

VIA EMAIL

February 22, 2013

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  
Registrar of Securities, Yukon Territory  
Registrar of Securities, Nunavut

Delivered to:

The Secretary  
Ontario Securities Commission  
20 Queen Street West  
19th Floor, Box 55  
Toronto, ON M5H 3S8

comments@osc.gov.on.ca

Anne-Marie Beaudoin  
Directrice du secrétariat  
Autorité des marchés financiers  
800, square Victoria, 22e étage  
C.P. 246, tour de la Bourse  
Montreal, Quebec, H4Z 1G3  
[consultation-en-cours@lautorite.qc.ca](mailto:consultation-en-cours@lautorite.qc.ca)

Dear Sirs/Mesdames:

**RE: CSA 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* – Comments from RESPDAC Members**

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The members of the RESP Dealers Association of Canada (RESPDAC) are pleased to provide the Canadian Securities Administrators (CSA) with this letter commenting on the above-noted Consultation Paper, which was published for comment on October 25, 2012. We appreciate being able to comment on the proposals, and wish to commend the CSA for providing an additionally long comment period which allowed our member companies to consider these proposals with the care necessary to provide meaningful feedback.

***Background – RESPDAC’s Mission and Achievements***

The members of RESPDAC are C.S.T. Consultants Inc., Global RESP Corporation, Knowledge First Financial Inc., Heritage Education Funds Inc. and Universitas Management Inc. All RESPDAC members are registered as scholarship plan dealers with their principal regulator, as well as with the securities regulators in other applicable provinces and territories. Each RESPDAC member, in its capacity as a registered scholarship plan dealer, retains, as agents, hundreds of individuals who are registered as scholarship plan dealing representatives<sup>1</sup> in the provinces and territories where such individuals operate. Each RESPDAC member<sup>2</sup> also manages and administers, as a registered investment fund manager, specific group and individual registered education savings plans (collectively, RESPs), which are known to the CSA as “scholarship plans”. It is important to note that each RESPDAC member and its dealing representatives are only authorized to distribute the specific RESPs that are managed and administered by the particular RESPDAC member (or affiliate). The registration of each RESPDAC member, and each dealing representative only permits these firms and individuals to distribute the specific RESPs indicated.

The focus of RESPDAC, since its establishment in 2000, has been to develop, maintain and enforce standards of professionalism and ethical conduct by all member companies and their employees and representatives. Among other things, RESPDAC’s mission is to ensure cooperative relations among member companies, with the ultimate goal of serving the needs of subscribers first and foremost, and maintaining the high standards of the group RESP industry.

In the past few years, RESPDAC and its members have completed several initiatives designed to ensure that member companies and their representatives follow the highest standards that keep the best interests of planholders in the forefront of all dealings, including:

1. Since November 1, 2007, it has been a condition of membership in RESPDAC that members be participants in the dispute resolution service offered by the Ombudsman for Banking Services and Investments (OBSI). RESPDAC and each of its member companies<sup>3</sup> outlines on their respective websites what a planholder or prospective planholder should do if he or she has a complaint about the services offered by a particular RESPDAC member firm or its dealing representatives, including the availability of the OBSI service if the planholder does not feel that the RESPDAC member firm has resolved the complaint to his or her satisfaction. RESPDAC’s initiative in this regard pre-dates the CSA’s proposals to mandate independent dispute resolution, which remain in development<sup>4</sup>.

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<sup>1</sup> RESPDAC estimates that there are close to 3,500 registered scholarship plan dealing representatives distributing the various group and individual RESPs in Canada.

<sup>2</sup> Global RESP Corporation distributes the RESPs managed and administered by an affiliate, which is registered as an investment fund manager.

<sup>3</sup> Universitas Management Inc. does not participate in OBSI at this time, given that it operates principally in Quebec and is therefore subject to the AMF’s dispute resolution service. Each of the other RESPDAC members also complies with the AMF’s requirements in respect of any Quebec-based complaints.

<sup>4</sup> Please see RESPDAC’s comment letter dated February 14, 2013 regarding the CSA’s proposals to mandate OBSI as the sole independent dispute resolution service for dealers and advisers.

