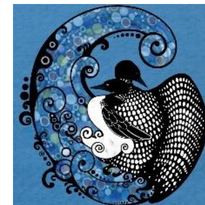
October 4, 2016



Members of the Canadian Securities Administrators (CSA)

- Alberta Securities Commission (ASC)
- Autorité des marchés financiers (AMF)
- British Columbia Securities Commission (BCSC)
- The Manitoba Securities Commission (MSC)
- Financial and Consumer Services Commission (NB FCSC)
- Nova Scotia Securities Commission (MSSC)
- Ontario Securities Commission (OSC)
- Financial and Consumer Affairs Authority of Saskatchewan

c/o Me. Josée Turcotte, Secretary
Ontario Securities Commission
20 Queen Street West, 22nd Floor
Toronto, ON, M5H 3S8
comments@osc.gov.on.ca

Me Anne-Marie Beaudoin, Corporate Secretary
Autorité des marchés financiers
800, rue du Square Victoria, 22e étage
C.P. 246, tour de la Bourse, Montréal, QC H4Z 1G3
consultation-en-cours@lautorite.qc.ca

Dear Sirs and Mesdames:

Re: CSA Consultation Paper 33-404 re Adviser, Dealer, and Representative Obligations to Clients

Please accept this response to the CSA Consultation Paper 33-404: *Proposals to Enhance the Obligations of Advisers, Dealers, and Representatives toward their Clients* ("CP 33-404"). I have worked with many of the best in the investment industry, read about the worst, and engaged with advocates, regulators, and investors of various levels of savings and financial literacy. I appreciate the efforts expended on discussing improvements to regulation of the Canadian investment industry for the benefit of investors, issuers, the Canadian economy and Canada generally.

Before elaborating on why I think there are too many unanswered questions to adopt a best-interest standard at this time, and better interim alternatives, I considered whether there was value in me, as someone formerly working for financial industry associations, commenting because it is particularly hard for anyone in the investment industry to argue *against* such a standard. This is because, as proponents of a best-interests say reasonably, the many advisors and dealers who truly believe they are acting in their clients' best interests should have nothing to fear from such a requirement, nor anything to object to in a rule change that would address the "bad apples". I determined to respond after considering that securities regulators also are not of a single mind in supporting a best-interests or fiduciary standard.

- **SEC Commissioner** Daniel Gallagher, expressing his personal view, wrote that an American fiduciary initiative was "**good for plaintiffs' lawyers, bad for investors."**[i]

- Former **ASC (and CSA) Chair** Bill Rice, speaking personally on December 3, 2013 (*before* CRM2, POS 3, mutual fund and ETF risk rating rule changes and more were in place) said:

  > **"This issue *[fiduciary/best-interests standard]* is an example, in my view, of what we inherit from our neighbours to the south when we might not have seen the necessity or even purpose to address it on our own… The question for me is whether we really need to create, define, implement and enforce an entirely new standard of conduct for the investment industry. I believe that the existing standards of suitability and know-your-client are very good standards. From my post as Chair of the ASC I do not observe that we have problems arising between salesperson and client because of our current standards, but we have problems because in too many cases the existing standards, on the part of the investor, are often not understood and, on the part of the salesperson, are often not abided by"**.

- Joe Yassi, **former IIROC Vice-President of Business Conduct Compliance**, noted at a January 2011 industry education event that **common law in Canada already treats unsophisticated investors as if a fiduciary standard applied to relationships between advisers and smaller, less sophisticated, more vulnerable clients.** This is in addition to existing Rule 1402 requirements for IIROC dealers to "(i) … observe high standards of ethics and conduct and … act openly and fairly and in accordance with just and equitable principles of trade, and (ii) … not engage in any business conduct that is unbecoming or detrimental to the public interest." IIROC Rule 1402 also addresses[ii] negligence; failure to comply with a legal, regulatory, contractual, or other obligation; unreasonable departure from industry practice; and likelihood to reduce investor confidence in the markets that also already provide for regulatory action.

- The **BCSC** – a partner of the OSC and NB FCSC in the Cooperative Capital Markets Regulatory System (CCMRS) – **opposes a best-interests standard for reasons set out in Part 8 of CP 33-404**. While the OSC and NB FCSC support a best-interests standard for reasons also set out in Part 8, **the majority of regulators** identified in CP 33-704 express **"… strong reservations on the actual benefits of the introduction of a regulatory best interest standard over and above the proposed targeted reforms" and concern with "the potential unintended outcomes of the codification of such an aspirational standard of conduct."**

In light of this divergence in views among those in the legal profession, who understand what a best-interests standard is or might be, I enclose comments below, ordered as follows:

1. **"Would a regulatory best interest standard materially enhance the effectiveness of the proposed targeted reforms and strengthen the principled foundation of the client-registrant relationship"?**
   a. What – in plain language – is a best-interests standard?
   b. What do the words "*materially enhance"* mean?
   c. Is there research missing to assess if the proposed standard materially enhances outcomes?
2. **What is the "highest and best use" of regulatory resources at this time?**
3. **Targeted reforms**
4. **Conclusion**

Appendix: Comments on Targeted Reforms

1. "Would a regulatory best interest standard *materially enhance* the effectiveness of the proposed targeted reforms and strengthen the principled foundation of the client-registrant relationship"?

a. What – in plain language – is a regulatory best-interests standard?

