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February 22, 2013

VIA E-MAIL

British Columbia Securities Commission
Alberta Securities Commission
Saskatchewan Financial Services Commission
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
New Brunswick Securities Commission
Registrar of Securities, Prince Edward Island
Nova Scotia Securities Commission
Superintendent of Securities, Newfoundland and Labrador
Registrar of Securities, Northwest Territories
Superintendent of Securities, Yukon Territory
Registrar of Securities, Nunavut

Attention:

John Stevenson, Secretary
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jstevenson@osc.gov.on.ca

Me Anne-Marie Beaudoin
Corporate Secretary
Autorité des marchés financiers
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consultation-en-cours@lautorite.qc.ca

Dear Sirs/Mesdames:

Re: Canadian Securities Administrators Consultation Paper 33-403: *The Standard of Conduct for Advisers and Dealers: Exploring the Appropriateness of Introducing a Statutory Best Interest Duty When Advice is Provided to Retail Clients (the "Consultation Proposal")*

We are writing in respect of the request for comments dated October 25, 2012 regarding the Consultation Proposal. We appreciate the opportunity to comment on these important matters.

Invesco Canada Ltd. is a wholly-owned subsidiary of Invesco, Ltd. Invesco is a leading independent global investment management company, dedicated to helping people

worldwide build their financial security. As of January 31, 2013, Invesco and its operating subsidiaries had assets under management of approximately US\$713 billion. Invesco operates in 20 countries in North America, Europe and Asia.

Invesco Canada is registered as an Investment Fund Manager, an Adviser and a Dealer in Ontario and certain other provinces. Our investment products are primarily bought by and sold to retail investors. As such, we take a great interest in regulatory discussions that impact those investors.

In this comment letter, we would like to discuss our views generally of the standards of conduct and the possible impacts of regulatory changes in that regard. In Appendix 1 attached to this letter, we have responded to some, but not all of the questions posed in the Consultation Paper. Where we have not responded we either do not have a view at present or we believe the question has been raised prematurely. Our comments are from the perspective of a manager of mutual funds.

Investor protection is, of course, one of the primary purposes of securities regulation. We recognize that every initiative brought forth from the Canadian Securities Administrators ("CSA") is done with this concept in mind. We are concerned, however, that the CSA has initiated many regulatory changes and many concept papers/consultation proposals over the last several years either without an overriding approach in mind or one that has not been well articulated publicly. That is, when one reads the multitude of proposals put forth by the CSA over the years, it is not clear what end state the CSA is seeking. We believe that if the CSA took the time to articulate the desired end state, it and those who provide comments could evaluate its proposals in that context and ensure that regulatory reform remains focused toward a desired outcome. We acknowledge the international context in which the CSA operates and the outside pressures to which it is subject. At this stage, we are not suggesting such is the case with the Consultation Paper which is a welcome procedural step toward reform, but we are concerned that this initiative could be compromised by following other jurisdictions' reforms before an evaluation of those reforms is possible. However, we believe the CSA should not be shy about using other jurisdictions' regulatory reforms as a test laboratory prior to making similar proposals in Canada.

Consistent with the foregoing thoughts, we believe the correct question to initiate the debate over statutory standards of conduct is how will reforms to the standard affect the retail investor. That is, if a statutory best interest duty or fiduciary duty is proposed to apply to the activities of financial advisors/dealer representatives or anyone who provides advice (collectively, hereinafter referred to as "advisors"), how does that, in practice, improve the protections for a retail investor from the status quo? The Consultation Paper does not attempt to answer this question. In fact, it poses this question in several different forms.

The Consultation Paper notes that, in Quebec, registered dealers and advisers are currently subject to a duty of loyalty and a duty of care and must act in the client's best interest. This is interesting in that such formulation is clearly the same as what is often referred to as a fiduciary duty. This is helpful to the questions raised in the Consultation Paper as it provides a real opportunity for the CSA to assess whether, as a result of this difference in standard between Quebec and the rest of Canada, Quebec investors are better protected? The answer to that question ought to inform this entire discussion. It would be helpful if the CSA would address the impact of that difference and assess it in the publication that follows this Consultation Paper.

