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Alberta Securities Commission
Autorité des marchés financiers
British Columbia Securities Commission
The Manitoba Securities Commission
Financial and Consumer Services Commission (New Brunswick)
Nova Scotia Securities Commission
Ontario Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan

Dear sirs/mesdames,

Re: Canadian Securities Administrators Consultation Paper 33-404 - Proposals to Enhance the Obligations of Advisers, Dealers, and Representatives Toward Their Clients (the "Proposal")

I am pleased to submit my comments on the Proposal.

The Proposal is an important investor protection initiative. It is a proposal that has the potential to substantially improve the relationship between investors and the registrants who provide them financial advice. If adopted, the proposals will contribute to the protection of investors from unfair, improper or fraudulent behaviour. Accordingly, the Proposal engages the core objectives of securities regulation.

IMPORTANT THRESHOLD CONSIDERATIONS

Let me begin by discussing a number of important threshold issues and considerations relevant to implementation of the Proposal.

Reliance By Retail Investors on Advice

It is important to recognize as a threshold matter, that there is a significant and inherent inequality in the relationship between most retail investors (by which I generally mean individual investors) and the registrants providing them securities investment advice. It is not just that many retail investors are unsophisticated in securities matters and may need assistance in deciding how to invest their money. Retail investors rely substantially on the advice they receive from securities advisers for a myriad of good reasons. Securities advisors are full time industry participants whose job it is to know and understand securities markets and to give informed advice. Depending on the nature of their roles, many of them understand the securities (and their attributes) being traded or issued to investors, current market developments and trends, the risk profiles of issuers and the securities being offered, analyst recommendations, the relative financial and business strengths of various issuers, the performance of equity markets relative to fixed income markets, risks and the appropriate diversification of an investment portfolio, the fees paid to compensate advisors and the conflicts of interest an advisor may have in performing that role. Accordingly, there are often very substantial knowledge, informational and financial literacy asymmetries between retail clients and their advisors.

Accordingly, it is eminently reasonable for a retail investor to rely heavily on the securities advice they receive from a registrants. An investor would not look for advice from anyone unless they trusted them and had a high degree of confidence in their knowledge, experience and ability to give relevant advice.

I note in passing that the National Smarter Investor Study referred to in the Proposal showed that 90% of respondents described their existing level of trust in their securities advisor as strong or very strong.

In any event, it is the inequality in the relationship between an investor and their advisor that makes it essential that the advisor have an obligation to act in the client's best interest.   I would add that it is this inequality and the need for implicit trust in an adviser that is the hallmark of a fiduciary duty at common law. I recognize that the Proposal is addressing a best interest standard of conduct and is not imposing a fiduciary duty per se. But the analogy is apt. It is right and proper that the superior person in such a relationship, that is, the person giving the advice, should have the obligation to act and advise in the more vulnerable person's best interest.

Securities are Sold Not Bought

This may be a good spot to make a slightly different but important point. Securities are sold, they are not bought. Let me repeat that. Particularly in the case of retail investors, securities are sold to them, they are not bought by them (meaning that the investor rarely identifies or initiates the purchase of a specific security; they follow the advice they receive). Fundamentally, most advisors are selling securities. That has important implications for the securities regulatory regime.

Effect of Mandated Disclosure

It follows that any mandated disclosure to retail investors is unlikely to change the core nature of the relationship between a retail investor and his or her adviser. Securities regulators may well express concern that the reliance by investors on advice is excessive or misplaced. There are, however, compelling reasons why retail investors place a very high degree of reliance on securities advice. That is not going to change as result of increased investor education, new disclosure requirements or any other regulatory action or initiative. This reliance is not misplaced by investors except in the sense and to the extent that advisors fail to meet an appropriate standard of conduct in providing them with advice.

