February 21, 2013

British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
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
Superintendent of Securities, Northwest Territories
Superintendent of Securities, Yukon
Superintendent of Securities, Nunavut

Me Anne-Marie Beaudoin
Corporate Secretary
Autorité des marchés financiers
800, square Victoria, 22e étage
C.P. 246, Tour de la Bourse
Montréal, Québec, H4Z 1G3
e-mail: consultation-en-cours@lautorite.qc.ca

John Stevenson, Secretary
Ontario Securities Commission
20 Queen Street West
Suite 1900, Box 55
Toronto, Ontario, M5H 3S8
e-mail: jstevenson@osc.gov.on.ca

Dear Sirs/Mesdames:

Re: Canadian Securities Administrators 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 (the "Consultation Paper")*

The Canadian Advocacy Council[1] for Canadian CFA Institute[2] Societies (the CAC) appreciates the opportunity to comment on the CSA's Consultation Paper.

[1]The CAC represents the 13,000 Canadian members of CFA Institute and its 12 Member Societies across Canada. The CAC membership includes portfolio managers, analysts and other investment professionals in Canada who review regulatory, legislative, and standard setting developments affecting investors, investment professionals, and the capital markets in Canada. See the CAC's website at http://www.cfasociety.org/cac. Our Code of Ethics and Standards of Professional Conduct can be found at http://www.cfainstitute.org/ethics/codes/ethics/Pages/index.aspx.

[2] CFA Institute is the global association of investment professionals that sets the standard for professional excellence and credentials. The organization is a champion for ethical behavior in investment markets and a

As a general note, we believe it is very important that the CSA require registrants providing advice to clients to abide by a best interests standard. As CFA charterholders, we have agreed to uphold the Code of Ethics, which requires us to put the best interest of our clients ahead of our own. We believe that retail clients, the investment industry and society as a whole would benefit if all professionals offering investment advice were held to this high standard.

The CAC wishes to respond to the following specific questions in the Consultation Paper.

Consultation Questions on Investor Protection Concerns

Question 1: Do you agree, or disagree, with each of the key investor protection concerns discussed above with the current standards applicable to advisers and dealers in Canada? Please explain and, if you disagree, please provide specific reasons for your position.

Yes, we agree with all five of the key investor protection concerns discussed in the Consultation Paper, namely (i) there may be an inadequate principled foundation for the standard of conduct owed to clients; (ii) the current standard may not fully account for the information and financial literacy asymmetry between advisers / dealers and retail clients; (iii) the expectation gap as investors already assume their adviser/dealer must always give advice that is in their best interests; (iv) advisers/dealers must recommend suitable investments but not necessarily investments that are in the client's best interest; and (v) the application of the current conflicts of interest rules might be less effective than intended. These concerns are on the whole representative of our experience in the marketplace.

Question 2: Are there any other key investor protection concerns that have not been identified?

Other concerns which have not been identified include the lack of full disclosure on the services provided by dealers and advisers to investors of (i) relative and absolute performance; and (ii) all aspects of remuneration, including its allocation to all parties involved.

Question 3: Is imposing a statutory best interest standard on advisers and dealers the most effective way of addressing these concerns? If not, would another policy solution (e.g., changes to one or more of the existing statutory standard of conduct requirements) offer a more effective solution?

Yes, we believe it is the most effective way of addressing the concerns, provided it is coupled with the additional disclosures referred to above in #2.

---

respected source of knowledge in the global financial community. The end goal: to create an environment where investors' interests come first, markets function at their best, and economies grow. CFA Institute has more than 113,000 members in 140 countries and territories, including 102,000 CFA charterholders, and 137 member societies. For more information, visit http://www.cfainstitute.org/

Question 4: Do you believe that some or all of these concerns are inapplicable (or less significant) in any CSA jurisdiction as a result of its current standard of conduct for advisers and dealers?

No, we believe that these concerns affect investors in all jurisdictions.

Consultation Questions on the Statutory Best Interest Standard Described Above

Question 5: Should securities regulators impose a best interest standard applicable to advisers and dealers that give advice to retail clients? Why or why not?

We believe that all parties that provide advice should be under the best interest standard regardless of the size of the investor. We note, however, that retail investors would in particular benefit from its application. The status quo in effect establishes lower standards for those working with retail clients under a suitability standard. As a result, retail investors who may not have sufficient assets to hire an adviser who is already bound by a fiduciary duty are at a disadvantage.

