CANADIAN BANKERS ASSOCIATION

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Mr. John Stevenson
Secretary
Ontario Securities Commission
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Email: jstevenson@osc.gov.on.ca

Dear Mr. Stevenson:

RE: Fair Dealing Model Concept Paper

The Canadian Bankers Association appreciates this opportunity to comment on the *Fair Dealing Model* ("FDM") Concept Paper.

At the outset, it is important to voice the CBA's support for the principles underlying the FDM concept. We support initiatives aimed at clarifying the respective obligations of advisers and their clients, improving the disclosure of conflicts and improving investor decision-making generally. These principles are important to our members.

But, we wonder whether the Concept Paper presents a convincing case that the current model is unfair to clients, or that it is so flawed that it must be replaced by the FDM. Are client-adviser relationships so deficient in terms of "fair dealing" that they require extensive remodelling? We believe that the case has not been made.

This having been noted, we believe that there are many areas where improvements could be made and we would be delighted to work with the OSC in achieving meaningful progress in identified areas.

Comments

Our comments about the FDM outlined in the Concept Paper are as follows:

"Fair dealing"

That we remain unconvinced about the need for extensive change prompts us, at the beginning, to express discomfort about the title that has been used for this Concept Paper. We are concerned that the name of this initiative could be interpreted by itself as a rebuke to the industry, on the basis that it could imply that the industry's existing business model lacks "fair dealing". There are areas, to be sure, where improvements could be made, but this should not detract from the generally sound footing upon which the client-adviser relationship is currently regulated.

Does the OSC have the authority to act on its own initiative?

Before considering the substance of the FDM concept, we also wonder whether it is properly within the mandate of securities regulators, on their own initiative and without express legislative authority, to revamp a broad range of existing commercial arrangements. The question, in our mind, is not whether the FDM would bring about the improvement of existing arrangements. The threshold question that should be asked is whether it is at all appropriate for the regulators to put forward proposals to intervene in such a far-reaching and intrusive way (and to put the industry to the considerable trouble and expense of responding), in the absence of express direction from the Legislature and without compelling evidence that the existing model has failed.

Advice-giving is already regulated

The FDM is premised on replacing a "product-based model" with an advice-based regulatory model, and its proponents suggest that part of the impetus for moving forward with the FDM concept is that it would replace a regulatory approach that no longer suits commercial realities. In our view, this fails to recognize that the industry already is subject to an advice-based regulatory model, based on the application of the "suitability rule" of the Investment Dealers Association and the Mutual Fund Dealers Association.

In our view, a new advice-based approach is not needed to replace the existing one. Rather, to the extent that the existing model is in need of improvement, such as possibly with regard to the disclosure of compensation, the identification of potential conflicts and improved communication with clients, regulators should work with the industry to make real progress.

Understanding the advisory relationship

The FDM would impose extensive obligations on advisers to educate clients with whom they are in an advisory relationship, both at the time of account opening and when investment decisions are being considered. The obligations underlying the FDM, however, appear to be largely one-sided, in the sense that they impose obligations upon the adviser and do not emphasize the client's responsibilities in the relationship such as to review the information provided to them, to inform themselves independently of the advisory relationship and to ask questions and carefully consider their investment decisions.

The FDM, we believe, fails to distinguish between types of advisory relationships and it appears to us that the FDM would apply a "one size fits all" solution to a wide range of advisory relationships. Thus, the same model would be applied to the client who is looking for advice on a $2,000 GIC or bond fund investment as it does to a sophisticated institutional client. Surely the same model should not apply in all circumstances.

Guiding principles

We also believe that the FDM is too prescriptive. It attempts to be far too explicit in setting out what should be required. In our view, given the diversity within the industry and the possible range of relationships, regulators should develop and articulate clear standards and principles. Regulators should, in our view, not attempt to develop detailed rules that would have to be complied with in a variety of circumstances, and would inevitably lack flexibility. Rather, it is our view that regulation should articulate the standard that ought to be met, but not how that should be done.