Investors' Expectations

Surveys tell us that many retail investors believe that their securities advisors already have an obligation to act in their best interests. I submit that is a reasonable belief and expectation. How can an advisor purport to give securities advice to a retail investor and not have an obligation to advise in the client's best interest? In the real world, on what other basis would a reasonable investor believe that the advice was being given? I can well hear a retail investor (if he or she even understood the matter) saying, "I don't care what investments you think are suitable! I want to know what investment you recommend that I should buy (or sell or retain)"? Remember, securities are sold, not bought.

I note in this respect that registrants regularly market their services to retail investors on the basis that they understand the investor's personal goals and objectives and that they will provide personalized advice that will respond to and advance those goals and objectives. Accordingly, retail investors are often led to believe by their advisors themselves that the advisors are acting in their best interests.

The Defect in the Current Relationship

If no duty to act in a retail client's best interests is imposed on securities advisors consistent with investors' beliefs and expectations, the foundation of that relationship will continue to be based on misrepresentation, misunderstanding and falsity.

A Best Interest Standard of Conduct Should be Adopted

I believe that the reasons articulated in the Proposal for imposing a best interest standard on securities advisors are compelling and overwhelming. I won't repeat them here. I would simply add the following thoughts.

First, one of the targeted proposals is that a fiduciary duty be imposed on registrants who invest for fully managed accounts. I agree with that proposal given the high degree of authority and discretion on the part of the advisor. But in practice there is frequently little difference between making investment decisions for a fully managed account and giving investment advice to a retail client. Given the nature of the relationship between many advisers and their retail clients, the advisor frequently has very substantial influence over the ultimate investment decisions made by the client. Many advisors can convince their clients to buy almost any security. How can it be that an adviser's standard of conduct in these circumstances is lower than that of a registrant investing for a fully managed account? If a fiduciary duty is appropriate in the latter case, it is also appropriate in the former case.

I also note that baby boomers are starting to retire and one of the real challenges they face is on-going management of their investments to finance retirement over an extended period. As they age, baby boomers are going to become even more vulnerable and will need to rely even more heavily on the financial advice they receive from registrants.   Now is the time for securities regulators to ensure that the foundational standard of conduct underlying that advice and reliance is the best interests of the client.

Accordingly,I respectfully submit that any registrant who gives investment advice to a retail client should have an obligation to act in the client's best interests.

I comment further at the end of this submission (under "ARGUMENTS AGAINST A BEST INTEREST STANDARD") on some of the concerns identified in the Proposal against imposing a best interest standard on advisors. I also comment there on the flexibility and appropriateness of that standard of conduct.

A Duty of Care

I note that the Proposal defines the best interest standard as a "Duty of Care". That surprised me because I had expected that securities regulators were considering imposing a best interest standard that was akin to the duty of loyalty in a fiduciary relationship at common law (such as that of a director to a corporation). That is the duty to act in good faith and in the best interests of the recipient of the duty. In contrast, the duty of care is the duty to exercise the care, diligence and skill of a reasonably prudent person in comparable circumstances.

I note, however, that the Duty of Care as defined in the Proposal includes the duty to act "with care" and that the conduct expected is that of a prudent and unbiased firm or representative acting reasonably in the circumstances. Accordingly, I believe that the Proposal is imposing a new and fundamental duty of care on registrants. While I would support that, if a duty of care is to be imposed, I think that duty should be expressly imposed in the same way that the best interest standard is proposed to be implemented (and not be subsumed as simply an element of the Duty of Care as currently proposed).

In any event, I would simply say that my preference would be to define the best interest standard as a "Duty of Conduct". I believe that later in the Proposal, the best interest standard is discussed with that characterization. Calling a best interest standard a duty of care is at least a bit of a misdescription.

Disclosure as a Regulatory Tool

The targeted proposals impose on securities advisors a number of important new disclosure obligations. I favour ensuring meaningful disclosure to investors of important information (including information related to fees, registration restrictions and conflicts of interest). It is important that relevant information be available to retail investors even if it's not read or understood.

However, disclosure is often not an effective regulatory tool in protecting the interests of retail investors. In practice disclosure to investors is often contained in the extensive account opening documentation that investors don't read and don't particularly care about. They treat signing those documents (and the disclosure in them) as simply part of what they need to do to get the account they want opened, the advice they are looking for or the trade they want to make executed. And they rely most heavily on what the advisor communicates to them orally.