Before considering whether a best-interests standard materially improves the effectiveness of the reforms, it is necessary to understand such a standard from the perspective of, say, an unsophisticated retail investor. Ellen Bessner, a respected lawyer representing registrants at all court levels and before various regulatory tribunals, while promoting to directors, officers, advisors and their supervisors how to reduce regulatory risk by better understanding liability, ethics and compliance issues, wrote **the following plain-language description of the issue** that seems helpful for non-lawyers (e.g., most investors and registrants) to understand:

> "Our judge-made law is pretty fantastic because the standard of care operates on a sliding scale, moving up and down depending on a client's knowledge, sophistication, experience, involvement and mandate — discretionary or not — in respect of his or her account. If the client is highly involved and sophisticated, the advisor's standard is lower; it then moves higher, to the fiduciary standard, when the client is unsophisticated and relies heavily on the advisor to make decisions on his or her account, especially if the account is traded on a discretionary basis, … The CSA's proposal will make the standard consistent for both sophisticated and unsophisticated clients. Some might think that makes sense, but the effect will be as follows, using a simple example: An advisor will be held to the same standard regardless of whether he is serving Mr. Smith, a securities lawyer who has been trading in stocks, bonds and options for decades and engages in unsolicited trades, or Mr. Jones, who left school after grade 6 and who never invested in anything beyond guaranteed investment certificates. That's not an improvement on the law as it stands now." (Sept. 26, 2016, *Investment Executive*).

Ellen's words imply that a beneficiary of such a standard would be knowledgeable investors. While not saying smaller unsophisticated investors will *not* benefit, would there be any resultant impacts on small unsophisticated investors through price adjustments if a new standard benefits *experienced* investors, all else remaining equal? CP 33-404 does not comment directly on such possible impacts.

It would also be helpful for those considering the new standard to have a view from the regulators as to whether the current conduct standards[ii] for IIROC dealers could successfully be interpreted to achieve an equivalent to a best-interests standard without the uncertainty associated with development of new case law and the risk of higher costs or less accessible or available, or fewer, options, for those such a standard aims to benefit.

b. What do the words "*materially enhance*" mean?

CP 33-404, reflecting Canadian regulators' focus on research-based decision-making, cites a good number of studies, consultation results and other relevant material to support proposals. "Materially enhance" implies measurable improvements against some base. To be able for most to make a reasonable decision on materially advancing investor welfare, parties interested in the issue would have benefited from the following:

i. Analysis of Canadian investor loss and registrant disciplinary data

FAIR Canada published *A Canadian Strategy to Combat Investment Fraud* in August 2014 that identified serious concerns regarding a lack of data with recommendations regarding data collection (beyond trade monitoring, etc.). I have made a similar but broader proposal to IIROC, the OSC, and a past CSA chair, and sought investor advocate support for development of, a publicly accessible, usable, searchable, cross-industry-segment, extractable relational database including information (scrubbed where appropriate for privacy reasons) on the number, value and summary nature of reasons for losses, infractions and complaints, fines, disciplinary activity (including what percentage of total registrants have no or trivial disciplinary actions) by registrant category and other data points that would help guide effective policy-making. It is not apparent that FAIR Canada's or others' recommended data collection of the nature proposed is moving forward.

ii. Some assessment of best-interest standard impact

In light of the already considerable reduction in number of registrants serving smaller retail clients, there needs to be rigour in the analysis of effects on investment and advice availability, choice and affordability *before* concluding that a best-interests standard will "materially enhance" investor protection on an all-in investor-outcome basis. That is, considering not just fees to apparent net return, but also taking into account using the correct instrument/account from a tax perspective, the financial coaching and hand-holding investment advisors provide, etc. Robo-advice, self-serve information, ETF/index strategies can be cheap solutions for those with the skills, time, risk tolerance and interest for them. However, this leaves retail investors with the foregoing but lacking confidence, or without these attributes, worse off particularly, in the case of major life events affecting finances, such as job loss, divorce, catastrophic illness and death where advisors can provide the most important advice without a direct charge.

iii. Additional context regarding the international backdrop

It would be helpful to have some commentary in CP 33-404 Part 10 (international developments) on what impact the following points may have had on consideration of a best-interests standard:

i. ***Fewer/less financial wrongdoing in Canada?*** The U.K., Netherlands and Australia introduced a qualified statutory fiduciary standard in the past few years and the U.S. may be getting two due to serious, extensive, repeated financial wrongdoing of which there does not seem to be the same extent in Canada..

