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CANADIAN SECURITIES ADMINISTRATORS

AUTORITÉS CANADIENNES EN VALEURS MOBILIÈRES

ROUNDTABLE DISCUSSION RE

STATUTORY BEST INTEREST STANDARD

DATE: Tuesday, July 23, 2013

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

BEFORE:

JAMES E.A. TURNER, Q.C.	Vice-Chair, Ontario Securities Commission, Panel Chair
ANITA ANAND	Panel Member
JAMES KERSHAW	Panel Member

JOHN FABELLO	Panel Member
CONNIE CRADDOCK	Panel Member

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--- Upon commencing at 10:00 a.m.

INTRODUCTION AND OPENING REMARKS:

CHAIR: If we could get under way, please. We have got a bit of a tight schedule so I wanted to get off the mark right at ten o'clock. I think, as you know, we are going for two hours and we have some interesting topics to discuss.

So I will introduce myself. I'm Jim Turner. I'm Vice-Chair of the Ontario Securities Commission, and I am the executive sponsor of this policy initiative. In a minute, I will introduce our panel, but I just wanted to give a little bit of context and background.

So, first of all, welcome. Thank you for participating in this roundtable. I think everyone here will know the CSA put out a consultation paper with respect to the issue we are going to be discussing, which is whether a best-interest standard should be imposed on a dealer/advisor when giving advice to a retail investor. That is a CSA initiative, and I should say that there are representatives of the CSA who are on the phone listening to this session. I should say it may be that other members of the CSA will decide to have consultation programmes themselves before we circle around in the fall.

As part of this consultation, we received a large number of submissions, 90, and we have had two previous roundtables: one roundtable focused from a retail investor point of view, the other roundtable from an industry point of view. And so what we were trying today is kind of to put the two together and see how it all flows out.

This is obviously a bit of a complex area. There are lots of developments going on around the world in other jurisdictions. Clearly, there are complex issues and issues that it is important that we grapple with before the Commission moves forward with any particular proposal.

I should emphasize that the Commission has made no decisions with respect to this area. We have put out a consultation paper, we will sit down and review the results of that consultation, and then the Commission will make some decisions as to how we want to proceed.

So this session, we have a panel. We are going to give each member of the panel five minutes to make some comments. A pretty tight schedule, but we are hoping, then, to open up for questions from the audience and have about 25 minutes for that. I will introduce the panel in a moment, but what we have attempted to do with the panel is to have different perspectives: obviously, an industry perspective, and then maybe an investor and investor-protection perspective.

So to my immediate left -- and all of our panelists have great resumes and CVs, but I'm not going to go into a lot of detail. I'm just going to very quickly introduce them.

Immediately to my left is Anita Anand. She is a professor of law at the University of Toronto, former associate dean. She is the Academic Director of the Centre for the Legal Profession, including its programme on ethics in law and business, and she was also the inaugural chair of the OSC's Investor Advisory Panel.

Next to Anita is Jim Kershaw. Jim has over 20 years of experience as an advisor and senior executive in the investment industry. He is Senior Vice-President with TD Wealth Management here in Toronto, and he seems to have the disadvantage of both having an accounting and a legal background.

Beside Jim is John Fabello. John is a very well-known, experienced litigator with the Torys law firm here in Toronto. His practice focuses on the securities industry, securities litigation, and advice in particular to registrants.

Finally, we have Connie Craddock. She is currently a member of the OSC's Investor Advisory Panel. She has had lots of experience in policy development in the securities area. She retired two years ago as Vice-President, Public Affairs at IIROC.

So with that, let me just do a short introduction in terms of the particular principles that we are going to be addressing today.

TOPIC 1: SHOULD DEALERS (AND THEIR REPRESENTATIVES) BE SUBJECT TO A BEST INTEREST STANDARD WHEN PROVIDING ADVICE TO RETAIL CLIENTS? WHAT WOULD THE CONSEQUENCES BE OF INTRODUCING SUCH STANDARD?

OPENING REMARKS BY CHAIR TURNER:

The first topic is: Should we impose a best-interest standard when advice is being given to retail investors? The current regulatory scheme, you probably know there is currently a requirement that a dealer/advisor deal fairly, honestly and in good faith with their clients. They have an obligation to collect information both with respect to clients, the know-your-client rule, and they have an obligation to know their product, and when giving advice their advice has to be suitable for the particular investor. There is an obligation on registrants to identify and control conflicts of interest and disclose to investors what those conflicts are.

So there are five basic concerns identified in our consultation paper with respect to the current relationship between dealer/advisors and their clients.

First, there are a number of market participants who have indicated that the current rules are not an adequate principle foundation for the relationship between an advisor and their client. That relationship in the current rules doesn't fully account for the informational and financial imbalance between the advisor and the client. If you ask retail clients, they believe that their advisors have an obligation to provide advice to them that is in their best interest. Obviously, that's not what the current legal scheme requires. And there is concern that advice with respect to suitable investments isn't good enough; the advice ought to be, if you're giving it, securities that are in the best interests of the client.

With respect to fiduciary duty -- and we kind of use back and forth the term "best-interest standard" and "fiduciary duty", but at common law the concept of a fiduciary duty requires a fiduciary to act in good faith in the best interests of their client.

There is a common law fiduciary duty that currently can apply to the relationship between an advisor and their client based on the vulnerability of the client, the amount of discretion that is given to the advisor. But there is no statutory fiduciary duty; there is just the common law fiduciary duty.

So what are the potential benefits of imposing a best-interest standard? I mean, it really is to respond to the four or five comments I've just made. A best-interest standard would provide a more principled foundation for the relationship; it would deal with the expectation gap between what investors believe that they are receiving; it would result in investors receiving better advice, i.e., advice with respect to purchase of securities that's in their best interests not just suitable; it would help mitigate some of the negative effects of the information asymmetry between clients and their advisors; and I think at the end of the day it would also make it easier for retail investors to bring civil actions against advisors who haven't made the standard.

Now, of course, there are a number of potential competing factors, why one might be reluctant to impose such a duty. Some argue that there is currently a functional equivalent; i.e., the duty to act fairly, honestly and in good faith is essentially a best-interest standard, and it is a standard that we as regulators could provide more meaning to by providing some guidance.

There are concerns that if you impose such an obligation that is going to impose greater costs on retail investors, and it may adversely affect their access to advisory services.

There is also concern that such a duty would impact the kinds of compensation practices that would be applicable in the market.

In any event, whether one implemented a best-interest standard or attempted to further articulate the existing standard, I think everyone agrees there would be a requirement for securities regulators to provide guidance as to exactly what the standard is and what is expected in the circumstances.

So with that introduction, let me go to our panel. We are going to give each of our panelists five minutes so I have encouraged them in five minutes to just hit what you think are the important issues.

I'd like to start, then, with Connie

Craddock. Connie?

OPENING REMARKS BY MS. CRADDOCK:

Thank you, Jim.

Within the brief five minutes that are allotted to us, and I know that we will be stopped if we go too far, I'm going to limit my comments to three reasons why securities regulators should replace the current inadequate suitability regime with a best-interest standard as regulators in the U.K. and Australia already have.

First, suitability rules are designed for a transactional relationship, for the selling of product. We talk a lot about advice, but the suitability regime and its rules do not really cover the provision of advice.

All one need to do to be fully compliant with the rules is to recommend a product which is a match. That's like going into a store and there's a rack of dresses and someone recommends the right size. So it's a very low standard that governs what constitutes a suitable recommendation.

It also doesn't require that the person making that advice have access to a full range of products. It can be a limited set of products, proprietary, or only one kind of protect, depending on proficiency standards of the registrant.

Secondly, the suitability requirement does not require advisors to take into account the costs of their recommendation. They do not have to recommend the lowest cost of equally suitable products. A best-interest standard would require advisors to take into account the costs of the product recommended, and this would certainly lead to better financial outcomes for investors.

Thirdly, and probably, at least in my view, the most important is the current suitability approach to conflicts of interest. They are characterized by inadequate disclosure and weak conflict management. A best-interest duty would require the avoidance of conflicts.

Today -- and it is important to stress that this is a registrant who is fully compliant. I'm not talking about people who break the rules or rogue advisors or anything like that. I'm talking about what the rules are today and what people can do to be compliant with them. Under our current rules and the practice of conflict management under the suitability regime, advisors can accept commissions from third-party manufacturers. I suggest to you that if your doctor told you that he was receiving a commission every time he recommended a certain pharmaceutical product to you that you would have some qualms about the quality of the advice.

Regulators in the U.K. and Australia have pointed to this conflicted remuneration structure, the management of conflicts within the suitability regime, as one of the prime reasons why they have moved to introduce a qualified best-interest standard.

These fundamental conflicts of interest which are allowed within the suitability regime mean that an advisor's interests are not aligned with those of their clients. We are not even talking best interests; they're not aligned with their interests. Rather, they are more aligned with the people who pay them.

This approach to conflicts leads to a bias in product recommendation. Research has shown that some products are recommended more than others. This doesn't encourage and foster competitive and efficient capital markets, and ultimately, this compromises the quality of advice.

I think financial incentives of this nature are endemic through the system. We are talking about performance incentives, volume bonuses. It's not just the payment of trailer commissions. And I think we all know in the industry and elsewhere that financial incentives drive and shape behaviour, so it should come as no surprise to us that currently 64 percent of advisor compensation comes from trailer commissions.

A best-interest duty has clear benefits. It would lead to increased investor protection through the better management of conflicts. A best-interest duty requires that they be avoided, not managed and disclosed.

Increasingly, we are aware that disclosure is an inadequate remedy for retail investors. You can shine the light on something, but that doesn't mean that people can understand what they see.

We would have a better quality of advice in this country if we had a best-interest standard, and I think it's time for Canadian regulators to emulate their counterparts in Australia and the U.K. to heed the calls of investor representatives, the IAP, FAIR, the Small Investor Protection Association and others who have made these recommendations for years, to move to a higher standard and to increase the level of retail investor protection in this country.

CHAIR: Perfect. You are exactly five

minutes.

MS. CRADDOCK: I wasn't counting.

CHAIR: So, Jim, you have to do as well. If we could have your comments?

MR. KERSHAW: I make no commitments.

OPENING REMARKS BY MR. KERSHAW:

First off, my comments this morning are my own, and nothing you hear should in any way be seen to reflect the views of the employer that I work with.