The Proposal states that disclosure to investors of conflicts of interest "is critical to their ability to make an informed decision" about engaging a registrant and managing and evaluating the relationship. While one may argue that statement is objectively true, retail investors most often don't understand the meaning or implications of that disclosure or simply don't believe that conflicts of interest are important to them. Retail investors trust their advisors and expect those advisors to do right by them. Disclosure to them of conflicts of interest tends simply to reinforce that belief. Securities regulators should recognize that disclosure in this area is not effective and should consider other regulatory mechanisms to address conflicts.

I would add as a general comment that if the targeted proposals require complicated information or complex disclosure to be made to retail investors, the eyes of those investors are simply going to glaze over.

The Suitability Obligation

I comment further below on the proposals related to suitability. Before doing so, I want to comment on one important aspect of them.

As I read the proposed changes to the suitability requirement, an obligation is being imposed on registrants to recommend products that are "most likely to achieve the needs and objectives" of the client. That seems to me to be very close to requiring that a registrant recommend the best products or securities available to obtain a client's financial objectives. That is too high a standard. I note that a best interest duty is for an advisor to act in a client's best interest but not that the advisor necessarily recommend the best products or securities.

I don't think that registrants should be put in the position of having to defend their investment recommendations as being the most likely to achieve a particular result. I recognize that the Proposal says that this formulation does not "necessarily mean that there is only one best strategy or product, as applicable, for the client". But that comment suggests that the targeted proposals would require a recommendation of the best strategy or product (even if there are other equally best strategies or products). There is professional judgement exercised by an advisor in recommending a particular securities product or strategy. If that judgement is exercised in good faith and the product or strategy is suitable, that advice shouldn't be able to be second guessed or challenged on the basis that it may not have been mostly likely to achieve a particular financial result for a client.

Approved Product Lists

The targeted proposals address in various ways proprietary versus non proprietary securities products. As a general proposition, I believe that securities regulators should be trying to encourage registrants to offer to their retail clients as wide a range of non proprietary securities products or securities as reasonably possible. I am concerned that regulators not hinder obtaining that objective by imposing on a registrant who offers such advice obligations that are too stringent. The bigger regulatory concern from an investor's perspective is that an advisor with a restricted proprietary product list may not be able to make suitable recommendations in the investor's best interest. Similarly, I don't think that securities regulators should require a registrant to have an approved product list if they otherwise wouldn't have one.

The provisions in the targeted proposals related to product lists is an area of regulation that seems more apt for registrants advising only in connection with investment fund securities. I don't see it as making sense for an investment dealer that is an IIROC member who offers investment advice for a wide range of securities. For instance, if I call my broker and want to buy 100 common shares of BCE, does my broker under the proposals have to be able to justify why he let me make that investment rather than an investment in common shares of Rogers or Telus or an investment in an equity ETF that tracks that industry segment? I am not sure how the proposals would apply in these circumstances. If an investment is otherwise suitable and the advisor has acted in the client's best interests, I do not believe that the advisor should have to justify why an investment was made in one security rather than another.

I assume that under the targeted proposals an advisor offering non proprietary products would not be treated as having a product list as broad as the range of securities the advisor is able to recommend (consisting of, for instance, all securities listed on the TSX or the NYSE).

As noted above, one of my concerns with the targeted proposals is that they may require my advisors to have a detailed discussion of my risk profile, investment objectives, asset allocation and personal circumstances every time I want to trade. If that is the case, I am eventually going to go elsewhere or invest through my on line account without advice. That is not necessarily a desirable outcome.

I recognize that some would say that I am a more sophisticated investor and may not be the kind of retail investor that the requirements are intended to protect. In response, I would say that I am not sophisticated. I am an informed investor who knows the right questions to ask but who also looks for and benefits from investment advice.