   Mr. Rice noted some legislators and regulators globally were:

   > "… spending great amounts of time and energy fixing the prior decade's problems and may be loading up the regulatory burden more for the purpose of optics than for impact. That challenge is compounded in Canada where we may not only be trying to fix yesterday's problems, but we may be trying to fix problems that existed elsewhere, and not in Canada."

   Some discussion of this view in the context of listed best-interest standard benefits would be helpful.

ii. ***More effective regulation?*** Unlike these other countries, Canada did not have an equivalent period of financial service deregulation after allowing banks and insurance companies to enter the investment industry through subsidiaries or directly. Yet like these other countries, Canada has substantially increased the regulation of investment dealers and regulated investment advisers in the areas of – among other things – relationship disclosure, conflict of interest, compensation, and performance disclosure. A former regulator believes that in CRM2, Canada has gone beyond anything in any other major country.

   While it is unlikely that The International Monetary Fund (IMF), concluding reviews of securities regulation under its Financial Sector Assessment Program (FSAP) of countries' implementation of *IOSCO Objectives and Principles of Securities Regulation* (with investor protection the first of the three goals of securities regulation), would inject its views on a best interests or fiduciary standard, it concluded in its:

   - March 2014 report on Canada that "The Canadian framework for the regulation and supervision of securities markets demonstrates a high level of implementation of

the IOSCO Principles." (It is instructional to look at what the IMF recommends for Canada, which is referenced in 2. below.)

- June 2016 assessment of the U.K. that "Since the last FSAP, the U.K. financial system has put the legacy of the crisis behind it and has become stronger and more resilient".
- April 2015 report on the U.S.: There is no easily findable equivalent of either of the above statements.

Although quantifiable data is hard to compare from country to country due to consistency and availability challenges, Canada still seems to report fewer client complaints/sanctions than in the U.K., Australia and the U.S., adjusting for country size. Also, we can say that within Canada we have not experienced Madoff-type fraud losses, nor do ABCP issues in Canada appear to be anywhere near the proportions experienced by investors south of the border and globally. For example, University of Chicago and University of Minnesota business professors found that 7% of financial advisers have been disciplined for misconduct that ranges from putting clients in unsuitable investments to trading on client accounts without permission. And some large, well-regarded firms have misconduct records that far exceed the average." While not final, the paper identifies nearly 20% of financial advisers at one recognized firm have misconduct records. I believe that Canadian regulators would not allow this, although we do not have available data to confirm this [iii]

This is not to say there should not be more, different or better rules, but continuing to levy additional regulations, as opposed to, for example, some incentives for good behaviour, ends up with all registrants and investors paying for the bad ones.

iii. ***Better after-the-fact justice options?*** While the goal of securities regulation is to avoid bad behaviour, or stop it before investors incur losses, Canadians have more easy-to-use free redress mechanisms for investors before having to resort to the courts or other remedies. The U.S., U.K. and Australia seem to have just one or only two bodies to approach when wronged, whereas Canadian investors effectively can go to an SRO, a CSA member and the ombudsman before resorting to the courts. In both the U.S. and U.K., there seems to be a practice of using lawyers even for what in Canada is a free service. In the U.S., criticisms have been leveled at the different avenues available to (and some disadvantageous rules applying in the case of) investors using advisors subject to SEC versus FINRA regulation. In terms of FINRA arbitration, investors pay approximately 25% of all case fees and industry parties pay about 75% (although these are waived in hardship situations)[iv], while there is no charge for MFDA, IIROC, CSA or OBSI use in Canada.

iv. ***Inconclusive results?*** Meaningful application experience with a new fiduciary/best-interest standard in relevant comparator countries is not yet available. Either regulation is in the process of being amended (i.e., Australia), has not yet been implemented (i.e., U.S.) or has lead to additional concerns and proposed solutions (i.e., U.K.):

- In the case of Australia, Dr. Pamela Hanrahan, one of Australia's leading authorities on securities and financial services law, pointed to concerns with the then newly enacted Part 7.7A of the Australian Corporations Act, noting it used 2,762 words to clarify the fiduciary duty, excluding words in related regulations. She also points out that retail client is narrowly defined, for example, does not invest more than $500,000. While possibly done to provide some balance, subsequent proposed Australian amendments, to address in part what has created significant legal

uncertainty on how advisers can actually satisfy the best interests duty, are described by the Australian Treasury as "deregulatory and … designed to reduce the compliance burden on the financial advice industry." It is not clear if the findings of the Australian Treasury *Future of Financial Advice Amendments* have been taken into account in the Canadian-best-interest proposal.