I am a lawyer, I am a chartered accountant, I am an investor, and I was once an advisor, so my view brings with it bias, bias that has come from a career in this industry, serving clients and giving advice.

I understand the complexities of behavioural finance and the psychology of investing. I respect the battle fought each day between fear and greed. I have observed how all too often, despite everyone's best efforts, greed actually triumphs over fear.

This discussion today is really about risk and the allocation of responsibility for the due management of risk. For the capital markets to function properly, we need financial intermediaries such as the organization I work for. We also need investors prepared to assume risk with an expectation of an appropriate rate of return.

Despite everyone's best efforts, not everything works, and, at times, notwithstanding everyone's best efforts, nothing works. As investors, we will forever buy too late and sell too early, and for every transaction completed there will always be two parties, each with a completely different perspective on the future. So clarity of perspective is required.

No standard will change the fact that every one of us will lose money from time to time by investing. In the end, the only safe haven is discipline.

Despite the fact that some at this table would attempt to convince us that this debate is not about outcomes, this debate will always be about outcomes. Do we need a new standard? I say no.

Would it surprise you to know that there's no agreement of any kind in this industry or with any particular regulator on the meaning of "risk"? In the result, that's what we are talking about today: Who bears the risk?

Does "risk" mean volatility, likelihood of loss? Does it mean point-in-time or over-time?

What is low risk, medium risk, high risk? Does every firm get to decide? Does every advisor? Does every investor? Without resolving these fundamental issues, why are we surprised that the standard based on suitability is found to be less than satisfactory?

In a best-interest world, we will not escape this debate. So I submit to you that the problem we face may not be inadequate regulation but inadequate enforcement of existing regulation.

For example, how tough is it to become a licensed advisor in Canada today? Two courses and a job offer. The courses are not even that hard. Shouldn't being an advisor to the public in the context of the uncertainty of the capital markets be one of the toughest jobs to get and one of the easiest jobs to lose?

If we adopt the proposed standard, as an advisor I would be required to act in the best interests of my retail client and exercise the degree of care, diligence and skill that a reasonably prudent person or company would exercise in similar circumstances.

As investors, what is our responsibility? Should we be obliged to bear even a minimum level of financial literacy? Is that acting reasonably? Do we need also to exercise care and diligence and possess the skill of a reasonably prudent person, or is naiveté our best asset? Need we be experts, or is our advantage ignorance?

Somebody tell me what the standard means - not in another industry, in this one.

I observe that some might say that an investment can be suitable but not in the best interests of a retail client. For some reason, the analysis remains anchored by reference to price. In the world in which we operate, isn't there always going to be arguments that there was an appropriate investment available at a lower price somewhere? Look hard enough, it's there. It will always be there. Or is the expectation that somehow advisors will be able to find the only one? Or is the expectation that an advisor simply avoid the wrong one? Is that appropriate? Is appropriate suitable? We have not even formed consensus about what "suitable" means, and now we are expected to agree on what's best.

The paper speaks to the inherent flexibility and fluidity of a fiduciary duty at common law, but this is a statutory best-interest standard. How will disputes about whether or not one acted in the best interests of another be resolved? By statute?

Don't be fooled. Countless volumes have been written about statutory interpretation. Flexibility and fluidity mean one thing when it comes to dispute resolution: uncertain.

This is a so-called principles-based route. Aren't we in this place because we can't agree on the meaning of the word "suitable" in the principle-based world we operate within today? This will no longer be about whether or not the duty exists. Make no mistake about it. Disputes will all be about whether or not the duty has been met in the circumstances. That sounds like a legal dispute to me. That sounds like lawyers. That sounds like courts. That sounds expensive. I really wonder if this will bring the benefits investors need and they want.

I agree with those who say this new standard of clarity will only serve to add complexity and uncertainty. Who amongst us honestly believes that the imposition of such a standard will come at no cost? One of the largest costs borne by this industry flows from the duty to supervise. I wonder how one would or could automate supervision of compliance with the statutory best-interest standard - every transaction, every portfolio, every client, every day.

I expect firms will be forced to be

less flexible on what clients they take on and more prescriptive in what those clients can invest in through them. The Street will decide the risks they are prepared to expose themselves to in this inherently flexible and fluid world.

The universe of choice, the options that exist today will not be available universally through full-service investment dealers; rather, I fear we will become limited-service investment dealers in order that we can prescribe outcomes that will limit our risk.

The structure of an account and the compensation options available will be limited. I see no option that would support transaction-based compensation. How could it in a world anchored in a presumption of bias. Investors will pay fees if they want advice. In the end, I work in an industry that manages risk, and this risk will be managed.

CHAIR: Thank you very much, Jim. So we will move to Anita.

OPENING REMARKS BY MS. ANAND:

Thanks, Jim. Thanks for inviting me here today. I will outline two recommendations, the first one being slightly more important than the second.

As we have seen thus far, and will continue to see this morning, there are vastly divergent viewpoints regarding the introduction of a best-interest, fiduciary duty standard in Canadian capital markets, but one thing, perhaps, that we can all agree on here today is that the law is a mess. What I mean by a "mess" is that there is a lack of clarity about what the standard of conduct owed to the client is.

Inconsistent legal standards across the country exist. In Quebec, registered dealers and advisors are subject to the duties of loyalty and care and must act in the client's best interests. In other jurisdictions, the situation is not so clear. There is a mix of statute and common law obligations in a variety of categories of registrants that may or may not be subject to a fiduciary duty standard.

This brings me to recommendation number one, that clarification of the law is in order. It is needed regardless of the particular policy stance that the CSA ultimately adopts. Debate has been dragging on in Canada while other jurisdictions with capital markets that are much larger than ours have adopted a best-interest standard. The U.K., the U.S., and the EU, albeit with certain carve-outs and exceptions, have seen fit to go forward and have done so.

Canadian securities regulators need to act, and I appreciate this roundtable is likely one step in that direction, but this push needs to continue for the greater certainty not only of investors but all other stakeholders in the market.

Now, moving on to substance, securities legislation, as we have heard, imposes the duty to deal fairly, honestly and in good faith with clients, imposing KYC and suitability, and we have heard two sides of the coin already that while the best-interest investment is always a suitable one, a suitable investment may not always be the best one.

One stat that I find particularly compelling is that 70 percent of all investors believe that their advisor has a legal duty to put the client's best interests ahead of his or her own personal interests. That's 7 out of 10 of these investors believe that their advisors have to act in their best interests. Yet, this is not the law. If they knew that this was not the law you may actually have more investors speaking out against the current legal standard or lack thereof.

Now, instead of continuing down this road, which I think Connie has ably done, I thought

I would respond to the two major objections that I hear regarding the introduction of a fiduciary duty or best-interest standard.

The first, alluded to by Jim, is that current requirements relating to financial advisors already embody a fiduciary duty or best-interest standard, and perhaps this may be the case. This is what "good faith" means.

Well, this point is easily dealt with, in my mind. If the law contains a best-interest standard already, securities regulators need to make this explicit, period. They need to eliminate the need to determine whether a common law fiduciary duty applies to a particular situation.

Objection number two is a little bit more complex, and it relates to costs. The costs, it is said, of moving to a fiduciary standard will be significant.

The first question I have is: What are the costs? What are the specific costs? The consultation paper raises this issue, saying that there may be greater costs on providing advice, negative impact on certain business models, and an uncertain effect on compensation.

We can imagine that there will be

increased costs relating to compliance, supervision, insurance, litigation, and complaint-handling. The argument is, as Jim pointed out, that these costs may be passed to the investor. And I agree. They likely will.

But the point I want to make is that it's not as though these costs do not exist at present. We are talking about a delta in costs, and that delta, in my mind, may not be material. We need more information, but that is a point that we need to be asking: Is the delta in costs of moving to this standard material? And if the delta in costs is likely to be small, then I would say that the additional investment by investors is worth it.

In short, the issue of costs, transaction costs in particular, arises in any policy change, and there comes a time, in my view, that those with the ability to make policy need to revert back to the historical mandate with which they are charged, which is, at root, one of investor protection. In light of this mandate, it is surprising to me that we are spending so much time deliberating over this legal point, especially when other jurisdictions coming out of a severe financial crisis have seen fit to amend their laws.

I'm done.

CHAIR: You're done right on the --

MS. ANAND: Thirty seconds early. I was the fastest.

CHAIR: Okay, John, if we could have your comments.

OPENING REMARKS BY MR. FABELLO:

Thank you very much. Hard act to follow, for sure.

Just to reset, so the question we are addressing in this little section is: Should there be a standard at all, and if so, what are the consequences of imposing it?

I was speaking with my partner Laura Paglia about this and I asked Laura, as I often do, "What should I say?" And she said, "Well, say, 'No, it should not be imposed,' and, 'Please read the case law.'"

So those two themes will pervade everything I'm going to saying today.

You know, I come to this -- full disclosure, I do act for the industry. I have for 20 years. I also act for plaintiffs. I'm a student of this area. I've studied it, I write on it. And I'm also an investor, a somewhat downtrodden investor.

I've been in the capital markets investing for about 20 years. I'm almost back to where I started as far as returns go. So I have a lot of self-interest in this topic, and I think I come to it objectively, and I say, as Laura does, no, there shouldn't be this standard, the reason being that there is a reasonably effective and very onerous standard that exists right now in the common law, which is the law made by judges, and in the very rigourous and good job that the regulators are doing imposing these standards.

I think there are three main, foreseeable adverse consequences in imposing this standard. The first is at best, in my view, it is unnecessary and it is going to be redundant. The current law does afford investor protection very effectively to the kinds of legal breaches that this duty speaks to; you know, a broker putting his or her interests ahead of a client's. And the current law does cover each of the five things that this duty encompasses as set out in the consultation paper: client interests are paramount, conflicts of interest are to be avoided, clients are not to be exploited, et cetera. You can read it in the paper. The common law and judge-made law does address this.

Very interestingly, this protection has

existed in our legal system for about a hundred years. You know, the earliest reported broker liability case in Canada comes from 1910. It's a case called Johnson v. Birkett. I'm going to quote from what the judge said in that case a hundred years ago:

"A broker cannot take advantage of his position, and a broker has to act in perfectly good faith after full disclosure."

Well, doesn't that sound an awful lot like what we are talking about today? So that concept is not new to our legal system.

