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Financial Planning Standards Council

Submission on CSA's 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*

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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;
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Dear Ms. Beadoin and Mr. Stevenson:

Financial Planning Standards Council (FPSC[®]) is pleased to provide comments on the CSA's 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*.

FPSC offers a unique voice to this dialogue as a national not-for-profit organization whose prime purpose is to represent the Canadian public interest by establishing, enforcing and promoting appropriately high standards for certification of financial planners.



Since 1995, FPSC has been certifying financial planners against our established standards of competence, ethics and performance to ensure those certified by us provide ethical, competent financial planning advice to Canadians. Over the past 15 years we have developed, executed and refined a rigorous certification program for financial planners based on the standards that we have set, through consultation with Canadians, industry, educators and financial planners themselves.

We continue to develop and enforce standards for the financial planning profession through our multi-tiered CERTIFIED FINANCIAL PLANNER[®]/CFP[®] certification program. Our program includes:

- An extensive, comprehensive educational requirement administered independently by over 30 public- and private-sector institutions across Canada;
- Two levels of national standardized examinations administered by FPSC;
- The completion of a comprehensive financial plan through a Capstone Course requirement (established by FPSC and delivered in partnership with the academic community);
- A three year practical work experience requirement; and
- Required adherence to a rigorous set of *Standards of Professional Responsibility*, which includes a Code of Ethics, Rules of Conduct, Standards of Practice and Fitness Standards.

Currently, there are over 17,500 CFP professionals in good standing with FPSC, in every province and territory across Canada.

Executive Summary

FPSC shares the investor protection concerns raised in your consultation paper. We agree that the current suitability standard related to the recommendation of investment products does not, in many cases, adequately serve consumers who are truly seeking unbiased, independent financial advice. We support the need to raise the standard of care and loyalty that advisers owe to their clients. We believe that such standards should be clearly defined as “best interest” standards rather than defining a judicially interpreted fiduciary relationship.

We believe however, that there is also a more significant, fundamental issue that is not addressed in the consultation paper, but that lies at the heart of the consumer protection issue. In our opinion, there is tremendous confusion amongst consumers, not only over the duty of care or loyalty owed by their advisers and/or dealers, but over expectations of what constitutes “financial advice” and what consumers can or should expect in the



way of advice from so-called financial advisers. In fact, under the current regulatory system in Canada, only product-related advice (i.e. advice related to specific transactions) is regulated at all. It is our view, a view shared by many consumers, that as a result of the misalignment of expectations between advisers and clients, and based on the true advisory needs of Canadians, that financial advice goes well beyond the question of “What product should I buy?”

Without due consideration to an individual’s financial situation, such as any or all of retirement, estate, childrens’ education, other short- or medium- term needs, or income tax issues, for example, the question of whether any specific investment advice in isolation is truly in the client’s best interest can never be certain, no matter how sound the investment recommendations.

We urge the CSA to consider our assertion that all who claim to offer the service of ‘financial advice’, or those calling themselves “financial advisers” or “financial planners” should not only be held to a best interest standard, but they should also be required to demonstrate their capacity to provide financial advice.

These requirements must include clearly defined, common standards of performance so that Canadians can have confidence that their advisers are truly competent to act in their best interest. This will necessitate continuing education and ongoing professional development in order to achieve, maintain and further develop appropriate competency levels. Further, the qualifications and expertise of those individuals claiming to provide financial advice to clients, outside of pure product recommendations, should be reflected in the titles they are permitted to use, such as “financial planner” or “financial adviser” or similar such titles. Those who have not demonstrated sufficient competence should be barred from using such titles.

Finally, we believe the best way to protect Canadians is to enact a professional oversight mechanism which would defer oversight of financial planning or non-product specific financial advice to those expert in such areas. This body should also be charged with setting and clearly defining competencies and performance expectations of individuals providing financial advice. This will not only help to distinguish the services offered but will also serve to clarify the corresponding duty of care and loyalty of individual advisers, planners or dealers to their clients.

We are pleased to provide the following specific comments regarding the development of a best interest standard that would address the appropriate conduct and care for all advisers and dealers providing financial advice to retail clients.



Our comments can be summed up in four sets of recommendations:

1. Raise the standard for financial advisers and financial planners and clearly define what it means to be acting in the client’s “best interest.”

We believe that the current “suitability” standard does not sufficiently protect consumers.

While FPSC supports a higher standard of care for those providing financial advice, we do not support calling that higher duty a “fiduciary duty” in regulation. It is our view that the determination as to whether or not a fiduciary relationship exists is based on the facts of each specific client-adviser relationship.