At this stage of the process, our primary concern lies with the practical meaning of a difference in the wording of the duty of care in that it is not clear what exactly would be expected of an advisor operating to that standard. Our experience is that in the face of this type of uncertainty, advisors became unduly conservative in approach, often to the detriment of their clients' longer term interests. In the Consultation Paper, the CSA describes the proposed standard of care as follows:

There may be a large number of potentially suitable investment products, but the question is whether the advice to the client must identify a smaller range of products that are, in the advisor's view, in the client's best interest. One consideration in giving that advice would be the relative cost to the client of the product.

Other than the last sentence, we find this formulation helpful in that it implies that the advisor can start with a list of suitable investments and then narrow the list to what is best among those for the client, based on the advisor's professional judgment. This further implies a reasonably safe haven for an advisor who can demonstrate that the process was followed, as it would be unjust to judge whether the standard was met in hindsight, which is the risk when the advisor's performance is assessed only after the performance of the investment is known. (Otherwise, the standard effectively serves as a guarantee.) The reason we dislike the last sentence is it sends the message that cost is the primary consideration. We disagree with that idea because it is an overly limiting factor. We are not suggesting that cost should not be a consideration, but there are high cost investments with superior long term performance (relative and absolute) and a client would not be well served by ignoring these products. If this is all about cost, then the CSA has to consider the impact of regulating with cost as an overriding concern. We think it is wrong for the regulators to focus on cost in a market-driven environment and it leads to unintended outcomes. When cost is the focus, the effect of regulation is typically to drive down participation. In this case, if the goal (whether primary or not) is to reduce cost, it seems likely that will lead to a reduction in the number of advisors servicing clients and we question whether that is a desirable outcome.

In the potential benefits of a new standard, the CSA notes that "this does not mean that there is necessarily only one "best" investment for a client. Nor does it mean that advisors would assume liability for the success of the investment." If a new standard is adopted, while we believe a court would agree with this, we think a lot of time and effort could be saved if a statement to this effect were included within the relevant rules.

The Consultation Paper reviews similar reform efforts in the U.S., U.K. and Australia. The tenor of the questions posed by the CSA indicates a preference for the U.K. and Australian approaches over that of the U.S. The issues raised in the U.S., as discussed in the Consultation Paper, are valid and serious issues. We believe the CSA must address those specifically prior to rejecting the U.S. approach.

We feel compelled to comment on the CSA's expressed view on commissions paid by issuers expressed in the fifth key investor protection concern. The CSA states that commissions paid by issuers to advisors and dealers for recommending the issuer's securities may constitute such a fundamental conflict of interest that regulators should consider how best to mitigate the risk (e.g. prohibiting some or all embedded commissions). This is an overly narrow focus on an element of an issue that may well lead to a perverse result. First, in the context of mutual funds, if all mutual funds paid the same commission, then the conflict would be mitigated, so that is one obvious solution to the perceived conflict. Second, while there are certainly some advisors that make recommendations based on their own compensation, there is no evidence that this is a widespread practice. If