The current law, jumping ahead to the 2013 time range, imposes the highest duty designed to give the most relief to people where there has been a -- I'm quoting from Varco and Hodgkinson:

"There has been an act of betrayal, disloyalty, a stench of dishonesty."

And the exercise in these cases is to determine what sort of conduct is necessary to constitute a breach of fiduciary duty, and all of the great remedies, the very flexible remedies, that come along with that. The goal here, similar to the goal of this proposal, is to deter this kind of conduct and have appropriate remedies.

The vast majority of brokers do not

engage in this kind of conduct, they don't engage in stuff where there is a stench of dishonesty, so there is no deterrent that is needed for those people. You know, there are rogues, there are bad people, and I don't think a fiduciary standard in a piece of legislation is going to deter that, but the current system does offer remedies for wrongs that are created by those intentional wrong-doers.

Secondly, at worst it is going to create unfairness and uncertainty, will leave confusion in the law for sure, in my view. This law that has developed very carefully and is highly calibrated over a hundred years is going to be juxtaposed with this deceptively simple statutory concept that numbers I think around 20 words, and judges are going to have to grapple with what this new standard means compared to this hundred-year-rich history of case law, and that's going to create some confusion.

Confusion as well? Potentially wrong message to clients. If this is presented, and sometimes it is, as a panacea - you know, this is going to be a fix-all to the industry - I think that's misleading investors. This is not new, it's not unique, but it does seek to replace a very complex but effective system in the common law.

The third issue and third problem that I foresee, and final one, is no matter what there will be a burden to clients and the industry. This will be a bonanza, I say with a smile, to compliance and legal professionals trying to figure out how you test and supervise for this. It will be before the courts for sure. Experts will be kept busy until the uncertainty is resolved, if it ever is. So there is a lot of job security for yours truly and people who do what I do.

Another burden is that it will require more time for brokers. If there's a standard across the board, no matter what the client relationship or profile, to act in the best interest... You know, brokers are going grapple with what does the 'best product' mean in a circumstance, what does the 'best trade' mean? This is particularly in an industry that has a product that is inherently uncertain.

Investment in capital markets, we all know, is uncertain going forward, and often there is no best product or best decision. There are a host of decisions that are equally acceptable. And I think the brokers' final point is that brokers who see the need to advise clients who perhaps didn't sign up for and don't need the full slate of advice are going to be spending time doing that at the expense of some clients who do.

COMMENTS FROM THE FLOOR:

CHAIR: Thank you very much, John. That was excellent, keeping our comments within the right time frame.

So we are going to open it up for questions. If you have a question, there are microphones. So put up your hand and a member of OSC will bring you a microphone. If you wouldn't mind identifying yourself before you raise your question. I should say there will be a transcript of this proceeding so it will be useful if you do identify yourself.

To start it off, I think we will call on Ermanno Pascutto of FAIR, see if he has a comment.

I should say, if you have questions we are perfectly happy to have them directed to any particular member of the panel, and if you don't direct it I may myself direct it.

MR. PASCUTTO: Good morning. Ermanno Pascutto, FAIR Canada. Thank you for giving me the opportunity to talk today. Before I make a comment, I'd like to preface my remarks by saying that it would have been nice to have a slightly larger panel, to have heard the perspective of the industry that favours a best-interest standard because we are hearing the industry perspective, but that is not the only perspective. There are a number of institutions in the industry that do support a best-interest standard.

Secondly, it would have been nice to hear the perspective, when we are talking about litigation, of a plaintiff's counsel because I think -- I've gone to your web site, and I see you're sort of the go-to partner for defence of financial institutions. So it would have been good to hear the other perspective.

CHAIR: Ermanno, I should say to you we have had two other public consultations in which the focus was specifically on those topics. You can only do so much in the context of a single panel. But I take your comment.

MR. PASCUTTO: So my point really relates to kind of investor expectations. We have heard and we all know that the consumer, the vast majority of consumers think that the industry is already required to meet a best-interests standard. So we have the consumer up here (indicating) thinking that they are owed a best-interest standard by the financial advisors that they deal with. We know that the reality, the regulatory reality is down here (indicating), that they're owed suitability, which is not as high a standard as best interests.

And I don't think that the regulators have an option of letting that kind of disparity exist. I think you have one of two options. Either you have to disabuse consumers of their notion that the industry is required to act in their best interests, and you've got to bring down their expectations, and you've got to reduce the level of trust they have in the financial industry, which would appear to run counter to your kind of overall objective of increasing investor confidence in the capital markets which that must mean investor confidence in the industry.

The only other way, as I can see it, to close that gap that exists today is to increase the standard. So I wonder what option are we going to take? Are we going to reduce consumers' expectations, or are we going to increase the standard to meet consumers' expectations?

CHAIR: I think I know what your answer to that question is.

MR. PASCUTTO: I don't know, I...

CHAIR: Well, that's certainly one of the questions that we are grappling with as part of this. There are certainly lots of people who would say, well, we ought to increase it to the best interests, but one might also say 'but in any event, if you don't do that, at least you've got to deal with the gap in perception.'

MR. PASCUTTO: If I may, one additional comment. I am an investor, too. I don't tend to go to financial advisors. I've been a regulator, I've taken the Canadian Securities Course a thousand years ago, I've been investing for a long, long time so I think I sort of know what I'm doing. Most of the financial advisors I've met don't seem to know half as much as I do.

MR. FABELLO: Will you take on clients?

MR. PASCUTTO: Actually, that's my possible next career.

MR. KERSHAW: I will give you one of my cards.

MR. PASCUTTO: But the vast majority of consumers are not financially literate, they don't understand financial markets. You know, the vast majority of people who are looking for advice or looking for help to invest are too busy taking their kids to ballet and hockey and all those sorts of things, and they really don't have time. And there's no way that financial literacy is ever going to bring them up to a level that they're able to understand the sophisticated markets that we have today.

So they decide that they're going to see a financial advisor, someone who holds themselves out as a financial advisor, to get advice as to how to invest for retirement, for children's education, and so on.

Now, the question I have: If I were a consumer going to an advisor, I would want to go to an advisor, and I'm going to pay them, I'm going to pay them significant amounts of money. And why would I go to an advisor that is not going to give me advice in my best interest?

To me, there's no logic in going to an advisor and paying them money if they're going to put their best interests first. I mean, there's no logic. Any consumer who wants financial advice is going to want an advisor that acts in their best interests. There's no logic to paying someone to give them advice that's not in your best interests.

CHAIR: Does anybody want to respond to that?

MR. FABELLO: I'll have a quick shot.

I hear what you're saying, but I disagree with the premise of your comments, which is that there is a disparity between consumer expectations and the current regulatory or legal regime.

I'm sorry for mentioning it and beating this or flogging the point, but, you know, good plaintiffs counsel -- and we run across them; I have the pleasure of doing battle with them all the time. I've talked to them about this issue - not all of them, but at least a handful. And they will say quietly over a drink that if you ask them whether the current legal system, the current common law remedies that are available have what they need to prove their case, they say yes. So they are supporting this, but --

MR. PASCUTTO: Sure. But the average consumer doesn't want to go hire a lawyer and spend $100,000 that they don't have in order to get to that point. They want that point at the outset. They want to know at the outset --

MR. FABELLO: I hear you.

MR. PASCUTTO: -- duty to act in their best interest.

MR. FABELLO: I hear you. And, Ermanno, if what you are proposing would deter those lawsuits and deter the kind of wrongdoing, both intentional and non-intentional -- I mean, brokers just like lawyers and all other professionals and people are going to mess up unintentionally. If what you are proposing was a solution that was going to deter those lawsuits with the need to have a regulator or a court resolve those issues, then I would say, "Perfect." I don't think it will.

MR. PASCUTTO: I think it will.

MR. FABELLO: Okay. Well --

CHAIR: Anyone else? Anita?

MS. ANAND: I have a real question, not rhetorical, for a change. But the question is if you -- and I guess you referred to Laura. If you believe that the current common law contains a standard or an adequate standard or a best-interest standard, what is the root of your aversion to moving that to a statutory standard? Where is the problem if you're saying that the law already provides this?

MR. FABELLO: Excellent question. I'm glad you asked it. I will quote from the case law. Varco and Hodgkinson say that there's a whole spectrum, that's a quote, of duties to cover a whole spectrum of broker/client relationships. I go further than that. I say this spectrum, this flexibility in the law to address different client relationships, to calibrate the duty to the particular relationship that is before the court, doesn't stop at that particular relationship but goes and has the flexibility to address transactions and changes within the context of a relationship.

That is a very delicate balance. The common law provides judges the tools necessary to determine on each case for each transaction what the duty is going to be, and it is that balance that I believe will be upset if you impose the 20 words that will define this duty on that 100-year history of common law, which does put a lot of power in judges' hands, no question. Right?

But judges, by and large, in this country are very good, and they get it. They're not perfect, but in 20 years of litigating cases I have never heard from plaintiffs or defence counsel going into a trial, "Geez, I don't know. I'm really worried about this. I think they're going to get it wrong." You might complain about the odd judge who might have a wonky history, but you don't complain about our judiciary and the common law having the tools necessary to get it right in a particular situation. And each situation, each client relationship is truly different, and I --

CHAIR: John, that's all true, but you might just view this initiative of saying let's clear up the uncertainty and say, okay, there is a fiduciary duty, and now go to the common law and have your court appropriately balance what that means in the circumstance.

MR. FABELLO: Respectfully, it puts the cart before the horse because there is a fiduciary duty. The only question is whether in a particular circumstance it needs to be imposed. And once you get to fiduciary duty at common law, let's be clear, you get the judge being allowed to be more flexible in the remedies he or she imposes. In some cases, that's necessary; in some cases, it's not.

I'll open it up to others.

MS. CRADDOCK: I was just going to say I'm not a lawyer, which is not said as an apology at all. I'm married to one, though, so I have interesting conversations at home, as I was telling John.

I think we are talking about securities regulation here, with all due respect to concerns about the courts and lawyers. IIROC reports 350 cases a year - I'm not even sure if they're all new ones - civil litigation. The experience of most investors in this country is not the experience that they acquire in court. They can't get there, they can't afford it, it's not worth it.

Secondly, I don't think we are talking -- and I made it clear in my comments. We are not talking about rogue advisors, we are not talking about people who break the rules. We are talking about whether the rules afford appropriate investor protection. That's the job of securities commissions.

