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British Columbia Securities Commission
Alberta Securities Commission
Saskatchewan Financial Services Commission
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
New Brunswick Securities Commission
Superintendent of Securities, Prince Edward Island
Nova Scotia Securities Commission
Superintendent of Securities, Newfoundland and Labrador
Superintendent of Securities, Northwest Territories
Superintendent of Securities, Yukon Territory
Superintendent of Securities, Nunavut

Attention:

Me Anne-Marie Beaudoin
Corporate Secretary
Autorité des marches 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

Mr. 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

Subject: CSA Consultation Paper 33-403

Dear Sirs and Mesdames,

CIBC welcomes the opportunity to comment on the CSA's proposal to impose a statutory best interest duty upon all advisers and dealers. CIBC subsidiaries are engaged in all aspects of the provision of financial advice to clients, from advising clients, to providing dealer services, to offering financial products. CIBC will be directly impacted by the CSA's proposal in CSA Consultation Paper 33-403 (the "Paper").

CIBC believes that advisers and dealers should act in their clients' best interests at all times. Indeed, in CIBC's view, advisers and dealers are already obligated to act in their clients' best interests – as a Canadian investor would understand this term – under the current robust legal and regulatory regime. The CSA's proposed best interest duty is a technical legal duty which may be difficult for clients, regulators and the courts to quantify or understand, and might not lend itself to integration with the existing Canadian legislative and regulatory regime. In addition, the proposed duty could have

the unintended consequence of harming investors by creating uncertainty and limiting access to products and services. CIBC is concerned that this potential harm may come with no corresponding benefit to investors, and that the proposed duty will not effectively address the CSA's investor protection goals. CIBC agrees that the Paper raises some legitimate investor protection issues that regulators and the industry should consider. However, if legislative or regulatory change is the most effective means to address such concerns, we suggest they be addressed through thoughtful amendments to existing regulation.

Discussion

We address our comments to the Paper in two sections. First, we respond to the CSA's investor protection goals with CIBC's views on whether this proposal will address them. Second, we set out key problems that may arise through imposing the proposed statutory duty.

Part I: Does the proposed statutory duty meet the CSA's goals?

CIBC agrees with the CSA that investor protection is a key focus of securities law and regulation. As noted above, we agree that certain of the investor protection issues identified by the CSA in the Paper are real challenges facing retail investors. However, we are concerned that these issues will not in fact be addressed by the imposition of a new statutory best interest duty.

1. Principled Foundation: CIBC agrees that "buyer beware" should not form the foundation for dealers/advisers' standard of conduct. Indeed, in our view, it does not. Advisers and dealers are currently obligated both to recommend only products that are "suitable", and also to deal with clients honestly, fairly and in good faith. These obligations may vary as appropriate depending on the level of sophistication of the particular client, but exist regardless of whether an investment is solicited or unsolicited. Advisers and dealers are also subject to disclosure requirements, to requirements for managing or avoiding conflicts of interest, and to the obligation to know their clients.[1] In our view, there is no evidence that the standard applicable to advisers and dealers is in fact "buyer beware" and therefore, there is no need to impose a new statutory duty to address this potential concern.

2. Information and Financial Literacy Asymmetry: CIBC also agrees that many clients should have a better understanding of the products and services in which they invest their savings. While some asymmetry between client and adviser/dealer is to be expected, financial literacy can always be improved upon. However, the imposition of a best interest standard will not address poor financial literacy; in fact, it may well create an additional disincentive for clients to take accountability for their own financial knowledge. Obliging advisers and dealers to act in clients' best interests does not require them to teach clients about the markets and investing, even assuming that clients are interested in taking the time to learn. As the Commissions have clearly recognized, given the recent regulatory focus on disclosure, client financial literacy can be improved through providing clients with clear disclosure about products and services, and opportunities for them to learn. The former is accomplished through disclosure obligations on advisers/dealers.[2] The latter is accomplished through investor education initiatives led by the CSA and other industry participants.