A fiduciary relationship exists where a client is seen as placing full implicit trust in the adviser, and where the client relies solely on the advice provided in making their investment decision. We believe that many client-adviser relationships fall between the extremes of order-execution directives which are clearly not fiduciary in nature, and the offering of discretionary accounts, which clearly are fiduciary relationships. By imposing the notion that all advisers and dealers are fiduciaries, the CSA may not be accurately reflecting the realities of many client-adviser engagements.

Existing case law and legal precedents have been used to establish and test whether the relationship between a particular adviser/dealer and a client constitute a fiduciary relationship. This determination is based on the pertinent facts of the case, including the vulnerability of the client, the degree of trust which is placed in the dealer or adviser, the extent to which the client may have relied on the advice provided, the discretion of the adviser and the professional rules or codes of conduct to which the adviser or dealer is held to.

That said, while we do not agree with the notion of imposing a fiduciary relationship on all advisers/dealers, we do agree that any adviser/dealer who claims to offer financial advice should be held accountable to a so-called best interest standard that would be clearly defined, and based on the same principles as the duty of care that a fiduciary would owe. That is, we believe that it is appropriate to refer to a “best interest standard”, which is clearly defined and incorporates the following five principles:

Always:

- Put the client’s best interest first;
- Act with the skill, care, diligence and good judgment of a professional;
- Provide full and fair disclosure of all important facts;
- Avoid conflicts of interest; and
- Fully disclose and fairly manage – always in the client’s favour – unavoidable conflicts.



In fact, FPSC currently requires that all individuals holding CFP certification meet this level of duty, as defined in the *Standards of Professional Responsibility for CFP® Professionals and FPSC® Registered Candidates*. It is our opinion that these tenets should apply not only to CFP professionals, but to all individuals holding themselves out as offering unbiased financial advice or providing financial planning, and that these principles should be codified to clarify the responsibilities and obligations which all advisers or planners should owe to a client.

Further, we recommend that if there are to be individuals, such as mutual fund salespeople, who are not held to a best interest standard, they be required to fully disclose that they are not held to a best interest standard and that they should be prohibited from holding themselves out as planners or advisers, or in any other way that may be misleading to a client.

2. Define roles, clarify competencies, and level the playing field related to service and advice expectations.

Canadians should be able to implicitly know, based on the title of their representative, the service offered and the duty of care and loyalty expected.

Opticians, optometrists and ophthalmologists all deal with the care of individual's eyes. While some of the services and competencies that they offer may overlap, there are clearly defined and distinct roles for each. There are specific rules regarding what services they may hold themselves out as offering, and the required duty of care is clearly spelled out for each. That is, consumers know that, while an optician is there to sell glasses, and may not be acting in their best interest during this transaction, the optician may still be providing some added value to the purchase decision. At the other extreme, consumers know that they should be able to implicitly trust the advice of their ophthalmologist related to the care of their eyes.

Similar clarity of definitions and competencies exist for most every other industry and/or profession (lawyer/paralegal/law clerk, as another example). If we are to truly address the consumer protection problem, a similar clarifying of roles and competencies is sorely needed within the financial services industry. By simply instituting an overarching "best interest" standard in the absence of role delineation, definition and the laying out of required competencies, the intended consumer protection objectives will not be fully realized.

While a best interest standard of care is appropriate for those holding themselves out as advisers and for those providing or claiming to provide financial advice to clients, it must be noted that many dealers or financial services representatives are neither qualified to, nor do they truly offer, advice that one would consider independent professional financial advice, but instead they offer advice solely related to a product transaction.



The fact remains that securities regulators regulate transactions, and not necessarily the advice that may have led to the transaction. In most circumstances it would be impossible for an “adviser” to provide advice “in the client’s best interest” without the knowledge, skills and abilities to understand more than what is currently required under the product-based regulatory regime that exists today.

This point is best illustrated in the following examples:

Example 1

A client is advised by her adviser to take the commuted value of her indexed defined benefit pension and reinvest the assets into securities, for which the adviser will receive fees or commissions. The advice to take the commuted value was not in the best interest of the client, as she was only two years away from an unreduced pension, however, the resulting investment recommendations were made in good faith and represented the best investments for the client. The products met the client’s risk profile, were in line with her long-term investing objectives, had low MERs and appeared to be the best ones for the client in the circumstances.

In this case, in the absence of defined competencies, roles, responsibilities and performance expectations of the so-called adviser related to the broader “financial advice” or “financial planning”, it is likely that this adviser would meet a “best interest” standard related to the transactions being regulated even though the original advice was actually biased and not in the best interest of the client.

Example 2

Many low and middle income Canadians are encouraged to contribute to an RRSP, often with the assistance of an RRSP loan. While the investment recommendations related to the RRSP’s may in fact be the “best investments” for the client in the circumstances, the advice that lead the client to make an investment in the first place frequently are not.