So I think we have to be really clear here. You can be fully compliant with the rules as they are today, and they don't afford adequate investor protection.

Also, it's not about outcomes. Investors have their problems, but they're not stupid enough to think that any system is going to guarantee them any product outcome.

What it's about is: Is the process that the regulators insist be in place is more likely to lead to fairer and better outcomes? I think what we are saying is that the current system of light regulation on conflicts and suitability and inadequate disclosure make it less likely that you are going to have a fair result for an investor. It is not about price, it is not about risk. It's about whether the standards that some people have when they invest in the capital markets where a fiduciary duty already exists, like portfolio managers, whether that should be extended to all.

CHAIR: Any questions out there? Anyone?

Anita, did you want to make a comment just while this gentleman is getting the...

MS. PAGLIA: My name is Laura Paglia. I am John's partner.

IIROC's position on this issue I find quite interesting because, to be perfectly frank, IIROC has used best-interest language for years, and IIROC has made clear in the CSA consultation paper that they do not mean that best-interest language to import a fiduciary standard at common law.

So with respect to the expectation gap and Ermanno's comments, it is not just investors that have that expectation. Investment advisors say it all the time because, by way of example, and I'm going to quote from the CPH: The Conduct and Practices Handbook tells investment advisors when they take those two courses that they have to take, that when disputes between dealer members and clients are resolved through civil litigation, the court will generally hold that that investment advisor owes a fiduciary duty to the client if the advisor provides advice and recommendation and the client relies on that.

That is incorrect, and that's what we are teaching our investment advisors, who believe they have that standard, and it really comes down to everyone misunderstanding the content of that standard, not the intention.

IIROC has used the intention for years.

Connie, I have to disagree with something you said at the beginning of your submissions, which is suitability does not cover advice, only transactions. I don't believe that's the case anymore, and it hasn't been for some years, and it's not what's reflected in IIROC's CRM model.

MS. CRADDOCK: They just added the three triggers. That's just new. And it's getting to what I'm saying. Perhaps I should qualify it. It isn't well-equipped to deal with advice; it's about products. It still is. It's inching its way through with some modifications in CRM, and I know that IIROC in its CRM modifications has said that conflicts should be addressed considering the best interests. It's a long walk from 'considering' to 'acting in'.

CHAIR: Okay, I think maybe we will move on. This gentleman here?

MR. TEASDALE: Andrew Teasdale. I just want to say that I thought the two best arguments for introducing best-interest standards came from Jim Kershaw and John Fabello today.

I think I agree with John. A best-interest standard should not be introduced for people who are selling transactions, if you are looking at the old definition of a broker. But I think what's happened is we have transcended to an advisory -- an advice review and we have gone beyond the transaction. That's why you need to bring a best-interest standard up from the courts onto a statutory basis.

The other thing with regard to Jim, you can't manage risk on a transaction-by-transaction basis. You will, as you say, have problems if you try to retain the current transaction focus and try and impose a best-interest standard on that, but you can manage the risk of all the transactions and monitor everything that's happening by centralizing a lot of the decision-making process that advisors use. So instead of advisors buying and selling products and buying and selling a stock here and there, all those decisions are managed by a framework and a process, and advisors become client relationship managers, so you can actually monitor and manage the liability of all the transactions that are happening in the industry. It's not really a problem or an issue, as far as I'm concerned.

MR. KERSHAW: I actually couldn't agree more with you with respect to what you foresee the industry becoming, and I think if we are thinking that a best-interest standard would create an environment in which advisors are searching the world for the best possible solutions for investors, I don't think that's what the future holds. In fact, what we would see is that they would restrict the range of product available to a known range of product which fits certain risk parameters. I think in the end we may find ourselves in a situation where firms are selecting clients as opposed to clients selecting firms and advisors because there would need to be a fit because they decide they can act within this spectrum and deliver product and solutions that are in the best interests of clients that actually fit in this universe and anything outside of that maybe you have to go somewhere else. I don't know if that's the world that we are hoping to move to, but I suspect that's where we will end up at the end of the day.

I also think one of the challenges we are going to face going forward is the move -- like, regulatory oversight today -- and the reason I'm fixated on this product issue is because today an advisor can do a great job providing portfolio-based advice, but if one position in that portfolio doesn't perform as expected, they can be subject to liability because that specific investment, the case can be made that it's not suitable for the client.

Now, we've taken a regulatory approach - audit, oversight, legal accountability - that is all centred at the position level. I'd love to be able to step back and say the industry should be able to give advice at the relationship level. And the truth is over time some things work, some things don't, some things work in different time horizons than other things, but at the end of the day, on balance, if it works, it works; you know, we have delivered to a client what a client should expect from us.

I think as we go forward -- and I've heard this a lot today, this conversation around compensation and the bias that's introduced in the industry as a result of compensation structures. I could not agree more. I could not agree more. And I think the conversations that have been taking place with the other CSA discussion paper that's out there I think is gradually going to move the industry into a better place. As I have conversations with advisors, I say to them -- you know, my going-in position is:

Why shouldn't my mother know what she pays to receive the advice that she gets each year? I think as we move to a world where that bias is removed -- and I'm telling you, it exists in spades in the industry despite the best efforts by the best firms and the best advisors; it's a creep. I think from a regulatory perspective if you want to implement real change I'd go after that one.

MR. FABELLO: And to the point about standards or the nature of the business evolving and moving to an advisory base, again the beauty of the current law, it can move with that shift in the industry, and it has.

In the next section I'm going to talk really quickly about a recent case where, in my opinion, there's a move in the judiciary following portfolio-managed type cases, discretionary accounts, and judges are achieving results for investors acknowledging that change and that shift and the heavier onus that has to be on the advisor in a portfolio-managed account, a discretionary account.

So I hear you and I don't disagree with you on that shift and I don't disagree that it needs to be addressed, but the fact is that it can and is being addressed.

CHAIR: Any other further questions?

MR. BISHOP: My name is John Bishop with the Public Interest Advocacy Centre.

I just wanted to throw out a few stats. The OSC punched out a stat in March saying 1 in 5 investors in Ontario actually trusts the advice they're given. Jim's point towards the compensation model was exactly the question I was going to ask, so I'm curious about what the rest of the panel thinks.

Will an alteration or an amendment to the condition in this model solve the issue that you guys are trying to address today, on top of a few others?

CHAIR: Anita, do you want to respond to that question?

MS. ANAND: Well, I don't think so because the issue of commissions is only one issue that we are dealing with in the large spectrum of potential cases that could be brought forward.

It also doesn't address the uncertainty point, it doesn't address the expectation gap point, and so I think it's a necessary but not sufficient step towards investor protection.

When I hear John and Jim talk about the consequences of introducing a statutory best-interest or fiduciary duty standard, I have to think that current common law does not embody the standard that we are contemplating even if that hasn't fully crystalized as of yet. The reason why, in my mind, you are telling us about potential consequences is because we don't have a best-interest or fiduciary duty standard at present. That's why consequences are on the table.

I guess my next point is the problem with common law and relying on common law and saying that common law does the job is that common law and analysis of common law, for an investor, it's an ex post analysis; it occurs after the wrong has been committed.

What we are talking about here in terms of securities regulatory mandate is the mandate they have to protect investors, and that's an ex ante or before-the-fact obligation as well as an ex post obligation in terms of enforcement and remedies, et cetera.

So to build on what Connie said, if we are simply going to be looking at the common law, securities regulators aren't doing their job, in my mind. This is an investor protection issue, and the principle needs to be set down in statute so that it addresses this ex ante or before-the-fact concern.

MR. FABELLO: Just a brief rebuttal, if I may. You know, the common law standard, the judge-made law that I've referred to, is very heavily influenced by the regulatory standards. One of the five criteria in the things that judges consider when they're determining whether a fiduciary duty applies in a certain circumstance are the regulations.

To be a little cheeky about it, are you suggesting that our regulators are not being vigilant and not doing a good job? I think you could ask anyone in the industry -- [Reaction from audience]

Okay, there are different opinions on that, like everything.

CHAIR: I'm sure there are differences of opinion.

MR. FABELLO: And I am not. I have heard for years and experience for close to 20 years that the regulators and regulations are becoming more vigilant, more onerous, and imposing higher and higher standards. And they are infused in the common law that I'm talking about.

A second point, Anita. My response is that what you are really talking about is the deterrent effect. If the goal is investor protection, one of the components of that is deterrence, and the question has to be asked: If you impose these...I said "20 words", several words that impose a best-interest duty, is that going to deter the kind of bad conduct that you are trying to address? And I say that it's not going to and that it already is being addressed.

CHAIR: I think it's probably just worth commenting that there is currently a fiduciary standard for portfolio managers, for instance, and so those portfolio managers are really making discretionary decisions with respect to investments in securities. That's not a lot different from the relationship between a dealer and the client. I mean, the dealer is recommending rather than absolutely making the decision, but, as a practical matter, in most circumstances it doesn't make much difference whether you would be exercising a discretionary power to invest or relying on the advisor.

So I would just say to those who say, well, this will change the world if you have a best-interest standard, it's clear that portfolio managers deal with that. They don't feel that they have to search the world and are liable for the success of an investment; they live within that relationship.

So let me just say, because I didn't, my views are mine alone and not those of the

Commission, and I'm trying to avoid making any comments.

But in any event, if anyone would like to respond to that on the panel?

MS. CRADDOCK: I think I made that point as well, that portfolio managers -- the world exists, this is happening now, and the world hasn't come to an end.

I think, again, as an investor, as a representative of the investor voice, I want to really reiterate -- I've said this several times, but in my view, this isn't about bad registrants, bad apples. We are not trying to prevent bad behaviour; we are trying to have a standard that provides good investor protection and clarity to advisors.

I certainly think that trying to manage conflicts within this world is incredibly difficult and it would be far easier and better for advisors as well to have an avoid-conflict standard.

MS. KEGIE: Sandra Kegie from the Federation of Mutual Fund Dealers.

I have to say I agree with Laura and John, which won't come as any big surprise, but my perspective is on the mutual fund dealer side of the business. In my career in this industry I have interviewed thousands of advisors over the years, and there isn't a single one who didn't think, whether it was at law or not, didn't think that they had a best-interest standard that they owed their clients, and this is where clients get the idea from. That's why they think it, because their advisors tell them. They don't differentiate. So if it's already there, I won't beat that dead horse.

CHAIR: But then one response might be just, well, let's just confirm it so there's no doubt.