Question 6: If such a duty is imposed, are the terms of the best interest duty described above appropriate (for example, should there also be an on-going obligation regarding the suitability of advice previously given or investments held by a client)? What changes, if any, would you suggest to the terms of the best interest duty described above?

We believe any explicit on-going obligation regarding responsibility for the suitability of advice previously given to clients must be carefully considered. For example, if a client has changed advisers, the new adviser should not be responsible for determining whether the investments were suitable for the client at the time they were made, but such adviser would be responsible on a going-forward basis if those investments are no longer suitable. Similarly, advisers should not be required to second guess investments made prior to the implementation of any new rules, but all investments made subsequent to new rules should be subject to the new standard.

There may also be circumstances in which it would not be in a client's best interest to sell an existing investment, even if that investment is no longer suitable for that client. For example, the costs of disposition may be greater than the potential negative impact of continuing to hold the security. While a fiduciary duty would require an adviser to explain to their client that an investment is unsuitable and describe in writing to the client why a disposition is not favourable, it should not necessarily require the adviser to recommend a disposition.

Question 7: Are there other general issues related to imposing the best interest standard described above that should be addressed?

Please see our response in #2 above. As another general issue, the legal recourse available to investors should be made very clear to them in any new rule.

Consultation Question on Potential Benefits and Competing Considerations Generally

Question 8: Do you agree, or disagree, with each of the potential benefits and competing considerations of the statutory best interest standard described above? Please explain and, if you disagree, please provide reasons for your position. Are there any other key potential benefits or competing considerations that have not been identified?

We agree with all the benefits as described in the Consultation Paper, but we do not believe that the potential competing considerations are worthwhile. These negative considerations are mainly highly hypothetical, and in any event would most likely be dealt with by the process of dynamic change that characterizes a well functioning, competitive marketplace. We also believe that current market practices and structures are not adequately protecting the best interests of investors. Competitive market forces should allow the industry to quickly adapt to new changes, including an explicit best interest standard.

The CFA Institute and its members have written extensively on the subject of fiduciary duty. One such article by Michael McMillan, CFA entitled Five Reasons for a Fiduciary Standard [link to article] argues that in addition to other benefits, a fiduciary standard would strengthen existing business models and provide a net gain to society as a whole.

Consultation Questions on the Potential Benefits of a Statutory Best Interest Standard

Question 9: What are the criteria that should be used to identify an investment that is in a client's best interest?

One of the standards for CFA charterholders is a duty of loyalty, prudence and care to their clients. CFA members and candidates must act for the benefit of their clients and place their clients' interests before their employer's or their own interests.

Criteria should include such factors as: (a) suitability (risk of loss, volatility, etc.); (b) diversification within current asset holdings (low or negative r squared); and (c) whether the client is able to hold the investment for any anticipated or requisite illiquid period.

The CFA Institute also has a list of criteria that CFA charterholders must apply in order to ensure compliance with the best interest duty. These recommended procedures for compliance are included in the Standards of Practice Handbook, Tenth Edition [link to Handbook] and is attached as Appendix "A" to this response letter. Important criteria include:

- Conflicts of interest must be eliminated or disclosed;
- Decisions must be based on the whole portfolio rather than by security; and
- Execution must always be in the client's best interest and not based on soft dollars or on a commissions basis.

Question 10: Should breaches of a best interest standard give rise to civil liability at common law?

Yes. This is a matter for the courts to decide.

Question 11: If so, is it necessary to state expressly that a best interest duty will give rise to civil liability on the part of the adviser or dealer or is it sufficient if that standard is a statutory duty?

Please see our response to #7 above.

Consultation Questions on Functional Equivalency

Question 12: Does the duty of an adviser or dealer to act fairly, honestly and in good faith when dealing with clients, coupled with the existing rules related to suitability and conflicts of interest, already impose a standard of conduct that is functionally equivalent to a fiduciary duty?

In theory, the duty to act fairly, honestly and in good faith when dealing with clients, together with rules regarding suitability and conflicts, should be functionally equivalent to a fiduciary duty. However, those rules deal only with specific circumstances and transactions, and as a result, the implementation of those standards (and the enforcement of such standards) might meet only the technical requirements of those rules and not their spirit.

Question 13: If so, should it be made clear that investors can enforce that duty as a private law matter?