These and other common practices in the industry demonstrate that often the true value of advice lies not in the products being recommended but the broader non-product related financial advice being offered. The advice provided regarding critical questions such as “Should I invest in an RRSP or a TFSA?”, “Should I take the commuted value of my pension or a deferred pension?”, or “Should I borrow to make an RRSP contribution?”, can have significantly greater impact on the future financial well-being of

a client than the question of whether a particular product was or was not the right or “best” investment.

In our view, simply imposing a higher standard will have no positive impact without:

- A clear understanding of expectations as to what in fact we mean by the client’s best interest; and
- A distinction between the narrow form of advice related to selecting a product that may be the “best product” for the client, and the broader, unbiased, independent, non-product-based advice.

3. Restrict the use of titles based on roles and required competencies.

Without restricting the use of titles based on clearly defined roles, confusion and misalignment of expectations will continue to pervade the industry.

FPSC recognizes that many consumers are confused regarding the advice they can expect from their adviser/dealer or planner. Consumers are at risk because there are no safeguards to hold those who claim to be financial planners or financial advisers accountable for the corresponding service they purport to provide.

This problem is exacerbated by an alarming trend within the industry where it has now become common to claim to offer financial advice or financial planning as a marketing tool to attract investors when the primary purpose of the relationship is to sell products.

According to a recent study by the Investor Education Fund cited in the CSA’s consultation paper, of those who do seek out financial advice, two out of three respondents know little about their financial adviser when they enter the relationship. Further, 60% have never done any form of background check on their adviser, including looking for a history of disciplinary actions or looking up the adviser’s qualifications.

Choosing the proper financial practitioner remains a daunting task for many Canadians. They are further disadvantaged when seeking out financial advice given that titles used by advisers and dealers are not restricted and often do not reflect the competencies or primary function or the role. While imposing a “best interest standard” on all so-called advisers and dealers sets a higher expectation of conduct, it does not address the real disconnect between titles used and the corresponding service offered, nor does it address the tremendous amount of consumer confusion regarding what exactly the adviser can or should be expected to do for them.

Titles such as ‘financial planner’ or even ‘financial adviser’ imply to consumers a higher degree of expertise than the limited knowledge, skills and abilities currently required



under the product-based regulatory regime. Other than in Quebec however, there are no restrictions on the use of titles.

To ensure Canadians receive the scope, level and quality of advice they deserve, the use of ‘financial adviser’, ‘financial planner’ and any related such titles should be restricted to individuals who have met accepted standards, which include clearly defined competencies, skills, qualifications and resulting certifications or designations.

4. Leave regulation of product-independent advice/advisers/planners to a professional oversight body, or bodies, in partnership with product/capital markets regulators.

It is critical that any regulation or oversight of financial advice be undertaken by those expert in the advice being regulated.

Today, financial advice is being more equated with financial planning advice than it is investment product advice. While there remain challenges with the model used in Quebec, in our opinion a model where titles “financial planner”, “financial adviser” or similar are restricted to those holding (an) appropriate designation(s) and are overseen by a professional oversight body is most appropriate to ensure consumer protection.

The current regulatory environment leaves consumers without any protection regarding advice that is independent of the products being purchased. As such, CSA members should work in partnership with organizations such as FPSC, who have proven expertise in setting standards, certifying against those standards and holding people accountable to the standards as they relate to financial planning. By working with an independent non-profit, consumer-focused organization such as FPSC to establish the requirements and monitor the conduct of those providing financial advice (outside of the scope of product-based advice) to retail clients, together we will be able to ensure that Canadians truly receive the protections they deserve.

In Summary

FPSC agrees with the investor protection concerns raised in the CSA consultation paper. We support the introduction of a higher duty of care for all advisers and dealers, but this higher duty of care must be clearly defined and understood, and must be established as part of a larger effort to ensure a clear distinction between the roles, responsibilities and corresponding competencies of the various providers of various services within the financial services industry. Further, in our opinion the appropriate standard of care for those who claim to offer advisory services or offer financial planning should be a best-interest standard that recognizes the asymmetrical relationship between the adviser and the client.



To avoid consumer confusion, such distinctions must be established through the restricted use of titles or holding out provisions, and regulation of such titles should be left to a professional oversight body, or bodies, expert in defining competencies and performance expectations and in overseeing the individuals who provide or claim to provide such service.

We appreciate the opportunity to present our comments and insights on this very important consultation paper. We look forward to working with the CSA members to build a framework that better addresses the key investor protection concerns raised in the paper and one that provides the proper safeguards for Canadians seeking all forms of financial advice.

For further reading:

Requirements to Earn CFP® Certification

Requirements to Maintain CFP® Certification

Standards of Professional Responsibility for CFP® Professionals and FPSC® Registered Candidates

CFP® Professional Competency Profile