MS. KEGIE: But then you are fixing something that's not broken.

Why not make products cost the same? That gets rid of the conflicts. Why not regulate financial planning? I know there are proponents of that here. And why doesn't the Commission take an extra step and actually do some testing of the products, the information on the products that they approve? Because clients out there believe that the securities commissions across the country don't just approve the words on the paper but approve the product itself, that they test it to determine whether or not it has a hope of meeting its objectives.

CHAIR: Anybody on the panel?

MR. FABELLO: Well, I'd say Jim, you

mentioned -- couldn't help writing down the phrase because it's kind of catchy: Is this going to change the world? It's not going to change the world if this standard is imposed, and to me, that's not the right question. It is: What does it really mean, this standard? And it is the uncertainty that bothers me.

Back to my mantra. If it's investor protection we are after, it has two components: deterrence preventing bad conduct, whatever it may be, intentional or unintentional, ahead of time; and remedies. Does the standard achieve better deterrence? Does it provide better remedies? It is a big question mark, in my mind, with respect, whether it will do this, and until we have certainty wrapped around the consent I don't feel we are even in a position to determine whether it's going to change the world or what impact it will have on the world.

CHAIR: I think we had another question.

MR. DiNOVO: This is John DiNovo. I'm an Approved Person in the MFDA channel. I've been doing financial planning and working with mutual funds and other products for about 30 years.

I think the use of the word "best interest" is an unfortunate choice of words here.

I think when you are using -- to get totally away from the legal side of it, just in terms of the expectations of people, they're looking for perfect outcomes, and there's only one best when you use a superlative, right? Is everybody in agreement with that? This is where we are getting into the discussion of searching the world for the absolute best product.

But when you juxtapose that with a transaction-based model for securities regulation, I mean, it becomes absurd because, as everybody knows, every trade is in the context of an individual's portfolio. I think Andrew beside me has addressed that. There are different strokes for different folks.

We referred to the portfolio manager already being in a fiduciary position, but how many people have access to a portfolio manager, and is that the best solution for them. As a financial planner, I know a lot of portfolio managers do not do in-depth financial planning to actually know their client as well as I would, for example. When you look at the duty of care that I have for most of my clients - and I do believe I have a fiduciary relationship with almost every one of them - I believe that it's incumbent to know your client in that kind of depth, particularly when you are planning a liability stream for your clients that they are relying on.

So I'd like to go back to the fair dealing model. The fair dealing model proposed three different types of client relationships. John Fabello has informed us today that in law there are hundreds of different client relationships.

I would like to put to the panel: How do you propose a client like Ermanno who wants to deal on his own, his relationship -- he's saying he's not buying advice. Well, that's fine. But what about the person who just wants advice on a transaction? How could that advisor possibly give the best advice and invest the appropriate amount of time, setting the remainder of the client's portfolio for circumstances to the degree that is necessary to find the best solution? It's practically impossible. It's just an impossible dream.

So I think those of you who are sitting here and think if you wave the fiduciary wand all will be well in investor land, I think you are grossly mistaken.

I see that from the perspective that most of you are not practitioners, you are not out in the market dealing with individual people who have behavioural modification challenges, not investment challenges. I refer to it as "behavioural alpha".

The amount of increased return an investor will get in their portfolio by just simply behaving differently, investing at the right time, being tax advantaged at the right time, making the most timely selections in terms of making shifts in their portfolio, that will have a far bigger impact than having the best product or anything else.

I'm not saying we shouldn't aspire to some of these things. Absolutely. But to misrepresent it as being absolute best I think is a bit disingenuous.

At its source, I think what we can say is given the resources we have, given the knowledge we have, which should be fully disclosed - and should be upgraded, to Jim Kershaw's point - we will do the absolute best we can to create the best possible outcome for you. I think that's a reasonable proposition for our client base. But to go beyond that, I think we are creating a dog's breakfast.

So when we get to the transaction-based client, expecting a fiduciary or a best-interest response, as we have defined it here as best we can, I think it's impossible. The costs would be enormous. Soren Kierkegaard I think wrote a book called "Purity of the Heart is to Love One Thing" [sic].

If you have one client that you can devote all your time to at little or no expense, maybe it could be done, but that's just practically not possible in today's world where costs are through the roof, where I as an advisor probably spend more time shoving paper at my clients, who trust me, who don't want to be responsible for reading it, want me to be responsible for studying the prospectus, reading the material and dishing out this advice, they... And I do the best that I can, but when the compliance responsibilities escalate and I'm working more for the regulator than I am for the client, I think you've got to look at the increasing burden there that is actually encumbering my ability to do the best work for my clients, and I'm already having, reluctantly, to parse clients that I normally would have taken otherwise just because of that extra burden.

So there's a lot of factors here, but the main one, I think, is that the appropriate standard for the appropriate relationship is the number one thing we should be looking at here.

CHAIR: Any comments from the panel?

MR. FABELLO: I've got a question, and I don't want to put anybody on the spot, but that is one of my principal concerns; that is, you know, the one-size-fits-all approach.

How would Ermanno or Anita or Connie respond to the example that you gave? You know, in a situation where a client is in a non-discretionary relationship with their broker, goes to the broker and wants advice maybe on an on-going basis - when should I buy or sell this tranche of securities, what is the best advice in that circumstance, what is the answer, is it buy or sell, and when - is that not fraught, when it's overlaid with a best-interest standard, with if it goes south or goes wrong is the broker going to be faulted for that under this standard? That's a concern that I have.

MS. CRADDOCK: I think the next section of the discussion is what other conditions would you think necessary if a best-interest standard were introduce. I think that's possibly part of that discussion, and to that extent, proficiency -- I mean, Jim, maybe you want us each to do our opening remarks for this and then to take those comments then?

CHAIR: Yes, I think we have got hung up on this, so we will go on.

But I do think there's a misunderstanding, that it's not a requirement to get the best security in the world or to guess what it's going to be... From an economic point of view, there's no guarantee of what that security is going to do.

The question is the relationship between the advisor and the client. There is absolutely no basis upon which, if the advisor is acting in the best interests of that client, there is going to be any liability as a result of simply the investment not performing as it should have.

MR. FABELLO: Jim, I hear you on that, but the consultation paper - and I've read it numerous times line by line - it does refer to the "best product" and the "best decision". Maybe those were anecdotal and extraneous comments, but I'm focusing in on those comments, and I do think it conveys that the standard does extend to finding 'the best decision' for a particular transaction.

CHAIR: I mean, I'm happy for you to make that comment because, I mean, obviously it's a consultation paper, we want to get all the issues out there, but I'm just saying - again, my personal views - that's not what we are talking about. It's not guaranteeing the best security --

MR. DiNOVO: This illustrates perfectly the self-referential nature of this discussion. You're coming at it from your point of view.

What I'm bringing to the table is my clients' point of view, and you seem to be totally out of touch with that, and that's where the discrepancy -- and until you've got experience giving advice to a multitude of clients across the board, you are in no position to make that assertion. I think you've got to recognize that, and I think securities commissions have to recognize that.

Until they do, yes, we can point to the failures, the failures in the advice market, but until we are prepared to sit down, deliberate with actual individual clients on what their real expectations are, it's better off to abandon this "best interest" language and use something different.

I'm not saying the standards can't be improved. They obviously can be, always, forever, going forward. But let's be truthful about it and not just look at it from our own perspective.

CHAIR: Any comment from the panel?

MS. ANAND: I guess my one response is coming here today I didn't come wedded to the words "best interest". I'm wedded to the content of the remarks I made in support of a heightened standard as being part of the duty, in my view, of securities regulators.

MS. CRADDOCK: And I would echo that. It's semantics, but I think it's the higher standard.

MS. DUBINSKI: Alana. I'm a compliance officer with a portfolio manager, and we do do discretionary management.

My perspective on this falls in line and follows on what the last speaker was saying and really has to do with the argument as to not whether "best interest" is appropriate or not, but is it appropriate given the current limitations and constraints of the fractured and wide-ranging business models and proficiency standards and products that we have.

So you are essentially putting the cart before the horse. You are imposing a fiduciary duty in an industry where there are varying levels of proficiencies amongst registrants, some not regulated at all, i.e., like the financial planners; you've got a wide range of issues with regard to the delivery model. You have to recognize that there's an inherent conflict right off the bat when the majority of advisors are sponsored by the very firms that employ them. So if I'm employed by the firm that sponsored my registration and I'm employed to sell their product, right there is an inherent conflict. Whose best interest trumps whose: my loyalty to my firm or my loyalty to my client?

So all of these things I think have to be recognized and have to be dealt with before the imposition of this higher standard. So it's not whether the higher standard is appropriate but whether it is appropriate under the current environment and do we need to first look at addressing some of these issues that really are the devil in the details, if you will.

CHAIR: I should just say, again personally, I do think you have to look at different relationships and different circumstances. You know, if one were going to impose such a standard -- and let me tell you again our Commission is nowhere near that, but I do think if you did that you do have to provide appropriate guidance with respect to how it would apply in different circumstances. There's no question about that.

MR. LINTON: Hi. Matt Linton, just an interested private investor.

I've heard something that as an investor jumped out at me but seems to have been glossed over. If it's the case that currently investors believe that their advisors of all different types have a fiduciary duty and we are arguing that there's no requirement for papering or making that fiduciary duty official, shouldn't we also then be trying to eliminate the communication of that fiduciary duty, which does not exist, to these investors who, for whatever reason, believe that that relationship currently exists?

MR. KERSHAW: Maybe -- well, I think if we just simply take notice of the fact there's confusion out there. I think it's worth considering whether the confusion is the result of a lack of effective commentary from those who are better positioned to explain exactly what the current state should be.

When I said I have a bias, I think I have a bias that's shared in certain segments of the room here, which is the practical reality of dealing in this industry every day at the client-facing level. And clients, I mean, God love them, they're the basis of our business, and our business starts and ends with providing clients with what they need, not necessarily what they want. I think in an environment where we are going to be held to a particular standard, as much as I'm not... And I think I could be mistaken in my comments earlier. I sort of get the sense that there's a potential bogeyman that I'm portraying out there. It's not the case.

The practical reality is that today we have portfolio managers held to a fiduciary standard. I get it. I'm not debating that.