A statutory fiduciary duty should be imposed, as stronger wording would help dealers/advisers apply the rules according to their intention (i.e. ensure adviser is acting in a client's best interests) and not in a technical manner.

Question 14: If you believe that the existing standard of conduct for advisers and dealers already imposes a standard of conduct that is functionally equivalent to a fiduciary duty, what impact (if any) would the introduction of a statutory best interest standard have? For example, would it be desirable for investors to have the benefit of a statutory best interest standard that has long been recognized and interpreted under fiduciary duty common law principles?

Please refer to our response in #12 and #13. It would be desirable for investors to have the benefit of a statutory best interest standard.

Question 15: Do you think the investor protection concerns raised in this Consultation Paper could be addressed by issuing guidance about current business conduct requirements, including the duty to deal fairly, honestly and in good faith with clients? Please provide specifics about the type of enhanced guidance that would be most effective.

A statutory duty is required, but additional guidance would also be of assistance. A key to any guidance is education, including professional development. Advisers and dealers should have the duty to educate clients and to explain their professional responsibility to clients. Client education would help to enforce the rules, and practice inspection would help enforcement. Guidance would also be helpful to the effect that the best interest duty can be satisfied using information available to the dealer/adviser at the time an investment recommendation is made, in order to help

avoid later claims by clients based on a change of circumstance or poor investment performance that a product or investment was not at the time in the best interests of that client.

Question 16: Do you think that the concerns raised in this paper could be addressed by increased enforcement of current business conduct rules, including fair dealing, suitability and conflict of interest requirements?

A statutory duty is required, but education and enforcement would be beneficial.

Consultation Questions on Potential Increased Costs

Question 17: Would the statutory best interest standard described above increase ongoing costs for advisers and dealers in Canada? If so, please identify the areas in which you believe there would be increased costs for advisers and dealers and provide any relevant qualitative arguments or quantitative data. In responding, please consider potential costs in the following areas:

(i) regulatory assessment (client information required to meet standard)

(ii) compliance/IT systems

(iii) supervision

(iv) ensuring representative proficiency

(v) client documentation/disclosures

(vi) insurance

(vii) litigation/complaint handling

(viii) other (please identify)

We disagree with trying to measure the intangible benefits of increased investor protection against potential increased costs to advisers and dealers, especially since many investors already assume that the advice they are given is in their best interest. Because this implicit assumption by investors already exists, advisers who have made the effort to satisfy a fiduciary duty standard already have all the necessary systems and procedures in place and should not have to incur any additional costs. Advisers who do not yet always act in the client's best interest could be said to have benefitted unfairly from that investor assumption, without actually spending the money to implement a fiduciary standard. If such advisers incur costs in the future to implement the standard, such added expenses would be balanced by the fees previously received from existing client relationships. In any event, we believe the costs of changes to documentation and compliance and IT systems would be marginal. The level of ongoing services by advisers can be expected to stay the same, and the only additional cost may be the time it takes to educate the clients at the beginning of an advisory relationship.

On the other hand, looking toward the future, when the understanding of the nature of the advisory relationship is aligned between the client and the adviser from the beginning, there may be less compliance and legal issues, reducing those costs.

Question 18: If yes, given that a fiduciary duty is already owed to a client in certain circumstances, why do you think that clarifying the circumstances in which such a duty is owed will affect ongoing costs of advisers and dealers in Canada?

As per our response in #17 above, we do not believe the costs would be affected in any significant way.

Question 19: Are the computer systems advisers and dealers use today to support their compliance mandate able to support a statutory best interest standard? If no, what types of investment do advisers and dealers anticipate needing to make to improve their IT systems in order to ensure compliance with a best interest standard?

We believe that those computer systems that are able to support the current client relationship standards and regulations would be more than adequate to support a statutory best interest standard.

Question 20: We note that cost-benefit and/or market impact analysis has been conducted to varying extents on the proposed reforms in each of the U.S., U.K., Australia and E.U. Do you believe that this international analysis is relevant to the possible introduction of a statutory best interest standard for advisers and dealers in Canada? If so, please explain.

While we believe that internationally conducted analysis from other developed markets can be applicable to Canada, we note that various existing studies do not seem to provide conclusive evidence yet. We would also like to reiterate that improved investor protection brings many intangible benefits to society as a whole and should not be compared exclusively to costs that are borne by a certain group or industry sector.