3. Expectation Gap: CIBC agrees that clients should understand the nature of their relationship with their adviser or dealer. However, in CIBC's view, clients, dealers and advisers are already aligned in their expectations. As is more fully discussed with

[1] See s. 13.2 of National Instrument 31-103, section 2.2.1 of MFDA Rules, Rule 1300 of IIROC Rules and the standards imposed on registrants who adhere to the Conduct and Practices Handbook.
[2] For example, see securities law requirements for "full, true and plain" disclosure in offering documentation, Point of Sale disclosure, disclosure obligations as part of IIROC Rule 3500 (Relationship Disclosure).

respect to the CSA's fourth concern, the nature of the advice that advisers and dealers are obliged to provide under the current regime is the functional equivalent of advice in a client's "best interest". Indeed, for IIROC members, the obligation to act in a client's best interest – while not perceived as a traditional fiduciary obligation – already exists.[3]

4. Adviser/Dealer Recommendations Not In Best Interest: Under current legislation and regulation, advisers and dealers must recommend investments which are suitable for clients, having regard to their sophistication, investment objectives and risk tolerance. Separate and apart from this obligation, advisers and dealers must also deal with their clients honestly, fairly and in good faith, and avoid, manage and disclose potential conflicts of interest. It is not clear to CIBC under what circumstances a recommendation which meets all of these requirements would not be in a client's best interest. The Paper suggests two potential situations: (i) an adviser or dealer might recommend a suitable investment at an inflated price; or (ii) an adviser or dealer might recommend a product which is suitable where another product might be "better".[4]

It is CIBC's view that the first situation is already prohibited under existing law. Were an adviser to be faced with two identical products, with identical objectives and risk parameters from issuers or managers who were equally well-known to and trusted by the adviser (setting aside the near impossibility of such circumstances), both products could clearly be suitable for the client. However, if one product cost the client more than the other or if the adviser were to receive a higher commission or trailer fee as a result of that product's compensation structure, it would be contrary to the adviser's duties to avoid, manage and disclose potential conflicts, and to deal honestly, fairly and in good faith with his or her client to recommend the more costly product solely in order to increase his own compensation. Accepting that not all investment products are identical, the cost to the client of an investment is only one of the factors that an adviser or dealer should consider in assessing suitability. To privilege product cost above all other considerations would be harmful to clients as it would ignore the many other valid factors advisers and dealers are expected to consider in recommending products.

The CSA's second situation either will not be addressed by the proposed duty or will result in wholesale changes to the financial industry that will harm investors. The CSA quite properly accepts that there is no single "best" investment for a client. It would be unrealistic to require advisers to be familiar with the entire universe of investment products and recommend only the "best" one from this entire universe for any given client. If the duty does not require an adviser to recommend the single "best" product (as this would be impossible), there are no other criteria offered in the Paper on which a recommendation could be judged "better" than a suitable recommendation. However, the CSA may be suggesting that a "better" investment might be an investment not available at a particular adviser or dealer, and that all advisers and dealers must offer a full suite of products. If this is the CSA's goal, CIBC requests that the CSA make this clear in its proposal and seek industry comment directly on this issue, given the potentially significant impact on both investors and the industry. Requiring advisers and dealers to offer as broad a suite of products, from as broad a range of manufacturers as possible, will be a substantial change to the business models of some advisers and dealers, one that may not be financially viable. While this could advantage larger market participants who have the capacity to offer a considerable depth of products, it could result in a reduced number of advisers and dealers, and reduced choice for clients.

Finally, imposing an obligation that would compel firms to broaden their product offerings runs counter to advisers' and dealers' obligations to conduct sufficient due diligence to satisfy their duty to "know their product". The practical effect of these diligence requirements has been a reduction in the number of products that ultimately make it onto a firm's "shelf" as firms work to ensure that they are able to meet their

[3] For example, see IIROC Dealer Member Disciplinary Sanction Guidelines. Repeated reference is made to members having a duty to act in their clients' best interests. See pp. 25, 27, 29, 31.
[4] CSA Paper at p. 9581.

regulatory obligations. To mandate an increased product offering is a significant step that merits clear justification and extensive industry consultation. CIBC is concerned about the unintended consequences of undertaking this type of change through regulatory interpretation of a best interest duty.