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2. Finalized a new Code of Ethical Business Conduct (March 2010), which reflects member companies' joint commitment to ensuring that all companies within RESPDAC operate with the highest standards of integrity, cooperation and dedication to planholders and their families.
3. Provided extensive commentary (2010 and 2012) to the CSA on the CSA's recently completed rule amendments to require RESPs (scholarship plans) to provide a newly reformatted prospectus and Plan Summary to investors in RESPs. RESPDAC has long held that clear and concise disclosure is of utmost importance for planholders. Each RESPDAC member will be revising their prospectuses to comply with the new requirements during 2013 and generally will provide prospective planholders with the Plan Summary at the point of sale, which is a higher standard than required by securities regulation at this time.
4. Provided extensive commentary to the CSA on the CSA's amendments to National Instrument 31-103 to require that dealers, including scholarship plan dealers, provide prospective planholders with clear and concise "relationship disclosure" at account opening. RESPDAC members have been providing relationship disclosure information to new planholders since the effective date of this requirement (September 2010) and each existing planholder (as of that date) also received this same information.
5. Provided extensive commentary to the CSA on the CSA's proposed amendments to National Instrument 31-103 to require dealers, including scholarship plan dealers, to provide clients with specified mandated cost and performance disclosure. RESPDAC members consider that they are ahead of other facets of the dealing/brokerage industry in this regard, given the current standards for annual account statements and the information provided by RESPDAC members to their clients. In April 2011, RESPDAC members agreed on a standard for disclosure to clients on what clients could expect to receive (on maturity of their plan) from their RESP through a Code of Expected Future Benefits, which was provided to the CSA as part of RESPDAC's submissions on the cost and performance disclosure proposals. This Code was also reviewed (and favourably assessed) by the OSC's Investment Funds Branch. RESPDAC members have been complying with this Code since 2011.
6. RESPDAC members are also finalizing Guidelines for its members on compliance with "know-your-client" and suitability requirements in the context of RESPs, given the enhanced requirements set out in National Instrument 31-103, the CSA's compliance expectations and the specialized nature of RESPs as securities financial products. RESPDAC expects that it will finalize these Guidelines shortly, and each member company will work to implement the Guidelines during 2013.

***RESPDAC's Comments on a "Best Interest" Standard***

It is very difficult for RESPDAC members to meaningfully comment on the proposals made in the CSA's Consultation Paper, given the lack of specifics and the broad – often very legalistic - conceptual statements made in the Consultation Paper. RESPDAC strongly considers that it is impossible to articulate exactly what the "best interest" standard proposed by the CSA would mean for member companies and their dealing representatives and the Consultation Paper provides no concrete explanations on this point. This issue is particularly acute, given that member companies have been focused on enhancing existing standards and implementing policies and procedures to comply with new regulatory requirements, including those described above, and quite apart from the discussion in the Consultation Paper, do not understand the need for any new standard.

We note that in recent years, there have been many new regulatory requirements that apply to RESPs, their managers or distributors, including NI 81-106, NI 81-107, NI 31-103 (various amendments of same) and NI 41-101. All of these regulatory requirements are, at their root, aimed at ensuring enhanced investor protection for investors in RESPs. The CSA's most recent proposals for a "best interest" standard as encapsulated by the Consultation Paper cannot be reviewed in a vacuum, and must be considered in light of the entire body of regulation that applies to RESPs, their managers and distributors. It is only when the entire body of regulation is reviewed, that one can ask "*what more should be done*", along with an appropriate articulation of "*why*" this "*something more*" is necessary in order to better protect investors. RESPDAC does not consider that the CSA have answered this fundamental question in a way that would enable RESPDAC members to adequately respond to the questions posed in the Consultation Paper.

Notwithstanding RESPDAC's overriding concerns about the aims of the Consultation Paper, RESPDAC members have carefully reviewed the five articulated concerns (outlined starting on page 35 of the Consultation Paper) to determine whether these concerns in the context of RESPs could conceivably explain why a new "best interests" standard for scholarship plan dealers and their dealing representatives was necessary. Our member companies' views on these concerns are outlined below.