Consultation Question on Investor Choice, Access and Affordability

Question 21: Do you believe that the statutory best interest duty described above would have a negative, positive or neutral impact on retail clients across each of the following dimensions: choice, product access, and affordability of advisory services?

We believe that in the current situation of overabundance of investment advisers and investment products available to retail clients, a reduction in those services and products that do not have the client's best interest in mind would be a positive, not a negative, development.

Consultation Questions on Impact on Certain Business Models

Question 22: How should a statutory best interest standard apply to mutual fund dealers, exempt market dealers and scholarship plan dealers?

The position of the CFA Institute has long been that only those in the industry who are bound by a fiduciary duty should be permitted to call themselves "advisers".

One of the reasons for confusion by retail clients about what level of duty they can expect from their investment adviser is the persistent use of the word "adviser" to describe those providing

limited information pertaining only to products they are paid to sell. In fact, even within the Consultation Paper, actions by salespersons who only offer certain products because of their limited registration or restricted product choice by a related entity is described as "advice", when in fact a sales process rather than an advice process is being described.

It is our belief that retail clients, together with the financial industry, as well as society as a whole, would benefit if the bar was consistently raised, rather than lowered, on investor protection. As a result, we think that those advisory business models that would not survive if they were forced to consider clients' best interest should be allowed to become extinct. Investors should be able to know that no matter who they turn to for advice in the financial industry, that person will have their best interest in mind when providing advice. The onus should not be on retail investors to know what type of a duty different types of financial professionals owe to them.

Please see our response to #25 below with respect to the application of the standard to dealers in the specific registration categories.

Question 23: Are there any adviser or dealer business models that could not continue if the best interest standard described above was adopted?

We believe that the possibility that some types of business models would not survive having to apply the best interest standard should not be an important consideration in this review.

Question 24: Do you agree with the approach reflected in the Australian Reforms or UK Reforms to accommodate restricted advice and scaled advice, respectively?

We prefer the Australian approach where even the so-called "scaled" advice has to consider the best interest of a client.

Question 25: What specific qualifications to the best interest standard described in this Consultation Paper are required (please provide proposed statutory language where possible)?

The only qualifications we would support on the best interest standard relate to the various dealer registration categories. For example, exempt market dealers, scholarship plan dealers and mutual fund dealers can only distribute securities of a limited universe of products, and thus should not be considered to have breached a statutory best interest standard simply because they are not licensed to recommend a broader range of products. However, as per our response in #22 above, within the realm of the various registration categories, we believe that every adviser and dealer providing advice should be subject to a best interest standard. The imposition of such a standard may require the securities regulators to re-examine certain dealer categories, particularly the exempt market dealer category, where many transactions occur on a one-off basis and there is often no continuing relationship between the adviser and the client even though the client might believe they are receiving advice.

However, we recognize that such a standard may not be appropriate for dealers who engage in execution-only services on behalf of clients and who do not have an ongoing advisory relationship with such clients.

It would be helpful to include prescribed reasonable steps regarding the investigation of financial products, similar to a "safe harbour", to help provide clarity to advisers and dealers on what exactly is required to satisfy a best interest standard, particularly for registration categories that are limited. Please see, for example, our response to # 9 above.

Question 26: Will the qualifications required to make a best interest standard work in Canada result in retail clients receiving only advice on a narrow range of investment products?

As CFA charterholders, we are required to put client interests ahead of our own – a concept that encapsulates fiduciary duty. Our members have had no problem in meeting this standard while at the same time advising clients on a wide range of investment options, including, but not limited to publicly-traded stocks, government and corporate bonds, mortgages and mortgage-backed securities, private offerings, hedge funds, commodities, private equities, foreign exchange, real estate and even mutual funds.

There may be some narrowing of the product selection that advisers are willing to recommend to clients based on the best interest standard. Products with higher fee structures, commissions, trailer fees and similar fees would be harder to justify if there are similar lower cost alternatives available. Advisers may be motivated to recommend less risky products that will be not be challenged in the face of stricter best interest standard requirements.

Consultation Question on Impact on Capital Raising

Question 27: Would imposing a statutory best interest standard as described above affect capital raising?

It is unlikely in terms of the primary market. This is one area where existing suitability requirements probably most closely resemble a fiduciary duty. It is possible that imposing such a standard will impact the type of accounts and clients for which registrants recommend certain products, particularly with respect to investment funds (including structured products). Certain compensation structures will become harder to justify, which may prompt product manufacturers to change the amount and type of compensation offered to advisers. As a result, it may be more difficult for manufacturers to persuade advisers to sell these products.