compensation was driving recommendations, then presumably one would expect consistent increases in the value of mutual funds held by clients of IIROC dealers. But the evidence is that the market share of mutual funds within the IIROC channel has been in steady decline for years. Second, we do not yet know the effect of banning certain commission practices. It is evident that investors are unclear how much they pay for investment products. However, the CSA has addressed this with the forthcoming amendments to NI 31-103. We do not believe that the U.K. or Australia took this step prior to banning certain commissions. We believe this is an innovative and prudent initiative by the CSA, but time is required to assess its impact. Historically the CSA has addressed conflicts through disclosure requirements before considering similar action in Canada, and therefore, would it not be prudent to see what the impact of cost transparency is in Canada and what the impact on investing is in U.K. and Australia? What would the CSA's position be if, in 2-3 years it became evident that, in those countries, there were fewer financial advisors, fewer retail investors using financial advisors (either doing it themselves or not investing) and overall savings were significantly lower? Surely the CSA would agree that such is a most undesirable outcome. What would be the harm in waiting to assess that? We believe such an outcome is likely because investors in those countries will perceive that, previously, they paid no commissions and now they are required to pay commissions without getting anything in return. At minimum, this could be avoided in Canada through the cost transparency initiative in the NI 31-103 amendments. Once investors realize what they are currently paying for their investments, then a debate on commissions and compensation would be more informed. We know from studies that IFIC has shared with the CSA that investors who have an advisor achieve better results than investors who do not have an advisor and also that those investors save more. In the context of dwindling public and corporate pension plans, is retirement savings not an overriding concern for the CSA?

Conclusion

It is clear that Canadian investors are generally unclear as to the nature of their relationship with their advisor and their advisor's legal obligations. Until investors have this clarity, it is difficult to assess whether the standard of care must change and, if so, to what degree.

Thank you for providing us with the opportunity to comment on this important initiative. We would be pleased to discuss our comments further should you so desire.

Yours very truly,

Invesco Canada Ltd.

A handwritten signature in black ink, appearing to read "Eric Adelson", with a long horizontal flourish extending to the right.

Eric Adelson
Senior Vice President and Head of Legal – Canada

Appendix 1

Responses to Specific Questions in the Consultation Paper

Question 1: Do you agree, or disagree, with each of the key investor protection concerns discussed above with the current standards applicable to advisers and dealers in Canada? Please explain and, if you disagree, please provide specific reasons for your position.

We do not agree with the concern that the current regime is not “based on the most principled foundation”. Given the range of investment choices available to investors and the simple fact that there is no way to predict the future performance of a product, the suitability standard is based on a solid principle, namely, how can anyone determine what is “best” for anyone, absent the ability to predict the future? For example, most investor advocates have expressed the view that fees are most important and if you have two equity funds with similar objectives, the best one is the lower fee one. We disagree with that assertion because it completely eliminates any consideration of the skill of the portfolio manager. Not all portfolio managers are equal. Some are actually better than others. Given the track record of the manager, the fee differential may be irrelevant when considering long-term results. In our view, a recommendation into such an investment would be quite likely to meet a suitability standard. We are concerned that if a similar investment had slightly lower cost but also slightly lower returns, it may not meet a higher standard of care. This illustrates the effectiveness of the “good faith” requirement in the current standard of care. This is the principle upon which the current standard is based and we believe that is a pretty strong principle. We are unable to comment on Concern 4 “Recommendation of suitable investment versus investments in the client’s best interests” because there is no articulation in that concern of what the distinction means. We do note that the courts already recognize a higher standard in situations of vulnerability, such as discretionary accounts.

Question 2: Are there any other key investor protection concerns that have not been identified?

A key investor protection concern that has not been identified is investor apathy. Many Canadians do not have adequate savings. Financial advice has been shown to be the best remedy for this concern. Canadians who seek financial advice typically save more and have better returns than Canadian who do not, including do-it-yourself (“DIY”) investors. In this context, we are concerned with any regulatory proposal that may have the effect of driving investors away from seeking financial advice and this potential impact should be considered in the context of the Consultation Paper. That is, would the impact of a statutory best interest standard or a fiduciary duty encourage Canadians to seek financial advice or would it drive those who do invest into the DIY channel. We address this issue further in our response to question 29. Until further data is available from countries who have embarked on the type of reform contemplated by the Consultation Paper, it is simply not possible to determine whether a change in the standard of care will effectively address concerns of investor apathy.

Question 3: Is imposing a statutory best interest standard on advisers and dealers the most effective way of addressing these concerns? If not, would another policy solution (e.g., changes to one or more of the existing statutory standard of conduct requirements) offer a more effective solution?

