Via email

February 22, 2013

John Stevenson, Secretary
Ontario Securities Commission
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Anne-Marie Beaudoin, Corporate Secretary
Autorité des marchés financiers
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Dear Mr. Stevenson and Ms. Beaudoin,

Re: 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

This comment letter is being submitted on behalf of the following entities within RBC: RBC Dominion Securities Inc.; Royal Mutual Funds Inc.; RBC Global Asset Management Inc.; RBC Phillips, Hager & North Investment Counsel Inc.; and Phillips, Hager & North Investment Funds Ltd. We are writing in response to the Canadian Securities Administrators' ("CSA") request for comment on Consultation Paper 33-403 - *The Standard of Conduct for Advisers and Dealers* published on October 25, 2012 ("Consultation Paper").

Introduction

We welcome the CSA's efforts towards improving retail investors' understanding of the relationship between them and their advisor. RBC strives to put clients first and is committed to working for the benefit of our clients. We agree that the interests of investors should be of paramount importance while ensuring access by investors to the financial services they want and need to achieve their investment goals.

We are supportive of the CSA's approach to review industry and public input before deciding whether to adopt a statutory best interest standard and on what terms, and view this Consultation Paper as an important step in the consideration of these vital and complex issues. The preliminary analysis and commentary on relevant international developments contained in the paper serve as a good starting point for this consultation, which should be reviewed within the broader context of recent and ongoing regulatory changes. Upon reviewing the paper, it became apparent that we are in need of further information in order to provide more specific responses to the Questions set out in the paper. Pending further details, we would like to take this opportunity to outline our general views concerning the desirability and feasibility of introducing a statutory best interest duty.

Investor Protection Concerns

The CSA staff has identified five key investor protection concerns with the current standard of conduct applicable to advisers and dealers in Canada and is seeking feedback on whether a statutory best interest standard would be the most effective way of addressing these concerns.

In our view, an effective and efficient policy solution should build on current regulatory requirements and recently introduced range of reforms. It is anticipated that current industry efforts to implement various regulatory developments would result in increased transparency for investors and incent dealers to enhance their existing practices. Of note, retail investors are or will be provided with relationship disclosure documents under Client Relationship Model ("CRM") rules and be informed of, among other things, their client account relationships, applicable fees and charges, suitability assessments and material conflicts of interest between investors and the firm or advisors. The stated concerns relating to dealer fees and compensation structure would be alleviated by upcoming performance reporting requirements under Phase II of CRM and the provision of Fund Facts under the Point of Sale Disclosure of Mutual Funds project. Given that the regulatory objectives of these reforms are to "raise the bar on industry professionalism and bolster investor confidence", consideration for adding further layers of investor protection should take into account the actual benefits that investors may experience in practice. A potential method that may be beneficial for the CSA when determining the additional measure that may be required could be to conduct a follow-up investor survey upon implementation of the performance reporting requirements.

We caution that the CSA should take steps to ensure that further consultation will not be based on a presumption that there are no alternative material means of addressing investor protection concerns. The CSA's concerns with investor education, investor perception of the account relationships, investment suitability and apparent inadequacy of conflicts of interest rules may be more efficiently addressed directly through relevant policy enhancements.

Key Considerations

It is recognized that there is a continuum of potential relationships between retail clients and financial service providers from self-directed accounts, where no advice is sought nor given, to discretionary accounts, where fiduciary duty is traditionally viewed by the courts as applying on an ongoing basis, and various models in between, where clients may or may not always deal with the same advisor to transact in their accounts held with the dealer. The scope of an enhanced standard of care would depend on both the nature and conduct of the relationship. In this regard, we agree with the CSA's recognition that any fiduciary duty imposed on dealers would need to be qualified to factor in the circumstances and business models of particular categories of dealers and advisers, and the desired investment objectives of clients.

We recommend that any proposed regulatory framework for a statutory best interest standard when advice is provided to retail clients should be balanced and take into consideration the following:

- *Business model neutral*. As noted, the proposed regime must be able to accommodate the existing broad spectrum of dealer and adviser activities so that retail customers may continue to choose among various service and compensation models that best suit their objectives and needs. Any proposed measure to accommodate "restricted" or "scaled" advice (or the like) should be available to all categories of registrants that would be subject to the statutory best interested standard.
- *Client's Needs*. In recognition that not all retail clients are the same and have different investment objectives, certain sophisticated retail clients should have the ability to make an informed election to opt out of a statutory best interest regime, if it could result in a greater availability of investment options or more advantageous pricing.
- *Investor protection focused*. Any proposed measures in addition to current and upcoming regulatory requirements should actually, in practice, improve investor experience and confidence in markets. Similar to the approach taken by the U.K. Financial Services Authority in carrying out post-implementation review of the Retail Distribution Review, the CSA could undertake a review of how the stated investor protection concerns may be addressed after the implementation of upcoming regulatory reforms (e.g. CRM) to determine whether and how additional measures may be required.
- *Scope of Dealer and Adviser Obligations*. The scope of dealer and adviser obligations in fulfilling the standard should be sufficiently defined. For instance, registrants would require clarification as to their supervision obligations including: how registrants would satisfy their duty at the time the advice is

given and on an on-going basis; how members of self-regulatory organizations ("SRO") would meet their supervision requirements under SRO rules; and how the standard would apply for clients who desire a buy and hold strategy and do not require ongoing advice.

- *Regulatory Guidance*. Regulators should develop guidance necessary to enable firms to apply the standard of conduct to various types of registrants and their distribution channels. A new standard of care must fit well in the current regulatory landscape, hence minimize the imposition of conflicting or duplicating new requirements for registrants. By way of illustration, a statutory best interest, if not carefully constructed, would impact suitability obligations. In this case, should an adviser determine from a range of "suitable" products the product that would be in a client's "best interest" or does the best interest determination factor into suitability, possibly impacting the range of products an adviser could choose to make available to its clients? Furthermore, guidance on how regulators expect registrants to demonstrate compliance with the standard of conduct would be helpful.
- *Practical Implications*. The Consultation Paper highlights recent U.S. studies on the possible impact of a fiduciary duty standard. The SIFMA Study determined that retail investors would experience "reduced product and service availability and higher costs" under a uniform standard of care; in contrast, the Academic Study concluded that "empirical results provide no evidence that the broker-dealer industry [would be] affected". While we appreciate the commentary on relevant international developments and studies conducted by foreign organizations, we submit that the Canadian securities industry offers a sufficiently different regulatory and business environment that warrants a Canadian market specific cost-benefit analysis in this context.

  Based on our observation, we caution that the imposition of a uniform fiduciary standard in the Canadian sphere may lead to unintended negative consequences from retail investors perspective including increased service pricing to offset increased registrant's liability and supervision obligations, reduced product selection due to registrants adopting a more conservative approach to risk, and less service and product innovation. A potential reaction from the industry may be to promote products subject to other regulatory regimes, such as segregated funds.

Recourse for Retail Clients

In response to your Questions, we submit that it is challenging to comment on whether the existing standard of conduct that advisers and dealers owe to retail clients is functionally equivalent to a statutory best interest duty without the benefit of an in-depth study conducted by the CSA on this matter. A study on this issue may clarify the following and invite more meaningful feedback from the public and industry:

- Consistent with the commentary in the Consultation Paper, it has been our experience that Canadian courts are effective at determining whether a fiduciary duty is owed in a given relationship. It would be insightful if the CSA provided a comparison of retail investors' litigation experience (in terms of factors such as costs, damages, timeline) in Canadian jurisdictions that have a statutory best interest requirement and in Canadian jurisdictions that recognize common law fiduciary duty.
- Would the statutory best interest duty import the elements of the common law fiduciary duty? For example, would the statutory best interest duty continue to recognize contributory negligence on the part of a retail client and/or a retail client's responsibility to mitigate his/her damages? What effect, if any, is the statutory best interest duty intended to have on a registrant's civil liability?
- Would the imposition of a statutory best interest standard provide a more favorable experience for retail clients with dispute resolution service providers, such as OBSI? If so, to what extent may a retail investor in comparable cases experience reduced costs, enhanced damages and/or more expedient dispute resolution process?
- How would the imposition of a statutory best interest duty strengthen a retail investor's legal remedy for breach of that duty? More specifically, the developed case law contemplates a range of remedies that depends on the extent to which the relationship includes a fiduciary component. In the case of a breach of statutory best interest duty, what remedies would the courts consider beyond restitutionary damages?

We appreciate the opportunity to provide comments on this important initiative and welcome the opportunity to discuss the foregoing with you in further detail. If you have any questions or require further information, please do not hesitate to contact the undersigned.

Sincerely,

"George Lewis"

George Lewis
Group Head, Wealth Management & Insurance

"David McKay"

David McKay
Group Head, Personal & Commercial Banking

cc. David Agnew, Chief Executive Officer, RBC Dominion Securities Inc.
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