**Concern 1: Lack of Principled Foundation**

RESPDAC members fundamentally disagree that there is a lack of a "principled" foundation for the current standard of conduct for scholarship plan dealers and their representatives. The existing standard consists of a combination of:

- (a) Clear disclosure – both of product and of relationship – and both at point of sale and on a continuous basis
- (b) Proficiency standards for dealing representatives, branch managers and the CCO of the firm
- (c) Standards of conduct and business for both the firms and the dealing representatives, including KYC, suitability and compliance systems

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- (d) Duty of conduct – to act fairly, honestly and in good faith with subscribers, coupled with the aforementioned standards of conduct and business
- (e) Regulation of the RESP (as an investment fund) and its management.

We do not fundamentally disagree with the points listed by the CSA under this concern describing why investing in securities is not just like any business interaction or transaction. RESPDAC members understand the differences articulated by the CSA and the importance that their subscribers place in their decision to invest for their children's education through setting up an RESP with one of the member firms. RESPDAC members do not consider, however, that these points are sufficient backing to say that the current regulatory regime does not have a "principled foundation" and therefore more must be done.

### **Concern 2: Information and financial literacy asymmetry**

RESPDAC members consider that clear and concise disclosure, coupled with the aforementioned standards and duties of firms and dealing representatives, are sufficient to deal with this concern. Even assuming we agree with the tenor of the Consultation Paper that most investors simply are not financially literate enough to understand most disclosure, which we find unsupportable in our experience with our subscribers, it is impossible to say what a "best interests" standard would do to further resolve this.

It is also far too soon to say that the long and arduous course taken by the CSA to change RESP disclosure does not work for subscribers, given that the new prospectus rule doesn't come into force until later this year and relationship disclosure has been given to subscribers only since September 2010. RESPDAC members will be complying with the prospectus disclosure rule during 2013, although they continue to have concerns about the length and complexity of the required disclosure.

### **Concern 3: Standard of conduct expectation gap**

RESPDAC members consider that subscribers expect their dealing representatives to act fairly, honestly and in good faith, and to bring to their attention all material elements of their investment. RESPDAC members also consider that they and their dealing representatives meet this standard, particularly when the mandatory disclosure required to be provided to new clients is taken into account. Neither RESPDAC nor the CSA has canvassed subscribers in RESPs, so it is speculation at best to state with any degree of certainty what more subscribers want or expect. But RESPDAC considers that its members' position on the expectations of subscribers to be as equally valid as the CSA's on this point. RESPDAC considers the CSA has not made a case for an "expectation gap" – particularly as it relates to subscribers in RESPs.

We also are very concerned with the notion expressed in the Consultation Paper that a subscriber would expect that his or her relationship with a particular scholarship plan dealer and his or her dealing representative to be a fiduciary relationship, giving rise to a common law duty of a fiduciary. In the context of RESPDAC member companies, we expect that this would be a very rare expectation at best. RESPDAC member companies consider that their investors understand the relationship with the firms and dealing representatives, particularly given the relationship disclosure provided to subscribers.

**Concern 4: Recommendation of suitable investments versus investments in the client's best interest**

As noted previously, RESPDAC members can only recommend their own specific product. The concept of making suitable recommendations on the type of RESP, as well as the recommended financial contribution, applies today, but this is not to say that dealing representatives are making recommendations that are somehow not in the best interests of subscribers. Subscribers generally want to save for their children's education, so approach one of the RESPDAC members for advice and recommendations. The RESPDAC members and their dealing representatives work hard to meet subscribers' expectations and to allow them to save – and in so doing, to qualify for the various government grants for education savings that are available.

The CSA appear to equate making recommendations about a single investment product (that is, a specific RESP distributed by a scholarship plan dealer) to mean that the dealer and its dealing representatives can never have the best interests of planholders in mind. We consider this to be an unsupportable statement and underlying concept, and strongly disagree with this premise.