The Paper contains no other guidance or clarity on how a recommendation might be suitable for a client but not in a client's best interest. If the only real issue is product cost, this is already accounted for in the existing standard, and in existing disclosure obligations and conflict requirements.[5]

5. Conflict of Interest Rules Ineffective: The most clear and principled method of ensuring conflicts are appropriately avoided, managed and disclosed is to properly enforce existing conflict of interest rules. The Paper presupposes that there is an "inherent" conflict of interest between client and adviser/dealer where the adviser or dealer is being compensated by an issuer for a recommendation.[6] While this may not always be the case, the best way to address this issue is to ensure clients are properly informed of how advisers and dealers are compensated, and to ensure that advisers and dealers are adhering to their duty to deal with clients honestly, fairly and in good faith. CIBC agrees that clients should understand the ways in which their advisers/dealers are paid. IIROC has already addressed this issue for its members through the imposition of fee and charge disclosure requirements in the newly-approved Client Relationship Model,[7] and for other dealers and advisers, this requirement will be implemented as part of the Cost Disclosure and Performance Reporting amendments to National Instrument 31-103. Imposing a new best interest duty is unnecessary to accomplish this goal.

Part II: Will the proposed duty harm investors?

CIBC is concerned that a new best interest duty will create uncertainty for investors and may work to limit their access to products and services. It is not clear that the proposed duty provides sufficient benefits to investors to outweigh these harms.

CIBC appreciates that the Paper reflects an early stage of consultation, and CIBC supports the CSA giving investors and market participants an opportunity to comment throughout this process. However, a statutory best interest duty will cause uncertainty for investors because – aside from the issue of product cost and adviser compensation, which is dealt with above – there is no clear guidance on what it means for a recommendation to be in a client's best interest and how to differentiate this from the suitability requirement. Neither investors nor regulators will be able to determine whether advisers and dealers have met this statutory obligation without any metrics by which to measure them. Further, CIBC understands that the proposed statutory duty would not necessarily supplant a traditional fiduciary duty that may exist at common law. Accordingly, clients may still claim a breach of a common law fiduciary duty side-by-side with a breach of the statutory best interest duty; courts will still have to engage in the usual fiduciary duty analysis in addition to a new analysis of a statutory breach. Finally, to the extent the CSA aims to reduce the uncertainty and complexity of litigation as a dispute resolution process, the imposition of a new duty will not achieve this goal. On the contrary, because courts will no longer be able to rely on existing jurisprudence relating to the content of the suitability obligation, they will have to develop new law on the meaning of "best interest" as it has been defined by the CSA.

If the implication of the proposed duty is that advisers and dealers will be required to offer a broader suite of products, as described above, this may harm investors as it may reduce the number of advisers and dealers who can meet these requirements, and may give rise to increased costs. Smaller advisers and dealers who currently service less

[5] For example, IIROC Rule 3500.5(2)(f) and (g) which requires members to disclose fees and charges relating to the operation of accounts and transactions in those accounts.
[6] See the CSA discussion of conflicts at p. 9582.
[7] IIROC Rule 3500.5(2)(f), (g).

affluent retail investors may no longer be able to do so if required to offer more products to their clients. This will have the unintended consequence of reducing the number of advice channels available to smaller clients, and may force them out of the markets entirely. This is not in investors' best interests.

Conclusion

CIBC supports the CSA's continuing efforts to foster fair and efficient capital markets, and provide investors with protection from fraudulent and unfair practices. However, CIBC has concerns about the CSA's proposal to impose a technical statutory best interest duty because it may harm investors and market participants without providing any tangible benefits.

CIBC has also participated in working groups established by the Investment Industry Association of Canada and the Investment Fund Industry of Canada to study the Paper, and we share many of the concerns raised in both the IIAC and the IFIC responses.

Yours truly,

"Gillian Dingle"

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