Further, the targeted proposals appear to apply the same rules and suitability responsibilities to all registrants giving advice in all circumstances. As noted above, I don't want my broker raising my risk profile, my asset allocation and my tax status every time I want to trade with his advice and input. (In fact, my personal circumstances are somewhat more complicated because I have two brokers and an on line trading account. Only I have detailed knowledge of all the securities I own, my overall asset allocation and my detailed tax status).

So, my bottom line concern is whether the targeted proposals should apply across the board in all circumstances and to all registrants who may be advising retail clients. My concern is that the targeted proposals don't adequately distinguish among all of the potential and relevant circumstances that may arise or apply. One of the real challenges in implementing the targeted proposals will be ensuring they have the flexibility to apply appropriately across a wide range of different circumstances.

Investor Responsibility

A retail investor should continue to have some significant responsibility in making investment decisions recommended by an advisor.

I believe, however, that an advisor should have threshold responsibility to raise and address relevant issues and engage on those issues with clients. But I don't see that as raising an unmanageable number of issues. It seems to me that there are really quite a finite number of issues that should be canvased depending on the circumstance. Some of those issues would include the client's overall financial resources, his or her stage in life, whether there may be high interest debt that should be paid off, risk tolerance, likely returns from different types of securities investments, appropriate asset allocation, whether investments are better made in a registered account and any tax consequences of a particular trade or investment. (I have not included in this list important disclosure obligations the advisor may have with respect matters such as fees and conflicts of interest.) At the same time an investor should continue have the responsibility to communicate relevant information to the advisor and some significant responsibility in making the actual investment decisions.

The Proposal seems to impose obligations on the assumption that a securities advisor is always responsible for overall financial planning and advice to clients. That will not always be the case, particularly where the investor is receiving relevant advice from others or where a one off transaction is involved. It seems to me that an informed retail investor should be able to tell an advisor that they want limited advice in a particular circumstance and that other issues may be left to the investor or other advisors. I think this is important in part because of the higher costs involved in providing overall financial planning advice and the higher costs of compliance by advisors with the much more extensive obligations that would be imposed under the targeted proposals.

OTHER COMMENTS ON THE PROPOSALS

Having made those opening comments, I will comment below on some of the specific issues raised by different elements of the Proposal. I don't intend to comment generally on all the matters in the Proposal that I agree with or that don't, in my view, raise significant issues. As a general comment, I would note that there are challenges in commenting thoughtfully on the proposals without knowing how all of the various issues might ultimately be addressed or resolved.

Note that the headings below are the corresponding headings in the Parts of the Proposal referred to.

Part 4 of the Proposal

Conflicts of Interest

I have commented above on disclosure as a mechanism to address conflicts of interest. Here I would simply say, I don't know how a registrant will be able to establish that they have a "reasonable basis for concluding that a retail client understands" conflict of interest disclosure. Consistent with my comments above, it is doubtful that many retail investors will understand conflicts of interest or that disclosure. And if that is the case, do the proposals then bar an advisor from giving advice to a client?

Know Your Client

There is some level of basic information that an advisor should have before they should be able to provide investment advice. But I don't think there should be an absolute obligation to collect all of the client information referred to in the targeted proposals particularly where the client isn't prepared to disclose it. For instance, I am not going to disclose to my broker detailed information with respect to all of the financial investments that I own and I am not going to provide my tax returns or detailed tax information.

On a different point, I am not certain how complicated it will be to develop a risk profile for clients as contemplated and how complex the disclosure to the client would have to be. Is the information required to be prepared and communicated more complex than the information disclosed in a fund facts document for a mutual fund? Securities regulators should keep the disclosure requirements simple or the disclosure will not be useful to retail investors.

Know Your Product

I have commented above that I am not convinced that all firms should be required to develop a shelf of approved products (if that is what is in fact proposed).

Suitability

I believe that each of the suitability requirements listed in the chart should be required, with the exception of the obligation to recommend the product most likely to meet a client's needs and objectives.