We do not believe that a statutory best interest standard is the most effective way of addressing the concerns. Fundamentally, a statutory best interest standard is useful only to the extent that it can be privately enforced and the reality is that in most cases it is simply too expensive for investors to engage in private litigation to enforce their rights, when one compares the cost of private enforcement with the amounts at issue. To the extent conflicts

of interest are the concern, we believe the CSA has taken too extreme a view over time of the efficacy of disclosure as a cure for conflict. In many cases, the disclosure has the opposite effect. If the CSA believes a practice that gives rise to a conflict is more likely than not to have negative consequences, the CSA ought to examine the range of options available to address the conflict, including banning the practice. We find it interesting that NI 31-103 requires registrants to identify all conflicts of interest, decide how to deal with those conflicts, and provides guidance that sometimes banning the practice is required, yet generally the CSA takes a pass on banning any suspect practices by regulation. The financial services industry is highly competitive and, sometimes, one player in that industry may realize that a conflict practice should be banned but does not do so because it will lose business to its competitors who take a different view. In those cases, the CSA must step in to ban the practice and ensure a level playing field.

Question 4: Do you believe that some or all of these concerns are inapplicable (or less significant) in any CSA jurisdiction as a result of its current standard of conduct for advisers and dealers?

We do not believe there is any difference among CSA jurisdictions in this regard.

Question 6: If such a duty is imposed, are the terms of the best interest duty described above appropriate (for example, should there also be an on-going obligation regarding the suitability of advice previously given or investments held by a client)? What changes, if any, would you suggest to the terms of the best interest duty described above?

Those who advocate for a change in the standard of conduct do so on the basis that the existing suitability standard is ineffective. As such, it is not clear when the suitability standard would apply if a best interest duty or fiduciary duty is a higher standard. The remainder of the "scope" of the duty set out in the Consultation Paper seems reasonable. Without private enforcement rights, we believe this entire exercise will be ineffective.

Question 8: Do you agree, or disagree, with each of the potential benefits and competing considerations of the statutory best interest standard described above? Please explain and, if you disagree, please provide reasons for your position. Are there any other key potential benefits or competing considerations that have not been identified?

We disagree that a principle-based approach is necessarily a positive in this context. A principle-based approach in a regulated environment typically introduces a level of uncertainty precisely because it is not prescriptive and, therefore, it is open to interpretation. In contrast to the uncertainty that would arise in the context of a new standard of care, the suitability standard has been in place for many years and, over time, a level of certainty has developed over precisely what is required to meet the standard. We note that the landscape today includes a suitability standard that is fairly well understood and, where the facts of the situation show investor vulnerability, a fiduciary duty exists. It is not always clear, however, what is required of an advisor when the advisor is subject to a fiduciary duty under current standards. As noted in our response to question 16, to the extent that there are perceived deficiencies with the application of the suitability standard, this could, and perhaps should, be cured by improved enforcement.

Question 9: What are the criteria that should be used to identify an investment that is in a client's best interest?

We do not believe that it is possible to devise a checklist as to whether an investment is in the client's best interest which, we believe, is the foundation of the suitability standard. We note that some investor advocates have failed to provide criteria, which we find telling. In our view, many of the examples discussed are contrary to the registrant's current duty to

act fairly, honestly and in good faith. One example cited is a churning situation. We ask, simply, how can that meet any standard of good faith? And if a fiduciary duty is imposed, how, practically, is that practice deterred? We would argue that suitability is only one part of the current standard. In a churning situation, the investment to which the client is switched may indeed be suitable (showing the deficiency in that standard) but in the context of the overall advice, the current registrant's duty is likely not met (showing the strength of the current statutory duty).

Question 10: Should breaches of a best interest standard give rise to civil liability at common law?

Yes, breaches of a best interest standard should give rise to civil liability. We also believe that breaches of the current registrant's standard should similarly give rise to civil liability to the extent it is viewed that it does not.

Question 11: If so, is it necessary to state expressly that a best interest duty will give rise to civil liability on the part of the adviser or dealer or is it sufficient if that standard is a statutory duty?