Consultation Questions on Effect on Compensation Practices

Question 28: Do you believe that the statutory best interest duty described above would affect the current compensation practices of advisers and dealers? If so, in what way?

The standard may or may not affect current compensation practices. If, given a choice between two or more similar investment products, an adviser always tended to select higher fee products that paid higher trailers and commissions, such an adviser would find that a statutory best interest duty would adversely affect their compensation. Advisers who seek out low-cost options for their clients will probably find that their volume of business would increase.

Question 29: Should a best interest duty expressly address adviser and dealer compensation practices? If so, in what way?

To the same extent that an adviser makes his or her 'best effort' to find products that match the expected return and risk that meets a client's investment objective, he or she should also consider fees, expense ratios etc. that will be charged to the client. As a result, the statutory best interest standard indirectly addresses compensation and fees.

Question 30: Could volume based payments or embedded commissions continue if the statutory best interest standard described in this paper is introduced? If so, should such compensation structures be specifically prohibited?

It is difficult to justify volume-based payments in the context of a statutory best interest. Volume-based payments are a particular incentive to put the next client dollar that walks through the door into "Product X" rather than what might be in that client's best interest. They should specifically be prohibited.

Embedded commissions exist to impair transparency. A statutory best interest presumes a greater level of transparency, so embedded commissions should also be specifically prohibited.

Question 31: What compensation structures that exist today among advisers and dealers do you think would be prohibited by the statutory best interest standard articulated in this Consultation Paper? Please consider compensation received by advisers and dealers both from clients and from product manufacturers. For each structure you mention, please provide your reasons.

Volume based commissions and embedded commissions as mentioned in #30 above would probably be prohibited for the reasons stated. High commission products create a natural conflict between the adviser and the client and would be hard to justify in the context of a statutory best interest. This would likely motivate manufacturers of investment products to find other ways to compensate advisers. Trailer fee structures can also create a conflict between the adviser and the client as the adviser is motivated to recommend the purchase and continued holding of high trailer fee products. For this reason, high trailer fee products might also be hard to justify under a statutory best interest standard. The natural conflict created by these compensation structures may lead more advisers to recommend fixed fee based accounts in order to avoid the conflict or perceived conflict of commissions and trailer fees.

In addition, the embedded conflict of interest that exists when dealers/advisers sell or recommend related party or proprietary products may result in the inability to recommend such products once a statutory fiduciary duty is imposed, and at a minimum should be clearly disclosed.

Question 32: Should any statutory best interest standard be modified in any way to preserve various compensation structures?

No. We are not opposed to advisers receiving compensation, but adviser compensation should

not take priority over a best interest standard.

Compensation structures will likely change to fit the standard and should not be legislated. Advisers, product manufacturers and dealers will determine the best way to compensate advisers and dealers within a statutory best interest standard.

Consultation Questions on Required Guidance

Question 33: If the statutory best interest duty described above is introduced, what areas of guidance would be most useful to advisers and dealers?

In accordance with our Code of Ethics, the CAC believes that advisers and dealers should act for the benefit of their clients and place their clients' interests before their employer's or their own interests. In addition, all matters that could reasonably be expected to impair their independence and objectivity or interfere with their respective duties to their clients, prospective clients, and employer should be disclosed in a full and fair manner. Therefore, the CAC feels that advisers and dealers would benefit from specific guidance in the following areas:

Conflicts of Interest

- Adviser Compensation:
    - Confirmation that all forms of adviser compensation should be disclosed, including non monetary compensation and advertising support;
    - Confirmation that where a related company product or proprietary product is offered, all sales incentives including gross-sales based compensation should be disclosed; and
    - Required disclosure for commissions paid by issuers (or their agents) to advisers and dealers for recommending that issuer's securities.

- Principal Trading:
    - Principal basis trading must be done at fair market value and not only be suitable for the client, but must be in the client's best interest; the trade must not be for the purpose of 'unloading' the security from the firm's inventory.

Question 34: Are there specific circumstances or activities, such as principal trading, that should be addressed?

Please see our response in #33 above.

Question 35: Are there any categories of registrants today whose minimum proficiency requirements would need to change in order to comply with the statutory best interest standard described in this Consultation Paper?