If we are taking a non-discretionary relationship manager and imposing that similar standard to them, where are they going to default to in that relationship when they deal with... And the comment about behaviour? Advisors have a really tough time managing clients at the inflexion points in the market, and what's actually in the best interests of the clients is often 180 degrees different from what the client actually wants to do and refuses to do, refuses to do what's in their interests.

Just like you can't cast aspersions on the entire investment industry because of the acts of a few rogue advisors, we can't do that with investors either, but I think what we'll see is a gradual move to say, 'If I'm actually held to a standard where I'm acting in each case in the best interests of this client, then I need to take the client out of the piece in terms of the decision-making,' so that it gradually moves to an environment where there's...

I think then we might end up in a polarized environment with clients like Ermanno, who choose to do it entirely by themselves, and then, at the other end of the spectrum, those who wish the benefit of advice but it's advice on the terms in which it's going to be delivered.

CHAIR: We should move on. Let me do one last question, and then we want to move to the alternative discussion.

MR. KENT: Mark Kent, Portfolio Strategies. I'm an advisor. I'm president of an MFDA firm and an IIROC firm. I've got a couple of comments, and I will finish with a couple quick questions.

The best-interest fiduciary issues will be assessed with the benefit of perfect hindsight. That seems to be lost here today. Perhaps we should have an ambulance-chasing lawyer on the panel to assess if he really would, you know, look the other way and say, "Well, you did the best job at the time."

The pro best-interest fiduciary camp, from what I see, always seems to come back to cost. That's the underlying tone of a lot of things I have read in the pro camp. Price is what you pay; value is what you get. A client can make that determination with the Fund Facts. The MER performance is there. We were told clients do not read the prospectus, so we gave them the Fund Facts. Now we are being told they don't necessarily read the Fund Facts. I don't know how much simpler we can make it for the client. You know, the client can make the assessment as to whether the additional cost is worth it.

There also seems to be an anti-deferred sales charge sentiment amongst regulators. You know, how should advisors get paid when they're doing comprehensive financial planning work? This could take 10, 15, 20 hours if it's a very comprehensive plan. If they've got $5,000 to invest and we do it at front-end-zero, that's basically $3.00 a month. None of the people at this panel would work for that.

DSC does have its place. We have seen the percentage of deferred sales charge commissions have fallen over the years. You know, there was discussion about it being used inappropriately so we've seen, at our firm for sure, DSC as a percentage of commissions have fallen, and yet someone at the OSC sounds the whistle, oh, my gosh, trailer fees have gone up. Well, trailer fee revenue has gone up because DSCs went down. You get a half-point trail on a DSC equity fund, a 1 percent trail on a front-end-zero. So we feel that as an industry we did move towards the best interests of the client, we did eliminate or reduce the use of deferred sales charge in certain situations, and now we are being criticized when our trailer fee revenue has gone up.

There seems to be a free put option against the investment industry with regulators. If the account goes up, good for the client; if the account goes down, bad for the advisor/dealer.

There has been a lot of discussion about leverage practices. We have seen situations where leverage was successfully implemented two or three times for a client, but if they did it in 2008, fourth time, didn't go down, the dealer community is told to pay up. So three out of four worked out well, the fourth one didn't; just pay up. That's the put option.

Question: If all mutual fund companies pay the same trailer fee amount, what is the conflict? I'm not really clear on that. If all balanced or equity mutual funds pay a 1 percent trailer for front-end-zero, where is that conflict of interest?

Why are we looking to investment scandal-ridden U.K. and Australia for guidance? It's well known that they had massive investment scandals. Their solution was the best interest or fiduciary.

That was their fix. Canada does not have this problem so why are we looking to those jurisdictions for guidance when we have not had those scandals?

CHAIR: Thank you. Does anyone want to comment on that quickly? Otherwise, I'd like to move on. (No response from the floor) Okay, so I think there will be an opportunity for further questions.

I just wanted to get to -- the next basic question was: If one decides something ought to change, what are the policy options for that change in addition or as an alternative to a statutory best-interest standard?

And so I think we were going to start, Jim, with you on this topic. Jim Kershaw?

TOPIC 2: WHAT OTHER POLICY OPTIONS COULD SECURITIES REGULATORS CONSIDER IN ADDITION, OR AS ALTERNATIVES, TO A STATUTORY BEST INTEREST STANDARD?

OPENING REMARKS BY MR. KERSHAW:

Thank you very much, Jim.

First and foremost, as I look at the situation in U.K., Australia and the emerging interest in this area in the United States, I think as Canadians we tend to move relatively slowly in the regulator environment, and I think that's a good thing. I see no issue with us pausing, given the currency of the implementation of these strategies in other jurisdictions, to get a sense for what's actually happening in those markets as a result. That's actually the benefit of being late, it's actually the advantage of being where we are today, and rather than squandering that advantage by forging forward in an environment when I think we have not necessarily thought through the issues completely, that we have an opportunity to examine the petri dishes that exist in other parts of the world to actually get a sense for whether or not it's actually going to work.

I do want to come back to one point here, which is -- and I want to emphasize this, that I think there is a regulatory gap existing in our system today which allows advisors -- because we have been saying this is not about the good advisors, it's really about regulation to deal with the bad advisors.

MS. CRADDOCK: No, I'm not saying that. I'm saying the reverse. I've been saying it's not about bad advisors; it's about rules.

MR. KERSHAW: The point I want to make is the cases that actually emerge, the disciplinary actions that actually come to fruition are the ones dealing with the bad advisors, and so we tend to be reactive a bit in our regulatory approach.

One thing I would suggest, and I feel very strongly about this, is that our regulatory community in Canada take a long, hard look at how easy it is to stay in this industry, and that the vast majority of advisors in the industry put their clients' interests ahead of their own each and every day, and yet for those who don't, they often find a way to go down market a little bit in the securities industry and reappear to do it again and again.

I can't help but think that if we are going to spend time on investor education and we are going to spend time on increasing the awareness of the investing community around some of the challenges of being an investor, one of the things they should also be encouraged to do is do an appropriate level of due diligence about the past regulatory history of their advisor and the firms that they deal with and ensure that their interests are properly aligned because I think for the grand majority, the vast majority of the investment industry in Canada, very, very strong compliance departments, very strong regulatory compliance histories, and, quite frankly, the system is working well for them.

CHAIR: Thank you. I mean, I should say just as a general comment, this is a tough time for the industry. I think there is no question about that, it is very challenging, and I do think regulators have to take that into consideration with anything we are doing going down the road.

Anita, what alternatives are there?

OPENING REMARKS BY MS. ANAND:

Just leading up to that point, what I've heard so far is that a fiduciary or best-interest standard would be difficult to implement. I'm hearing that the panel or certain members of the panel don't understand the industry. I'm hearing that a fiduciary duty standard already exists. I'm hearing that we need to look at the business model instead of looking at fiduciary or a similar standard.

What I'm not hearing proponents of the status quo talking about, what I'm not hearing is what's in the interests of the actual investors, the people who are purchasing the securities.

You know, I teach securities regulation so I teach the law as it is, but I think that what's in the interests of the investors is of primary concern and perhaps exclusive concern for the actual regulators who are making the policy and who are setting the law. And it is absolutely crucial that we see the forest through the trees and that, in addition to thinking about the complexity and understanding the industry and the business models, et cetera, we ask at the end of the day what would be in investors' best interests.

Now, in terms of potential policy options, I want to just for a moment focus on titles.

I think that investors are, in today's world, likely to be confused regarding the use of business titles and financial designations, and I think that this needs to be a policy option that's focused on also.

I think IIROC has been doing some useful work in this area in a recent notice talking about the need for meaningful description of the type of service and investment products that a licensed representative can offer to a client because currently some titles imply that the individual carries out an executive function within a firm, is a senior vice-president when in fact these titles are misleading. I would like to see some more focus by the regulators on designations and looking at requirements to earn and maintain these financial designations.

CHAIR: John, do you want to comment on this topic?

OPENING REMARKS BY MR. FABELLO:

Sure. I will make three points. My first is a final push for the status quo. At the risk of boring you, I will be brief. And I've got two alternatives.

So the status quo, I think we have canvassed it fully. I've done as good a job as I can. It's very flexible, it's developed over a long period of time. Within that flexibility there is room for a judge, and they do, to be very favourable to the investor where it's found that there's a fiduciary duty and it's been breached. They set aside the investors' responsibility, mitigation for damages, contributory negligence; they increase the damages awards; they put the onus on the broker to disprove that they acted inappropriately as opposed to keeping the onus on the investor. So it's a very flexible system that can and is beneficial to investors.

An example of how judges tend to get it right? Very quickly. There are two cases, similar facts: Young and Vipond. The Young case is from 2008, Vipond from 2012.

In both cases, there was a concentration of tech stocks. I think Nortel was involved in both cases. They rode the stock up, it wasn't deconcentrated, and they rode it down; they sued the investor [sic] for the loss.

The Young case is a normal retail account, non-discretionary. The Vipond situation was a managed account.

In the Young case, the evidence was that the broker gave just enough advice, a little bit of advice that the client should lighten up and sell. In that case, the broker was not liable.

Contrast that with the Vipond case. The broker was liable. Even though the client was aware that the concentrated position remained and they rode it down, the judge found that the portfolio manager was responsible. Why? The judge doesn't come right out and say it, but I believe the judge was informed by the fact it's a portfolio manager discretionary account, the duty is higher, they're going to be held to a different standard. So it works. That's it on flogging the status quo.

First alternative, true alternative in my view, is to fortify the existing regulatory standards and penalties to address things like deterring the truly bad actors. Increase the damage awards, create statutory cause of action to address intentional wrongdoing, import the concept from the United States of treble damages. Deter these people from doing this kind of bad stuff.

On non-intentional conduct that is in issue, I'm hearing a lot today and I've read a lot about fees. Why not address that issue completely and fully in regulations? Make advisors disclose exactly what the fees are. Make the advisor, if they are recommending a product that has a higher fee, explain to the client why in their view, notwithstanding the higher fee, this is a better product for them.

So it strikes me that we can be more pinpointed and more accurate with the standard.

The third and final alternative is that if we absolutely have to go to a best-interest standard, fiduciary duty -- and I say if, "if" - I don't recommend it, I don't propose it, but if - then two things need to happen.

Number one, we don't say that the duty is "to act in the best interests of the client"; we say rather that the broker must 'be guided by' or 'consider at all times' the best interests of the client. Moreover, it should say that that duty is discharged by taking into account the client's specific circumstances and the circumstances of the particular advice.