In general, subject to the comments above, I would hope that securities regulators move expeditiously to address the issues listed under "Summary of Areas Without Explicit Requirements" that are not controversial. It would be unfortunate if any controversy surrounding the other new suitability requirements and obligations in the Proposal were to derail and delay addressing those basic issues.

Part 7 - Proposed Framework for the Proposed Targeted Reforms

Conflicts of Interest - General Obligation and Appendix B

I understand that current IIROC rules require a firm to resolve conflicts of interest in the best interests of clients. I am not a fan of the formulation in the targeted proposals that conflicts be resolved in a manner that "priorities the interests of the client ahead of the interests of the firm and/ or representative". I don't know if those words mean something different than in the client's best interests. If securities regulators impose a best interest standard, why would this obligation use different words? As an alternative, I would be more comfortable with requiring that registrants in resolving conflicts must put the interests of the client first.

See my comments above with respect to disclosure of conflicts of interest.

Know Your Client and Appendix B

I don't believe that registrants should be required to collect detailed tax information, particularly if the client objects to providing it. In my view, a representative can have a meaningful discussion of relevant tax issues with a client without seeing detailed tax information. So I would not, for instance, require a retail investor to provide copies of their income tax returns to advisors.

This raises, however, a larger point which is that the targeted reforms shouldn't impose on all registrants an obligation to provide all of their clients broad financial planning advice. The targeted proposals seem to assume that all registrants should have an obligation to provide such advice. That should not be the case.

As noted above, I agree that an advisor shouldn't be allowed to advise a client without possession of basic client information. The question, of course, is what is considered basic. Ultimately, I believe that there should be some flexibility for a client to decide what level of detailed information he or she discloses to an advisor.

I also think that there should be further guidance on the development of risk profiles. Risk has to be an important topic of discussion between an advisor and their clients. I am not certain, however, how complex a risk profile required by the proposals would need to be or how complicated the disclosure to clients would be.

Subject to my comments above, I think that a firm offering mixed/non proprietary securities should be required to carry out a fair and unbiased market investigation to determine a reasonable universe of products that the firm would advise or trade in and that would meet identified client objectives. I don't think that market comparisons and product optimization are necessary or useful. It appears to me that the effect of the proposals would require all firms to offer a comparable range of products to meet all client objectives. A firm should have some discretion as to what products are offered and what client objectives they address. If a restricted range of products is offered, there should, of course, be clear disclosure of that to retail clients.

As noted above, I am concerned that the regulatory regime not discourage the offering by a firm of a broad range of non proprietary securities products. There should be no regulatory requirements that unduly limit the ability to do that or that unduly increase the costs of doing so. I don't think that firms offering proprietary products should be required to offer non proprietary products but I agree that a proprietary firm should have an obligation to make effective disclosure to clients of the fact that the products offered are restricted as well as the implications of those restrictions in meeting client needs and objectives. I don't believe in this respect that securities regulators should directly force a change in the business model adopted by a registrant, provided clear disclosure is made and the standard of conduct required is the best interests of the client.

Suitability and Appendix E

I am concerned with the statements in the Proposal indicating that there is significant non compliance with current suitability requirements. That includes the statement that investor complaints show a "consistent and ongoing non-compliance with many of the key regulatory requirements, with the unsuitability of investment recommendations being the primary basis for complaints to OBSI ...". Enforcing existing suitability obligations should be a key focus for securities regulators. If the suitability obligations of registrants are to be substantially increased as proposed, securities regulators will need to take significant action to educate registrants as to their obligations and to encourage compliance.

Subject to the comments above, I believe that the suitability requirements set out in the Proposal and identified as not explicitly required should be required. As noted above, however, I am concerned with imposing an obligation on advisors to recommend products that are "most likely to achieve the client's investment needs and objectives".

I am not certain what the targeted proposals mean by the reference to "directing cash into a savings account". Is that intended to mean that a registrant must advise the client with respect to his saving rate or an appropriate saving program? In my view, the targeted proposals should be limited in requiring advisors to provide overall financial planning advice to clients. Where that broader advice is to be required, the requirement should be explicit.