As there appears to be some confusion as to whether being explicit in the regulation is required for civil liability to follow (otherwise, presumably, the question would not be raised) we favour elimination of confusion as an overriding principle. Therefore, to reduce uncertainty, it should be stated.

Question 12: Does the duty of an adviser or dealer to act fairly, honestly and in good faith when dealing with clients, coupled with the existing rules related to suitability and conflicts of interest, already impose a standard of conduct that is functionally equivalent to a fiduciary duty?

We believe that, for the most part, the current regime is functionally equivalent.

Question 13: If so, should it be made clear that investors can enforce that duty as a private law matter?

If there is uncertainty as to private rights of enforcement, then these should be clarified for retail investors.

Question 14: If you believe that the existing standard of conduct for advisers and dealers already imposes a standard of conduct that is functionally equivalent to a fiduciary duty, what impact (if any) would the introduction of a statutory best interest standard have? For example, would it be desirable for investors to have the benefit of a statutory best interest standard that has long been recognized and interpreted under fiduciary duty common law principles?

We are unclear of the benefits. We believe those who propose regulatory changes are obliged to set forth the real benefits of a change.

Question 15: Do you think the investor protection concerns raised in this Consultation Paper could be addressed by issuing guidance about current business conduct requirements, including the duty to deal fairly, honestly and in good faith with clients? Please provide specifics about the type of enhanced guidance that would be most effective.

We believe guidance would be a viable alternative to imposition of a new duty. We are unable to draft guidance for the regulators. As a starting point, we would urge the CSA to publish a list of the primary types of investor complaints and explain for each example how such practice is contrary to the current standard. The CSA must provide this guidance in

true collaboration with the MFDA and IIROC, since they bear the brunt of enforcement and, by virtue of their responsibilities, possess better expertise than the CSA on this matter.

Question 16: Do you think that the concerns raised in this paper could be addressed by increased enforcement of current business conduct rules, including fair dealing, suitability and conflict of interest requirements?

We believe most of the concerns can be addressed through increased enforcement. We note that proper enforcement requires both manpower and adequate penalties. Additional regulation without addressing the questions relating to proper enforcement is likely to be ineffective.

Question 18: If yes, given that a fiduciary duty is already owed to a client in certain circumstances, why do you think that clarifying the circumstances in which such a duty is owed will affect ongoing costs of advisers and dealers in Canada?

An increase in certainty means an increase in internal rules for any registrant and an increase in compliance oversight. At minimum, that implies an increase in personnel devoted to this function and an increase in personnel requires such personnel to be paid a salary. Given the economic circumstances faced by many registrants, we would expect to see a shift in personnel from revenue-producing roles to compliance monitoring roles to meet the clarified standards. This leaves fewer people to deal directly with clients and could lead to some of the negative outcomes discussed elsewhere in this letter.

Question 20: We note that cost-benefit and/or market impact analysis has been conducted to varying extents on the proposed reforms in each of the U.S., U.K., Australia and E.U. Do you believe that this international analysis is relevant to the possible introduction of a statutory best interest standard for advisers and dealers in Canada? If so, please explain.

We believe it is necessary for the CSA to engage in its own cost benefit analysis. We remind the CSA that, at least in Ontario, this is a legislative requirement and failure to provide that could render any regulatory reform *ultra vires* the *Securities Act* (Ontario).

Question 22: How should a statutory best interest standard apply to mutual fund dealers, exempt market dealers and scholarship plan dealers?

The response to this question really goes to the heart of our comment in the body of this comment letter, namely, what end state is envisioned by the CSA? The closer one gets to a “pure” fiduciary duty, the less viable are the categories cited in this question.

Question 24: Do you agree with the approach reflected in the Australian Reforms or UK Reforms to accommodate restricted advice and scaled advice, respectively?