**Concern 5: The application in practice of the current conflicts of interest rules might be less effective than intended**

The examples provided in the Consultation Paper of why the CSA has a concern about its approach to conflicts of interest (and how the rules are complied with) do not apply to the member companies of RESPDAC. Not only is there clear disclosure of any conflicts of interest – the conflicts of interest inherent in managing the RESPs are considered by the independent review committee of the RESPs as mandated by NI 81-107. Unlike mutual funds, the compensation paid to dealing representatives is clearly paid by the subscribers to the dealer firms and is agreed to by the subscriber at point of sale. The dealer firms then pay over a portion of the commission to the dealing representatives<sup>5</sup>.

There is no notion of “embedded compensation” for RESPs in the way there is for mutual funds where trailer fees are paid by fund managers to dealers.

In addition, as noted above, we fail to understand why the CSA suggest that it is somehow “wrong” for dealers and dealing representatives to trade in only proprietary products, particularly, as is the case for scholarship plan dealers, investors understand that their dealing representative only represents a single product provider (the RESPDAC member). It should not be the role of the registered dealer firm or its dealing representatives to suggest to a prospective client that the RESP may not be “best” for the client and the client should go elsewhere to save for their children's education.

***RESPDAC Overriding Support for Regulation***

RESPDAC member companies completely support a strong regulatory regime that seeks to ensure that investors make informed investment decisions about their options to save for their

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<sup>5</sup> RESPDAC member companies may pay over differing amounts of compensation to dealing representatives depending on the type of RESP that is being distributed to the client. RESPDAC notes that each member company may have a different compensation model vis a vis its dealing representatives.

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children’s education through one of the member firms, with the advice of educated, fair and honest dealing representatives who keep the investors’ best interests in mind. As we have noted earlier in this letter, RESPDAC and the member companies have worked hard to ensure that the CSA regulation achieves this objective – and does not result in overly complex and duplicative information being provided to investors. RESPDAC member companies have also worked hard to implement the many new and enhanced compliance obligations that have been disseminated by the CSA over the past few years.

RESPDAC considers that the current regulatory regime described in this letter – enhanced through the standards agreed to by RESPDAC members -- works well for investors in RESPs. The potential imposition of a “best interests” regulatory standard for dealing representatives and member firms, will introduce a completely unknown and unknowable standard – with potential for unintended consequences resulting from the increased costs, the unknowable compliance standards and the threat of litigation resulting from the new unknowable standard. The most drastic unintended consequence of all may be the slow withdrawal from the marketplace of investment opportunities for retail investors who seek alternatives for investing for their children’s education through RESPs. RESPDAC does not consider this to be an optimal result for investors.

In conclusion, RESPDAC urges the CSA to recognize that many Canadians have chosen as a career to become dealing representatives – not just of its member companies, but of mutual fund dealers and investment dealers. These individual dealing representatives do, on the whole, provide a valuable service to investors, through providing educated and proficient financial advice and encouraging investors to plan for their children’s education (through member firms) and for their retirement (through other dealers), as well as achieve other financial goals. These individuals, just like any other profession or vocation are providing a valuable service in exchange for compensation. In the case of RESPDAC members, the scholarship plan dealing representatives are paid by their dealers, through receipt of the commissions that are paid directly by planholders. Obviously, there is nothing wrong with receiving compensation for service and we urge the CSA to acknowledge the fact that dealing representatives, just like individuals in any other profession or vocation, need to earn a living commensurate with their services and do so through receipt of commissions. In our view, the focus of the CSA and the regulatory regime should be to enhance investors’ understanding of this concept – and to reinforce the fact that dealing representatives and dealers do not somehow provide a “free” financial advisory service to investors. We highlight this issue because of its ultimate importance to dealing representatives and dealers - and ultimately to investors – and also because the Consultation Paper does not discuss this very basic threshold issue.



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Thank you for considering our comments. Please contact James Deeks, RESPDAC's Executive Director, at 416-689-8421 or [jdeeks@primarycounsel.com](mailto:jdeeks@primarycounsel.com) if you have any questions about our comments or you would like to meet with our members to discuss them. We would be very interested in participating in any round table discussions that may be set up by the CSA on the issues outlined in the Consultation Paper and hope that you will contact our Executive Director to ensure adequate representation from RESPDAC members.

Yours very truly,



Peter Lewis  
Chair



James Deeks  
Executive Director