We are of the view that the minimum proficiency standards for any dealer or adviser who works with clients in Canada, regardless of registration category or product type, should be universal. Every dealer and adviser should be subject to a basic best interest standard within their respective

categories which must be well understood and applied by each registrant. Each dealer and adviser can conduct the necessary due diligence on the products which they are permitted to sell or advise on. As noted in the Consultation Paper, there are already certain jurisdictions in Canada, such as Quebec, in which registered dealers and advisers are subject to a duty of loyalty and a duty of care and must act in the client's best interest, regardless of registration category. As a result, we feel that a statutory best interest standard should apply to all categories involving the provision of some advice to clients, including exempt market dealers and scholarship plan dealers.

In addition, to prevent regulatory arbitrage, we believe that the securities regulatory authorities should work with the regulators overseeing the insurance industry to implement a similar standard amongst its representatives.

Consultation Questions on Interaction with Existing Regulatory Regime

Question 36: Are there any advisory relationships between an adviser or dealer and a retail client where a fiduciary duty would not be appropriate?

No. As a result of the informational advantage held by advisers and dealers and the expectations of clients that their advisers and dealers are already required to act in their best interests, we see no reason why any type of advisory relationship should not be subject to a fiduciary duty. It is in fact the nature of an advisory relationship that necessitates a fiduciary duty. The onus should not be on clients to determine whether or not their advisers are acting in their best interests.

In addition, we do not believe that all relationships should be called "advisory", in order to help eliminate confusion about titles and duties in the minds of many retail investors. For example, execution-only relationship with brokers should not be considered to be an advisory relationship.

Consultation Questions on Targeted Best Interest Standard

Question 42: Should the CSA consider only imposing a best interest standard in respect of certain requirements, such as conflicts of interest or suitability requirements?

No. The onus should not be on clients to try to determine in which circumstances their advisers are required to put clients' interests ahead of their own.

Question 43: If so, how would more targeted best interest standards address the key investor protection concerns raised in this paper? Please provide specifics.

Please see response #42 above.

Consultation Questions on Application of Duty on Retail Clients

Question 44: Should a best interest standard apply only to advisers and dealers when dealing with "retail clients"?

No. We are of the view that the best interest standard should apply to all clients. In many circumstances, an intermediary client may provide instructions on behalf of the ultimate "retail client". In addition, we see no reason to distinguish the standard of care owed to institutional and retail clients.

Question 45: If so, is the definition of a "retail client" appropriate? Should any such duty apply to other clients in addition to retail clients?

In the opinion of the CAC, the standard should apply to transactions with all clients. In addition to the comments in response to question #44 above, the CAC believes it would not be appropriate to try to define a retail client with metrics such as income or financial assets or those otherwise registered under securities legislation. As we have noted in the past, income and net worth are not reliable indicators of investment knowledge, and a wide spectrum of proficiency exists within various registration categories.

Question 46: Should certain kinds of permitted clients (e.g., municipalities) have the benefit of a statutory best interest standard?

In dealing with registrants, we do not believe that some clients should have the benefit of a statutory best interest standard while others do not. Please also see our response to #44, #45 and #47.

Question 47: Are there certain kinds of retail clients that do not require the benefit of a statutory best interest standard?

We do not believe there is a clear definition of a retail client. By trying to exempt certain kinds of retail clients from the benefit of a statutory best interest standard, we run the risk of excluding a large segment of clients who are indirectly being advised on a personal level. For example, an investor may be one or more places removed from the adviser by the use of a corporate entity, trust, partnership or investment club or otherwise, and thus may not be classified as a retail investor even though the individual behind the entity is ultimately receiving the advice on his or her personal financial goals and objectives. Another example would be advising a pension committee of a corporation on the management of pension funds contributed by employees and the employer. We do not see any reason for a relaxed standard in such circumstances.

Question 48: If the best interest standard described above was introduced, should advisers and dealers be permitted to modify or negate the standard by contract with their clients? If so, what limitations (if any) should be placed on that ability?

We believe that all registrants providing advice should be held to a fiduciary standard and those registrants should not be able to modify or negate the standard by contract. If the registrant had an ability to modify the standard by contract, there would be the potential for abuse and misuse of the adviser's position, which negates a key rationale for the standard in the first place. A client always has the right to change the nature of the relationship from an advisory relationship to another type of relationship where a best interest standard may not be required, such as one where a registrant provides purely execution services.