Does more disclosure mean a better educated client?

Securities regulators and the securities industry are adept at generating disclosure rules aimed at informing clients about rights, obligations, products, conflicts and risks. The amount of disclosure continues to grow, but we wonder about the effectiveness of the disclosure, in terms of whether it is being read and understood.

We also note that the obligations to inform, educate, disclose and to ensure suitability increasingly carry liability risks for advice providers. Thus, a largely one-sided obligation on an adviser to ensure that a client is appropriately informed about investment products, both at the time of account opening and when new investments are being considered, creates liability risks and costs for the adviser. It also is questionable whether clients, in a wide range of likely circumstances – from clients seeking advice whether to buy a GIC or invest in a mutual fund to highly sophisticated clients - would be at all receptive to suggestions to view educational videos or to read brochures.

All things considered, therefore, we believe that the FDM should put more of a focus on the responsibilities of clients in an advisory relationship and should address the responsibility of clients to assimilate the disclosure and information that is provided to them and to ask questions.

Costs, regulatory burdens, competitiveness and the possible impact on small retail clients

We are, moreover, concerned that the FDM, if implemented, would almost certainly add to the cost of providing advisory services in Ontario. The competitiveness of firms offering advisory services, compared to other intermediaries, could thus suffer. In addition, the fees and charges borne by clients could increase and ironically, this could mean that the very persons who are least experienced and most in need of assistance on investment matters (i.e. those with small portfolios and limited resources) could be deprived of access to advisory services since advisers could find it difficult to continue providing advice to them.

We believe that the OSC also needs to consider the implications, for national institutions, of implementing the FDM concept in Ontario only. The implementation of the FDM in Ontario, in our mind, would highlight the inefficiencies that arise in a decentralized regulatory environment. The securities intermediaries that are affiliated with member banks operate across the country and generally aim to offer the same products in all provinces and territories. They try to deliver investment products and to serve clients in a consistent fashion across the country. If these firms were required to abide by the FDM in Ontario, it is likely that they would do so in other provinces as well and this would place firms that operate throughout Canada at a competitive disadvantage, relative to firms in those other jurisdictions that are not subject to the FDM.

The devil is in the details

Finally, we note interested stakeholders are being asked to comment on a far-reaching concept, the details of which remain to be worked out. The devil is in the details as far as the FDM is concerned and we would, therefore, welcome the opportunity to have further input as more information about the FDM is known.

What should be done?

In closing, our members certainly endorse the purposes of the FDM, but we do wonder whether the FDM is the appropriate way to proceed.

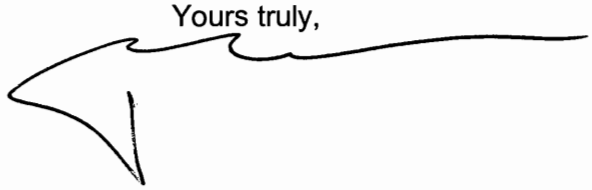
We believe that meaningful improvements to industry practices could be achieved without resorting to an extensive overhaul of the regulatory framework governing advisory relationships. A focus, for example, could be put on the following initiatives to improve the regulatory framework without "re-inventing the wheel":

- Development of improved, standardised disclosure concerning conflicts and dealer compensation, and the nature of arrangements between dealer and client;
- Improved account-opening procedures and related disclosure;
- Consolidation of the forms of mandatory disclosure; and
- Making clients responsible for assimilating the disclosure that is made available to them, and for asking pertinent questions.

We would be delighted to work with OSC staff in pursuing these alternative approaches to improving the client-adviser relationship.

We have appreciated the opportunity to express our comments about the *Fair Dealing Model* Concept Paper, intended as they have been to be taken in a constructive way. We would be pleased to answer any questions that you may have about our comments and would certainly welcome the opportunity to work with the OSC on alternative ways to reaching our mutual goals.

Yours truly,



WL/DI:sh