We have not reviewed the Australian and U.K. proposals extensively. On its face, we do not understand the principled reason why a lesser amount of investor protection is required to suit the circumstances that give rise to a tailored approach. That is, if someone providing financial advice has to consider the best interests of the client, how can it be possible to ignore an entire range of products? Ultimately, how does that serve the client? For example, we have no information on why a client would select an advisor who is only permitted to speak about scholarship plans when a client is seeking to save for education purposes. Perhaps the client is best served by another type of investment vehicle altogether. Such categorization only works with a suitability standard. Furthermore, we do not believe that under the current system in Canada, retail clients understand the distinction

among different types of dealers. Therefore, they would likely not understand that different standards of care may apply.

Question 26: Will the qualifications required to make a best interest standard work in Canada result in retail clients receiving only advice on a narrow range of investment products?

If a true best interest standard is imposed, then by definition the client must receive advice on the widest possible range of products.

Question 28: Do you believe that the statutory best interest duty described above would affect the current compensation practices of advisers and dealers? If so, in what way?

We believe that compensation generally is a separate matter from standard of care. We say generally because, obviously, if an advisor can be shown to be recommending one investment over another because of the compensation to the advisor, that would seem to be a clear breach of a traditional fiduciary duty. However, the question is really the degree to which that compensation erodes the investor's return.

Question 29: Should a best interest duty expressly address adviser and dealer compensation practices? If so, in what way?

Given the forthcoming amendments to NI 31-103 regarding cost and performance reporting, we believe addressing compensation – which we take to mean embedded compensation – is premature. The U.K. and Australia have addressed embedded compensation extensively in their recently effective reforms. Those reforms have been in place for too short a period of time to assess their impact (i.e. a few months). The transparency initiative under NI 31-103 is expected to have some impact. Once that data is in and/or a proper assessment of the U.K. and Australia experiences is possible (i.e. after 2 or 3 years) then it would be appropriate, based on that assessment, to consider a similar reform. Our concern is that at this time, the entire debate around embedded compensation is mere conjecture. However, U.K. and Australia are two real life examples in regulatory systems and cultures not dissimilar to ours. It is rare that such a test opportunity is available and deciding these matters now serves no public purpose.

Question 30: Could volume based payments or embedded commissions continue if the statutory best interest standard described in this paper is introduced? If so, should such compensation structures be specifically prohibited?

For the reasons cited in response to question 29, we decline to answer this question at this time.

Question 32: Should any statutory best interest standard be modified in any way to preserve various compensation structures?

We believe that the subject of compensation is separate from consideration of a statutory best interest standard. The CSA should first determine what compensation structures are appropriate and only then should it deal with the standard of care issue. We say that because any standard of care will have to be defined by the CSA in the regulatory reform process. This provides the opportunity to address compensation structures within that duty. But that can only work if the determination is first made as to what compensation structures are appropriate.

Question 33: If the statutory best interest duty described above is introduced, what areas of guidance would be most useful to advisers and dealers?

Extensive guidance on how an advisor is supposed to apply the standard in everyday practice would be necessary. Regulation that captures unintended behavior or makes “criminals” out of those who are not intended to be is simply bad regulation. The CSA strives for considerably better than that.

Question 36: Are there any advisory relationships between an adviser or dealer and a retail client where a fiduciary duty would not be appropriate?

In a relationship where a dealing representative only provides recommendations and the client is able to reject those recommendations and actually does on occasion, then a fiduciary duty is inappropriate. The client has to be truly vulnerable to the advisor for the duty to exist. Many relationships exist where the advisor provides recommendations and the client decides; in reality, the client typically follows the advice. In that case, we believe vulnerability exists. It is for this reason that we have formulated the first sentence of this response in the manner which we did.

Question 39: Are any existing regulatory rules inconsistent with the best interest standard described above?

There are none of which we are aware.

Question 40: Would the statutory best interest duty described above require revisions to the rules that govern how firms address conflicts of interest with their clients?

We do not believe the rules that govern how firms address conflicts of interest with their clients would change. The registrant’s policies in that regard may have to change.

