management.

But with that, Deb, I think we can wrap.

CLOSING REMARKS BY CHAIR:

CHAIR: Yes. So I wanted to say thank you very much. This was a lively debate. We've got a lot of information to take back and work through. A lot of messages came through. We have the transcript so we will be able to go back and get all of that information.

I wanted to let you know there is a next roundtable. It is going to be a moderated panel between academics, industry, investors. Vice-Chair Jim Turner will be moderating that panel, and that is on July 23rd.

Also, we will be providing you with a survey. If you can provide us feedback on today's session, that will help us in formulating roundtables going forward.

Also, behind me and in your papers there is the e-mail address, the best interest consultation e-mail address. If you have other questions, comments, thoughts, send us an e-mail. We are looking at all that information, and we definitely value everyone's input, so we encourage you to participate.

Thank you.

--- Whereupon proceedings adjourned at 12:01 p.m.

I HEREBY CERTIFY THE FOREGOING
to be a true and accurate
transcription of my shorthand notes
to the best of my skill and ability.

RACHEL L.A. ROSENBERG, CSR
Chartered Shorthand Reporter