If we do that, then I think the regulatory standard would be more in sync and consistent with the judge-made law and less mischief in potential variant outcomes would result.

CHAIR: Thank you. Connie?

OPENING REMARKS BY MS. CRADDOCK:

I'm going to echo what Anita said. In so doing, I'm going to reflect the recommendations of the IAP this year.

We strongly recommended that the introduction of a best-interest standard be accompanied by reform of regulations regarding titles and specific proficiency requirements supporting the use and maintenance of such titles.

I think the point was made earlier about certain regulatory context and business models are something we obviously have to take into account. One of them is it is no use to introduce a higher standard if you still continue to allow the use of titles, which regulators do today.

Again, I stress that advisors are being totally compliant with the current regulations. They can call themselves senior retirement specialist, a vice-president. There doesn't have to be any connection particularly between the title and the scope of services and the proficiency standards underlying them.

In other industries, you are a registered massage therapist or you are a physiotherapist, and it's clear. So it's time for the regulators to act and help investors in that way.

I'm telling you, too, from my background in IIROC and public affairs, it is extraordinarily difficult for investors today to do due diligence in trying to choose an advisor. When an advisor can call themselves by a certain title which isn't the one that's in the registration records, when they can use the name of the business unit within their firm on their business card, you go check with the regulator and see if you can figure out if that's your advisor.

So it's time for the regulators to address that and to help investors do what they need to do, which is due diligence and check.

A little boost for IIROC. IIROC's got AdvisorReport. All that information comes from the National Registration Database, and you can check and see registration history, proficiency, civil actions against them, enforcement, their full record. And we need to have more of that in this country, and we need the CSA to do that as well.

So I think if we want clients to do

what they should be doing, we need to make it easier for them. We should have clearer titles so people know what they're getting.

And we might want to talk about what they've done in the U.K., which is look at restricted and independent advice which reflects business models where some advisors should be viewed as operating under suitability standards. They've got a restricted shelf, they've got different proficiency. Let's look at doing that.

But what we are going to do there is give clarity to the advisor and clarity to the registrant and support the good professionals within our industry.

So I think there's a lot of work that the regulators need to do to support a move to higher standards.

CHAIR: Okay, we will go to the question-and-answer. Do we have any questions on that or any other topic?

MR. COSTELLO: Thank you. Keith Costello from the Canadian Institute of Financial Planners. We represent financial planners, and most of them are certified financial planners. We are the certification body that represents and certifies them.

Listen, I've been listening to this, and the answer is not to beat up on advisors and planners. We are all working in the system and it has its problems and needs to be fixed.

Connie, I do agree with you. I have an alternative. I think putting fiduciary duty on a system that doesn't work is just a wrong step.

What we need to do is have policy that moves advice independent -- or call it financial planning, whatever you want to call it. Put a fiduciary duty on that where an investor can go to that person, get the advice and a plan, and then go to a product implementation and implement the solution. Investors then know if I go to a person who can have a ten-year relationship with me and serve my needs from an advice perspective, then I can stand by that fiduciary duty, and then I will go get someone who can buy the proper products and mix to meet those long-term objectives.

I think long term the policy -- second point I wanted to make, which I've brought up in various forums, is regulatory arbitrage. What we have here -- and I commend the Securities Commission, and I know it's difficult, and I know you are limited, but I do strongly recommend you get the joint form involved because a lot of advice and a lot of this product sales to the end investor is through the insurance route, it is through the non-registrant route, through accountants, people who have nothing to do with securities, and there is no common retail experience for the end investor.

So if you want to take leadership and get it in first, but I do recommend don't stop there, please, and get your partners involved and try to solve this problem. Thank you.

CHAIR: Any comments from the panel?

MS. CRADDOCK: I agree totally on regulatory arbitrage. The securities regulators have to clean up their own house first, and if governments won't move on the others I don't know what we can do.

CHAIR: I think we have some questions.

MR. DONALD: Steve Donald with Assante Wealth Management.

Just two observations and related questions. The first one, John, to your point.
I would suggest to you that the "status quo" does not exist. We are in a very, very rapidly evolving industry, and there have been some significant changes to the client relationship model that have been introduced that are going to significantly increase

disclosure of conflicts, management of conflicts, disclosure of costs and compensation, accountability over performance within accounts.

So that together with -- actually, maybe I can back up and just make one observation on the comment that has been made a number of times about a fiduciary standard applying to a portfolio manager but not to a retail advisor. These are fundamentally different business models, so a portfolio manager for a mutual fund, as an example, has a single client, a very straightforward objective that they have to meet that is contained within the prospectus. A discretionary portfolio manager in the IIROC world, as an example, starts to deal with a different level of client.

So my first question is: As it relates to the introduction of the client relationship model in 33-103, isn't it in our interests to wait and see whether that addresses the policy gaps that we have identified? If it doesn't fully address those gaps, we move forward, because I think -- so that's my first question, but it relates to my second observation.

I agree, Anita, that we need to put the question: Are investors' best interests addressed with these standards? I would suggest to you that we have missed a very significant constituent in smaller investors.

We have this tremendous learning laboratory opportunity in the U.K. where we can see what the implication is on smaller investors with the introduction of a fiduciary standard. Anecdotally, people have been pushed out of the advice market at a time when people need advice the most. So isn't it in our interest to wait and see what happens in the U.K. and then address our policy concerns here in Canada?

CHAIR: So any comments? Anita, do you want to respond?

MS. ANAND: I think one of the problems we are having in Canada -- and I was trying not to go there because it seems to be an argument that I flog, but a lot of our issues are because we don't have a national securities regulator. We have got jurisdictions across the country doing separate things. It may be the case that if we actually had some uniformity - and I'm hoping that the CSA on this initiative might take us there and serve as an example - that we wouldn't have so much disagreement in the room because it would have been easier to get somewhere and get to a uniform policy stance. But as it currently stands, we have got investors receiving differing treatment across the country, ex ante and ex post. In my mind, that's not a good thing.

CHAIR: Another question?

MS. PASSMORE: Marion Passmore, FAIR Canada.

I just had a comment about the argument used by industry to wait to see what happens in the U.K. and other jurisdictions, 'Isn't it great to be able to wait and get all the information down the road,' and, 'The CRM, we should also wait for that to be fully implemented because that might solve our problems.'

I don't agree with that because that's a delay tactic used by industry to prevent further movement on this issue.

CRM 2 will not deal with the conflicts of interest inherent in the existing system. It will not deal with the fact that there is conflicted remuneration that prevents the advice being given in the client's best interest. So I encourage you to read our section of our submission on conflicts of interest because that will not be dealt with by CRM 2.

Whilst it will be interesting to see what happens in the U.K. and in Australia, that is not determinative of how it will unfold here because, as we all argue, the industry in Canada is unique, so even if we wait we won't necessarily know how it happens here. So I disagree.

MR. FABELLO: It's very interesting to me to hear the themes that are coming out now when we are talking about what are the alternatives because I hear that there's a lot of disagreement and very, very healthy debate on the issue of what does "best interest" mean.

I'm not hearing a lot of debate or disagreement when it comes to things like disclosing conflicts, disclosing and rationalizing fees, Anita's point on consistency across jurisdictions on these specific issues.

MS. PASSMORE: It's avoiding conflicts. Disclosure.

--- Multiple reactions from floor.

MR. FABELLO: Okay. Well, avoiding conflicts, then.

If that is a specific, a very important -- I agree that there's a difference, no question, but that is a very important but discrete issue.

That issue can be discussed, can be addressed from a regulatory perspective by saying conflict must be avoided if that's the route to go. Let's do that. Let's focus on the specific issues and problems as we are now - and I think there's remarkable agreement on that - and not try to fix it by an amorphous and ill-defined general concept that is a so-called best-interest standard.

CHAIR: Connie, did you have a comment?

MS. CRADDOCK: I was going to say I have lots of confidence in the ability of lawyers - so many of them work at commissions and SROs and everywhere - to come up with a perfect definition of "best interest".

I think the problem with CRM is it's been nine years in the process. It's going to be three more years before the CSA CRM 2 is fully implemented. I believe, and people can correct me if I'm wrong, that IIROC and the MFDA haven't published their next version of the rules, which would have to go out for consultation. And we don't want to get into a discussion about how long consultation takes in this country.

So it could be another five, six, seven, eight...maybe another decade before we might feel it had been in place long enough to review and look at it. I mean, quarter centuries go by in this country. Investors die; I've got my tongue in cheek. But we need to move a little faster. We need to move prudently, with deliberation, and thoughtfully.

But I really have difficulty with the idea of waiting for CRM and also because of the conflict issue. I think avoiding conflicts is so key. And it doesn't cover that.

CHAIR: A question here?

MR. DeGOEY: My name is John DeGoey. I am a Vice-President and Associate Portfolio Manager at Burgeonvest Bick Securities Limited. To comment on his point, I don't do a darned thing to manage the company, but I'm still a vice-president so I'm part of the problem.

I wanted to respond to one thing that Steve Donald said. Steve, I can't possibly disagree more. Because I am an associate portfolio manager I have some discretionary clients. The majority of my clients are not. There is not a lick of difference, with the exception of discretion, in terms of the services I offer, the products I recommend, the manner in which I recommend them, the fees I charge. No difference. So as far as I'm concerned, the only question of the conduct of the advisor is one of whether or not a fiduciary relationship exists in the first place.

To that end, I wanted to go to Anita. Anita, you mentioned that we need to find a way to solve the problem sort of ex ante. So my question to you and to the other members of the panel is: If I took a pledge, voluntarily submitting myself to a fiduciary standard, would it be binding? What terms and conditions should I be mindful of?

MS. ANAND: Obviously, we are not able to come up with one particular standard. What we have been talking about today is a standard that is flexible enough for meeting differing client needs. I am not suggesting that there is some Holy Grail in the words "best interest", but what I am suggesting is that more needs to be done to service investor interests in an era, in my mind, that it has been somewhat lopsided in favour of what industry's concerns are.

What I like about this debate is that hopefully some resolution and greater certainty will come to the market, whether it is in establishing a best-interest standard, full-fledged, like other jurisdictions have done, or not.

As you'll remember, my very first point was contrary to what John is saying. John is saying that a best-interest standard or fiduciary duty standard will create more uncertainty in the market.