Question 49: If a best interest standard is introduced, should the existing duty on advisers and dealers to deal with their clients fairly, honestly and in good faith continue to apply whenever the best interest standard does not?

In the event the legislation was drafted such that the fiduciary standard did not apply in all circumstances, the existing duty on advisers and dealers should continue to apply in any excluded circumstances.

Consultation Questions on Duty Applying to Advice

Question 50: Should the best interest duty described above apply when any advice is provided to a retail client or only when personalized advice is provided to a retail client?

We believe that any advice by an adviser directed at a specific client is personalized and such adviser should be subject to the best interest duty. While there are circumstances where recommendations and analysis are written generally in an investment newsletter or analyst report and the writer of such report, if a registrant, should not be subject to a best interest duty, if such a report were provided by an adviser to a particular client or a client seeks advice from an adviser to act on information contained in such a report, then the report becomes personalized and the adviser should be subject to the best interest duty in providing the report to the client.

Question 51: If a best interest duty should apply only when personalized advice is provided to a retail client, what should "personalized advice" mean in this context?

We believe any advice directed to a client is personalized; only generally and widely disseminated information not aimed at specific persons is not personalized.

Question 52: Should it be triggered in the same circumstances in which the suitability requirement arises? Does this include advice to hold securities (as opposed to buying or selling securities)?

Please see our response to #50 and #51.

Concluding Remarks

We thank you for the opportunity to provide these comments. We would be happy to address any questions you may have and appreciate the time you are taking to consider our points of view. Please feel free to contact us at chair@cfaadvocacy.ca on this or any other issue in future.

(Signed) *Ada Litvinov*

Ada Litvinov, CFA
Chair, Canadian Advocacy Council

Appendix A
Recommended Procedures for Compliance with Best Interest duty[3]

Regular account information. Members and candidates with control of client assets should submit to each client, at least quarterly, an itemized statement showing the funds and securities in the custody or possession of the member or candidate plus all debits, credits, and transactions that occurred during the period; should disclose to the client where the assets are to be maintained, as well as where or when they are moved; and should separate the client's assets from any other party's assets, including the member's or candidate's own assets.

Client approval. If a member or candidate is uncertain about the appropriate course of action with respect to a client, the member or candidate should ask what he or she would expect or demand if the member or candidate were the client. If in doubt, a member or candidate should disclose the questionable matter in writing to the client and obtain client approval.

Firm policies. Members and candidates should address and encourage their firms to address the following topics when drafting the statements or manuals containing their policies and procedures regarding responsibilities to clients:

• Follow all applicable rules and laws: Members and candidates must follow all legal requirements and applicable provisions of the Code and Standards.

• Establish the investment objectives of the client: Make a reasonable inquiry into a client's investment experience, risk and return objectives, and financial constraints prior to making investment recommendations or taking investment actions.

• Consider all the information when taking actions: When taking investment actions, members and candidates must consider the appropriateness and suitability of the investment relative to (1) the client's needs and circumstances, (2) the investment's basic characteristics, and (3) the basic characteristics of the total portfolio.

• Diversify: Members and candidates should diversify investments to reduce the risk of loss, unless diversification is not consistent with plan guidelines or is contrary to the account objectives.

• Carry out regular reviews: Members and candidates should establish regular review schedules to ensure that the investments held in the account adhere to the terms of the governing documents.

• Deal fairly with all clients with respect to investment actions: Members and candidates must not favor some clients over others and should establish policies for allocating trades and disseminating investment recommendations.

• Disclose conflicts of interest: Members and candidates must disclose all actual and potential conflicts of interest so that clients can evaluate those conflicts.

• Disclose compensation arrangements: Members and candidates should make their clients aware of all forms of manager compensation.

• Vote proxies: In most cases, members and candidates should determine who is authorized to vote shares and vote proxies in the best interests of the clients and ultimate beneficiaries.

• Maintain confidentiality: Members and candidates must preserve the confidentiality of client information.

• Seek best execution: Unless directed by the client as ultimate beneficiary, members and candidates must seek best execution for their clients.

• Place client interests first: Members and candidates must serve the best interests of clients.

[3] ©2010, 2006, 2005, 1999, 1996, 1992, 1990, 1988, 1986, 1985 (supplement), 1984, 1982, by CFA Institute. Used with permission.