Question 42: Should the CSA consider only imposing a best interest standard in respect of certain requirements, such as conflicts of interest or suitability requirements?

We do not believe that a best interest standard can be partially applied. We also believe that where registrants are under different duties in respect of different functions, there is often confusion and the higher standard often is adopted regardless.

Question 44: Should a best interest standard apply only to advisers and dealers when dealing with “retail clients”?

We do not necessarily agree that the standard should be based on who the client is but on the nature of the relationship. If the advice is tantamount to discretionary management (i.e., with a client rubber stamp) then the standard should apply.

Question 46: Should certain kinds of permitted clients (e.g., municipalities) have the benefit of a statutory best interest standard?

As noted in our response to question 44, the application of the standard ought to be based on the nature of the relationship. The “permitted client” definition illustrates this quite well. Many “permitted clients” are sophisticated institutional investors who are perfectly capable of looking out for their own interests. However, some are significantly less so. For example, it is not uncommon for certain pension funds to be overseen by a board of trustees that have no investment experience. Presumably, those boards place greater reliance on their financial advisors and, in such case, the same standard ought to apply to them as to a retail investor.

Question 47: Are there certain kinds of retail clients that do not require the benefit of a statutory best interest standard?

As noted in our previous responses, we do not agree with the underlying premise of this question. If a retail investor, even one with thorough investment knowledge, places heavy reliance on the advisor, their own sophistication should not be relevant to the standard to which the advisor is or ought to be subject.

Question 48: If the best interest standard described above was introduced, should advisers and dealers be permitted to modify or negate the standard by contract with their clients? If so, what limitations (if any) should be placed on that ability?

Contracting out of or modifying the standard should be permitted. However, it is in this context where we believe that the distinction between retail investors, accredited investors and permitted clients is appropriate. Given the issues of vulnerability, information asymmetry and power that lead to a fiduciary-like duty, we do not believe that contracting out or modifying a standard is appropriate for retail investors. However, accredited investors and permitted clients do not have the same vulnerability or asymmetry and, therefore, should be permitted to contract out. The problem we foresee, however, is that if the standard is not well defined, it is not possible for an accredited investor to make an informed decision in that regard.

Question 49: If a best interest standard is introduced, should the existing duty on advisers and dealers to deal with their clients fairly, honestly and in good faith continue to apply whenever the best interest standard does not?

Yes.

Question 50: Should the best interest duty described above apply when any advice is provided to a retail client or only when personalized advice is provided to a retail client?

We question the distinction between advice and personalized advice. If advice is being given to a retail client that is not personalized, it is foreseeable that the retail client would try to adopt that general advice to their own situation which could lead to rather undesirable results. If the advice is so general that the advisor can appropriately distance himself or herself from the implementation of the advice, then the client will be unlikely to establish that a duty of care was even owed in the circumstances. Most likely, if this distinction is made, both parties to disputes will have to deal with an additional level of argument, namely whether or not the advice was personalized.

To illustrate the foregoing, suppose the non-personalized advice was to invest in global equities. If the client applies this advice by buying Fund A without consulting the advisor, then no duty of care is owed by the advisor relating to that investment, whether the standard of care is the current standard, a best interest standard or a fiduciary duty. If the client applies this advice by buying Fund B in consultation with the advisor, then the advisor would be subject to a suitability standard in relation to the selection of Fund B for the client under current law or, under a modified standard, under such standard. That is, this distinction is implicit in the legal application of any standard of care and, therefore, it does not need to be addressed in a rule or statute.

Question 52: Should it be triggered in the same circumstances in which the suitability requirement arises? Does this include advice to *hold* securities (as opposed to buying or selling securities)?

If a client seeks advice, whether to buy, hold or sell, the same standard ought to apply to the advisor. However, we do not believe it is practical to require, in all cases, an advisor to regularly monitor an account and contact the client when he/she feels it necessary. That said, clients should be able to contract for that service – and one could see tremendous value in such a service – but absent a deliberate agreement between client and advisor, the standard should be restricted to advice-giving.