I don't understand the sentence in this section that says that where a non securities product is recommended by an advisor, and where the client has a reasonable basis to believe that the advisor was also considering advising with respect to a securities product or strategy, the advisor must substantiate why the recommendation not to buy a securities product was made. I am not sure what mischief this sentence is attempting to address. Are regulators trying to discourage this kind of advice (which would appear to be contrary to the personal interests of the advisor that a client engage in a securities transaction)? Further, isn't it the registrant or advisor, as opposed to the client, who will most likely know whether a securities product or strategy was also being considered? In general, I am loath to require a registrant or advisor to substantiate why any particular advice was given.

I am concerned that the targeted proposals provide that all registrants "must" take each of the steps listed in Appendix E under "Investment Strategy Suitability". Surely not all registrants should be required to comply, particularly if the client doesn't want the advice or if a one time or limited transaction is involved. Further, while I believe it is important to discuss likely rates of return, I believe that the focus should be on likely current market returns from different securities products and what the implications are for achieving the client's financial goals and objectives.

I think that further guidance should also be given as to how a registrant would be able "to produce evidence that they had a reasonable basis for concluding that the suitability analysis was conducted in a manner that complies with the registrants' other duties toward their clients ....".

Overall, it will likely be much more costly for registrants to provide advice to retail clients if all of these suitability requirements are implemented. That may well adversely affect the ability of investors to obtain advice on a cost effective basis.

I would also ask that securities regulators consider how these proposals would affect robo-advisors. I believe that such advisors potentially provide appropriate advice to retail investors on a more cost effective basis. Securities regulators should not be concerned that the advice may be relatively standardized across investors with similar characteristics. I believe investors receiving such advice would be better off having received it than not.

Relationship Disclosure and Proficiency Requirements

I fully support these proposals.

Titles

I believe that regulating titles is an important part of these proposals. I also believe that registrants should not use titles that include the word "advisor" unless they have an obligation to act in the best interests of their clients (either as required under the regulatory regime or by contract).

In terms of the specific targeted proposal, I would support Alternative 2, except that I would not limit the first category to only registrants managing discretionary accounts. All other registrants should be identified as salespersons. Securities regulators need to keep the title categories simple in order for retail investors to understand them.

ARGUMENTS AGAINST A BEST INTEREST STANDARD

The Proposal includes a section discussing why a best interest standard should not be imposed on registrants. I would like to address a number of the concerns expressed.

Principles Versus Rules

The debate between imposing a best interest standard and imposing the targeted reforms is the debate between establishing broad principles versus detailed rules. That is a debate that is well understood; so I won't spend a lot of time on it.

Principles are important because they have broad application to many different circumstances. But at the same time, there is some inherent uncertainty in applying them to every circumstance. Specific rules have the benefit of certainty but the potential disadvantage of more limited application. Further, it is difficult for regulators to keep up with implementing appropriate securities rules given the difficulty in reaching consensus and the timeframes involved in rule making. Securities rules are always going to trail market developments.

Accordingly, to be effective, the securities regulatory regime must have both appropriate over arching principles and detailed specific rules. The challenge is in establishing the appropriate balance. Reasonable people can disagree about what the right balance should be.

The Uncertainty of Principles

The best interest standard would obviously constitute an over arching principle. There are three comments I would make about the potential uncertainty for registrants of a best interest standard.

Guidance Necessary

First, appropriate regulatory guidance as to the application of the best interest standard is obviously necessary as contemplated by the Proposal. One of the advantages of providing guidance with respect to an established principle is that future guidance needed as experience develops does not then have to wait on a formal rule making process. Future guidance can be given relatively quickly through policy interpretations and notices.

The Standard Would Drive Better Behaviour

Second, there is a very important benefit arising from any uncertainty that may be inherent in the best interest standard. That benefit is that any uncertainty will force a registrant to pause and give some sober consideration to whether any proposed recommendation or action is in fact in the best interests of the client. Imposing a best interest standard would force that consideration, would establish the standard by which to judge such issues and would therefore drive better behaviour by registrants to the benefit of investors. That may be the most important point made in this submission.