My view is that there is a great amount of uncertainty right now as to what the standard is. I've heard it, with respect, from John himself that there is already an existing standard but we should not introduce a standard. To me, that suggests that there is some uncertainty as to whether there is a standard or not, and I think the role here for the regulator, first and foremost, in the investors' and everybody else's interest, is to clarify what the standard is, and then, secondly, to consider, if there is no fiduciary standard at present, whether such a standard should be introduced.

MS. PAGLIA: I have a question for the CSA to consider in due course; I'm not asking for a response today.

I was listening to everybody and thinking what haven't we covered yet. There has been no commentary with respect to your definition in your CSA paper as to what constitutes a "retail investor". You have defined a retail investor as someone who has overall net financial assets of $5 million or less, and I'm going to suggest that "$5 million or less" is a very broad definition that is not reflective of the middle of the market. When I hear everybody today, I wonder if we are really debating the middle of the market.

So the middle of the market is at the bottom; there are people who just don't have the discretionary income to invest, they have other expenses; and at the top there are people who have a lot of discretionary income to invest, and the comments have been made they have the privilege of going to these portfolio managers; and then there's the big, wide middle.

When I hear these comments I think we are debating the big, wide middle, and in the big, wide middle what I would like the CSA to consider and answer in their ultimate response, which understand is coming out next spring, is: Do you believe it is in the best interests of Canadians, that big, wide middle, that they have the option of an advisory relationship? So does the CSA believe that there is value and that investors can elect to participate in their accounts, talk to their advisor and instruct before any buys or sells happen? There are plenty of studies that show that there is value to that. I'm hearing different views here. But if you value that, that is the area that is not, according to the common law, inherently fiduciary, the big, wide middle. Maybe it is, maybe it isn't. It depends on the facts.

If the CSA agrees that there is value to that advisory relationship, and I hope that you do, my question to the CSA is: How do you propose to support that relationship? Apart from policy-based regulation at a granular, street level, how can you support it? Because from an industry perspective, what I see the industry doing is trying to respond to current realities, which is there's no more pensions, life costs a lot of money, and that big, wide middle wants to see investment returns without, to Jim Kershaw's point, investment risk.

So what the industry is trying to do is create products, create services that reply somewhat to that concern, and considers costs, and they have to do it in a commercially viable way.

My question for Anita, not for today but to consider, is --

MS. ANAND: For the next paper.

MS. PAGLIA: -- for the next paper is: What can the investor advocacy groups do to support that commercial business model? If you agree that advisory relationships for the middle of the market have value, how can you help the industry come up with those commercially viable products? Because you want them to be profitable and successful if you agree that they're providing a valuable service.

My second point for further consideration by the CSA is with respect to these other jurisdictions; Australia and the U.K., for example. I'd like to see more analysis there as to why they've gone to the models that they have and what their common law says.

So, for example, in the U.S. a lot of the language that they are using to describe "fiduciary" in Canada we describe as "duty of care". So I'm not suggesting there was anything other than a passing reference, but rather than explain what they're doing let's get into the why.

Thirdly, the other area of analogy that I don't see anybody has really discussed here is the statutory best-interest standard for directors and officer in Canada. There is a statutory best-interest standard for directors and officers. There has been a lot of discussion today as to what a statutory best-interest standard does.

I would like the CSA to analyse what it has done in that circumstance and how that best-interest standard has been qualified for directors and officers. I am going to suggest in that regard --

remember, directors and officers have to act in the best interests of the corporation. Like investment advisors, they are subject to competing interests - the corporation, the shareholders, the creditors, the employees, the community at large - and they are subject to a balancing act.

But they have protections. The court gives them the protection of the business judgment rule. If they've made an informed decision on a fair and reasonable basis and show no conflict of interest, they get afforded deference.

The courts also allow -- and, Connie, this is to your point with respect to conflicts. A corporation can enter into agreements that directly benefit a director, and a director can use business arrangements that directly benefit him or her under limited circumstances. So there is compensation being paid to these directors that have been dealt with despite the best-interest standard.

CHAIR: So let's leave it there. Connie, do you want to respond?

MS. CRADDOCK: I would just simply say that it's my understanding -- I will start at another point.

I agree entirely that we have an

opportunity in the U.K. and in Australia to look at what they've done.

In the U.K., it was a six-year-long retail distribution review in which they analysed and studied why they shouldn't move to this. So there's lots of evidence, and I would certainly hope that the CSA is looking at it very carefully, analysing what the motives were. I know the ones that I've read they talk about the quality of compromised advice due to the conflict regime. So I think we have a wonderful opportunity to learn why they moved in those areas.

I note, but I don't pretend to particularly well understand it that in Australia their qualified best-interest standard includes a "safe harbour" concept. So I think that they have looked at ways to implement it.

We will have the advantage, because, heaven knows, we don't move quickly in this country, of looking at how well that's being implemented and some of the challenges.

So I certainly would support in principle. I think it's a great opportunity for us to learn. Being late to the party sometimes has its advantages. I just hope we are not too late.

CHAIR: Maybe I will just comment very

briefly on a couple of things in the last question.

You know, one was when we put out the consultation paper we expected to get lots of comment about what a retail investor is, and so if we were to move forward that obviously is one of the key issues.

In terms of the advisory relationship, I just mention we have a crowd-funding initiative underway in which we did a survey of retail investors to get some sense of their approach to investments, particularly in the exempt market. But one of the interesting things was approximately 70 percent of investors rely and say they rely on advisors for their investment decisions, and so there's absolutely no question out there, I think, that there is a very high proportion of investors who are relying on that relationship.

Does someone have one last question? And then I will wrap up. Yes? This gentleman has been waiting for some time.

MR. TEASDALE: Andrew Teasdale again.

I think this is a very complex area, and one of the problems with forums like this is everybody is shooting ideas and points that really don't have any real structure, and trying to respond to that is very difficult.

One of the things that we have missed is that the heart of the matter is about advice and who is responsible for that advice. I believe that investors should be responsible for their decisions, but I think they need to be able to make a decision, and I think advisors need to be responsible for their advice and the processes that lay behind that advice, and that advice and those processes should be directed and structured in the client's best interests.

So we are talking about responsibility here, and we are trying to find a way in which the industry can take responsibility so that when there are issues clients don't have to go all the way down to court. You know, let's not get caught up in what "best interest" means.

I think there are issue with the consultation. I think that they are going to be worked out. I do think that the industry is not going to be -- be about moving forward to higher standards, but we have to do that. We have to take responsibility for our regulation, we have to take responsibility for the marketplace, and advisors have to take responsibility for the advice that they're giving to their clients.

End of story.

MR. FABELLO: I think that

responsibility does exist currently, and I think that we may be manufacturing what I've heard to be the confusion in the investors' minds. You know, if you said to an investor --

MR. TEASDALE: Actually, hold on one second. The framework at the moment is a transactional framework, as Connie said. It's a parameter-to-parameter framework. I'm sorry, I've been dealing with investments all my life. There is no way that you can structure a portfolio from a KYC. No way at all. You may be able to plug in a transaction, but you can't construct a portfolio. It may be a suitable transaction within a transaction-based regime, but it is not a suitable framework for giving advice.

CHAIR: Okay, John. You have 30 seconds, no more.

MR. FABELLO: Right. I would say that the clients needn't be and really aren't concerned if you drill down. If you said to a client, "Look, do you think currently that your advisor owes you a best-interest fiduciary standard," they would say, "Yes, of course they do." If you asked them, "Does that mean to you that the broker should not take advantage of his position and act in a perfectly good faith manner after full disclosure in the circumstances," I'm sure all of those clients would say, "That's exactly what I mean."

That's a quote from 1910. It's been going on and been applied in various circumstances, and taking into consideration the nuances for going on 103 years now, it's a good system that we have got. It does protect investors.

MR. PASCUTTO: Sorry, John, I really have to challenge your statement that the litigation system that we have is beneficial to investors. I mean, that is simply, simply not true. Maybe your clients are multi-million-dollar investors with very large portfolios where we are talking about very large losses.

For the average person who loses $25,000, $50,000 or $100,000, the system does not serve them at all. Experienced securities lawyers won't take on their cases. If they're able to get a case taken on, maybe they may settle it for 50 cents on the dollars. Maybe after they pay their lawyers they end up with 20 cents on the dollar.

The system doesn't work for the average consumer.

Maybe they then go to OBSI and try to get OBSI to help them. Well, the industry is able to delay and beat down because OBSI has no power to make binding decisions, and so at the end of the day the consumer, if they're able to go that route, and it's only in limited circumstances that they're able to go that route, they may get some kind of compensation, but then there are lots of firms -- the big firms, the banks and the bank-owned dealers will eventually, eventually come to the table, but they're the smaller firms who just disregard it, and they will disregard the decisions because they're not binding, and so they don't get -- and you've seen the name-and-shame cases and you've seem the outrageous circumstances that have happened, and investors have not had compensation in those cases.

So the system doesn't work for the average Canadian.

MR. FABELLO: There are parts of the system that are not often used. The IIROC arbitration programme is not used. It's designed for streamlined and cost-effective adjudication.

MR. PASCUTTO: But you need a lawyer.

MR. FABELLO: You don't need a lawyer for that. Sorry, you don't.

And the Small Claims Court systems across Canada now deal with disputes that are between

$25,000 and $75,000. Those systems apply the same good common law.

CONCLUSION AND CLOSING REMARKS:

CHAIR: We are going to have to leave it here, unfortunately. We want to bring it in on time.

I do want to thank all of the members of our panel for their contribution this morning. And thank you for coming out.

Our objective, as I think you could tell, is to try and air the issues. There are complex issues here, and people have quite different perspectives with respect to them.

I should say in the process the CSA and our Commission have to analyse all the feedback we have received and try and come to some reasonable conclusion as to whether we want to move forward and on what terms. I do emphasize there has been absolutely no decision to do that. These are difficult issues.

I think the panel has successfully identified what those issues are. So the CSA will be publishing an update of the consultation this fall, and when I say 'an update', where we are, what we've heard, what the issues are. Then, I think securities regulators recognize that we have to do a careful analysis of any regulatory impact before we move ahead with new rules or guidance.

But in the circumstances, we very much appreciate you coming out, making your comments known. Obviously, any of us would be happy to speak to you afterwards if you have other thoughts.

So thank you very much.

--- Whereupon proceedings adjourned at 12:02 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