As noted in the Proposal, a best interest standard would also be helpful in interpreting securities rules including the targeted proposals if they are implemented.

It will be very interesting and useful for securities regulators to hear from registrants as a result of this consultation process what specific practices or circumstances they consider may be problematic if a best interest obligation is imposed. That will, of course, also inform the guidance that can be given by securities regulators.

Flexibility of Application

Third, a best interest standard, unlike the targeted proposals, is flexible in applying to a wide range of different circumstances. The standard applies to and is defined by the specific circumstances involved.

Just as a simple example, suppose a retail client wishes advice as to the investment of $50,000. The client has two years until retirement, has no other financial assets and is most concerned about ensuring no loss of capital. An advisor recommends investing the full amount in a single high cost equity mutual fund. I submit that it is clear that recommendation would be contrary to the client's best interests.

Now assume another retail client wants advice as to the investment of the same $50,000. That client has a substantial financial portfolio, has carefully considered risk and has established an appropriate asset allocation strategy between equities and fixed income investments. The client wants advice from the registrant as to how to invest the funds as a long term investment that will form part of the equity portion of his financial portfolio. The registrant recommends that all $50,000 be invested in the same equity mutual fund as in the first example. In these circumstances, however, I say that the registrant would have complied with the best interest standard in making that recommendation.

In this example, the same investment advice was given but there were different conclusions as to compliance by the advisor with the best interest standard.

What I am saying is that the best interest standard is inherently flexible in addressing the particular circumstances that may be involved. While there may be some uncertainty in the application of the principle (and to be clear that will not always be the case), there is also inherent flexibility. The targeted reforms may be more specific and certain but the obligations they impose and their application must appropriately address a wide range of different advisors providing advice in different circumstances. I don't believe that the targeted proposals adequately do that or, in certain respects, can be up to the task.

Retail Investors Misunderstanding the Protection

Concern has also be raised that investors may be misled by the extent of the protections provided by a best interest standard and may as a result put too much reliance on the advice received. Let's be clear. Imposing a best interest standard would be an important investor protection action. It would provide important additional protections to retail investors. It is not a compelling argument to say that such regulatory action should not be taken because it may not provide enough protection to investors or that those investors may not fully understand the nature of the protection provided. Investors will be much better off than they currently are if a best interest standard is implemented. It is quite surprising that anyone would suggest otherwise.

Further, many retail investors already believe that their advisors have an obligation to act in their best interests. That fundamental misunderstanding is far worse than investors having the protection of the best interest standard but having some lack of understanding as to the scope of the protection. Because many retail investors already think they have the protection of a best interest standard, they are unlikely to inappropriately change their behaviour because such a standard is actually implemented.

Advisors Unable to Comply

It is also suggested that imposing a best interest standard may not be appropriate because some registrants, given their business model or circumstances, may never be able to act in their client's best interest. While I don't believe that is necessarily true, to the extent it is, those registrants should at the very least stop masquerading as advisors. They should be required to inform their "customers" that they aren't providing them with investment advice; that the customer needs to go elsewhere if they need such advice; that they are simply selling securities; and their relationship with the customer is one based solely of buyer beware. And they should have an obligation to substantiate that they clearly and effectively communicated that information both orally and in writing.

Other Regulatory Issues Need to be Addressed.

Finally, a concern is expressed that addressing a best interest standard should await other regulatory initiatives such as whether and how to address imbedded compensation in the fund space. In a perfect world that might be desirable, but we don't live in a perfect world. I am already concerned that the current proposals raise so many issues and considerations as to make it difficult for market participants and regulators to fully address them in any reasonable time frame. Adding other potentially controversial regulatory proposals to the current initiative will not be fairer to market participants and will not be, in my view, effective regulatory policy making. It will simply mean that effective regulatory action will not be taken on a number of important issues in any reasonable time frame. Delaying for that reason would just be kicking the can down the road.

There is no reason why a best interest standard can't be implemented now as a stand alone policy initiative. If market participants and regulators believe that implementing a best interest standard requires further guidance, then that guidance can be provided as part of the current imitative. It does seem to me, however, that the existing proposal includes appropriate guidance on a number of issues that are raised by the application of the best interest standard.

OTHER QUESTIONS ASKED IN THE PROPOSALS

Appendix I to the Proposal contains a list of consultation questions. It will be clear from the foregoing discussion how I would answer a number of those questions, so I won't address them expressly. Nor will I address questions in respect of which I don't believe I have any useful comment.

I would respond to certain of the questions in Appendix I as follows. The numbers used correspond to the numbers of the questions in Appendix I.

13. I am concerned that this will be the case.

16. I don't believe it is appropriate to require all registrants to address basic financial strategies. There is a limited extent to which the proposals should require all registrants to provide broad financial planning advice to clients.

20. It is important that the proposals distinguish among the different roles different advisors play. As an example, not all of the suitability proposals should apply where a client has only a transactional or one time trading relationship with a firm.

23. and 24. I agree with these disclosure requirements.

27. That would be very helpful.

33. It is important that securities regulators should directly regulate the use of industry titles.

36. There should be a best interest duty imposed in addition to the targeted proposals.

39. If the proposals are implemented, compliance costs are likely to substantially increase. Securities regulators should carefully consider as part of the consultation process how to limit those costs, particularly where the specific requirements are not sufficiently material to obtaining regulatory objectives.

44. It is not appropriate.

47. As is apparent, I think the regulatory proposals should focus on individual or retail investors because those investors are potentially the most vulnerable. There should be a reasonable definition of "institutional investor" or "permitted client" that captures large institutions and companies who can look out for their own interests. The proposals do not need to apply to those persons. I would add, however, that I am not suggesting that there is any reason why a best interest standard shouldn't apply to advisors giving advice to institutional investors. It is simply that institutions can look out for themselves and are not as vulnerable as retail investors.

54. There should be no requirement for a registrant to obtain detailed tax information from clients. In my view that is not necessary in order for a registrant to appropriately discuss relevant tax considerations with a client.

56. Additional guidance would be useful. Complex risk profiles should not be required.

57. Yes to both questions.

59. More guidance would be useful.

61. This is addressed in the submissions above.

65. The standard of care should not be applied to those persons. It would be a mistake to require securities regulators to waive the application of the standard to such persons on a case by case basis. On what basis would they do so?

67. I agree.

68. I don't understand the question but I am comfortable with the requirements not applying to institutional clients.

CONCLUSIONS

I believe that, in general, the Proposal is a very important investor protection initiative that, subject to careful consider of the comments received as part of the consultation process, should be proceeded with expeditiously.

I believe there are compelling and overwhelming reasons supporting the imposition of a best interest standard on registrants providing investment advice to retail investors. Clearly, however, there will be no consensus among securities regulators for adopting that standard. In my opinion, Ontario and New Brunswick should proceed as a separate policy initiative to expeditiously impose a best interest standard. There is no valid reason why securities regulators in Ontario and New Brunswick shouldn't act now to provide further appropriate protections to retail investors in their jurisdictions. Investors will substantially benefit and the world as we know it will not end. To the contrary, it will be a better world for retail investors.

I also believe that, subject to the comments above, many of the targeted proposals are important and should be proceeded with. Many elements of those proposals are not and should not be controversial and implementing them should not be delayed. To the extent that elements of the targeted proposals do create legitimate concerns on the part of market participants, those concerns should be addressed in a reasonable manner as part of the policy making process.

There are obviously other important policy development initiatives that securities regulators should consider and address, not the least of which is imbedded compensation in the sale of investment funds. Those issues should not, however, delay the current proposals.

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If I can be of any further assistance in clarifying or explaining the comments in this submission, I would be pleased to do so.

All of which is respectfully submitted.

James E. A. Turner

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