- In the case of the U.S., an estimate of costs and benefits associated with the Department of Labour fiduciary standard was released in April 2016 that promises a major transfer of benefits to financial consumers from financial intermediaries (including pension plans, which are not covered under Canada's the proposed best interest standard). Interestingly, Professor Mercer Bullard, President and Founder of Fund Democracy Inc., MDLA Distinguished Lecturer and Professor of Law University of Mississippi School of Law, who supports a fiduciary standard, said[v]: "Whether investors have a clear understanding of the legal duties owed to them by financial advisers is not the issue that a fiduciary duty addresses… Broker-dealers routinely hold themselves out and provide investment advice as financial advisers, and the law has for centuries held such professionals to a fiduciary duty, *regardless and independent of their clients' understanding of that duty*." (emphasis added)

- In the case of the U.K., a March 2016 report said that "many advisers told us that concerns about future liability are preventing them from giving advice today" and "One of the principal areas identified by firms as a barrier to providing this kind of guidance was uncertainty about the boundary between regulated advice and more general forms of help. Firms have also stated that they do not feel able to develop more streamlined advice services that meet simple consumer needs. As a result, many consumers who are seeking support through guidance or limited forms of advice are either unable to access support or end up paying the cost of full advice, even when their needs are comparatively simple. FAMR [Financial Advice Market Review] therefore recommends making the regulatory landscape clearer for firms so that they can deliver high-quality guidance services for consumers who want help in making their own decisions." It would be helpful to know if and, if so, how CP 33-404 proposals have benefited from the FAMR recommendations.

v. ***How the best interest standard will interact with current rules?*** It is conceivable that the proposed standard will lead to decisions contrary to current rules. It is likely that this issue has been dealt with, however, it would be good for those who do not have legal training to understand the implications of the interaction between the standard and other rules.

vi. ***What can be learned from others with fiduciary duties?*** CP 33-404 does not discuss what we might learn from others with a fiduciary or quasi-best-interests duty: Are lawyers required to tell clients asking for a basic will that cheap legal will kits are available or to provide fee disclosure in advance for future year updates? Are doctors required to write out their thought processes for patients regarding what course of action is "most likely" to achieve the health outcomes a patient can reasonably expect and to review material changes in the risks of drugs they prescribe? Can clients take a tax professional to a redress mechanism to be compensated for a very basic error?

These questions are not aimed at avoiding the CP 33-404 questions, delaying progress or bringing rules to the lowest common denominator. It is to focus on the need for that most difficult of achievements – a balance that ensures that the maximum number of

investors wanting financial advice have the best possible accessible, affordable choices available to them and what I am hearing is an increase to the minimum account size.

It is reasonable to ask why the fact that we are not as bad as others means we should not try to get better with a best-interests standard. That said, a broad across-the-board best interests standard, with its attendant costs and uncertainties, may not be the silver bullet that some think as such a standard:

- ***Does not address the greater losses due to unregulated issuers and advisors.*** In one year, approaching 50% of annual investor losses was attributable to unregistered parties[vi].

- ***Would come on top of other new regulations (whose efficacy is still being assessed) applying to dealers and advisors that are subject to regular in-depth examinations,*** which do not appear to exist in the case of fiduciaries

- ***Does not guarantee there will be no breaches.*** Canada's Governor General David Johnston, commenting on the 2008 financial crisis, asked: "How many lawyers "papered" the deals that involved fraudulent statements of assets, liabilities, income and valuations? How many lawyers "sounded the alarm" about conflict of interest in the web of financial transactions and creative financial instruments?" He also referenced the accounting scandals of Enron and World.Com.[vii]

Conclusion: While sympathetic to the concerns of those pressing for some time for progress on this issue, I believe that the above points show there are too many unanswered questions to proceed at this time. **CP 33-404 does not provide a unique position on a best-interests standard, Canada-specific comparative loss and disciplinary data, an impact assessment, or implications of implementing a best interest standard in light of opposing views among members of the soon-to-be-operational CCMRS.**

2. What is the "highest and best use" of regulatory resources at this time?

While there are many "priorities" in the various regulatory strategic priority documents, the five top IMF securities-regulation recommendations for Canada (referenced above) are:

- More robust collection and use of quantitative analysis – this is consistent with FAIR Canada and other recommendations referenced in 1.b.i above
- More effective use of enforcement powers in connection with criminal offenses – this is particularly important for the material number of investor cases involving unregulated/unregistered issuers and advisors, which leave investors with comparatively less protection and recourse, an is a recommendation supported by all
- Stronger co-ordination between regulators
- More timely decision-making in policy formulation – this becomes most effective if there is good data easily available on which to base decisions and work on this may also be supported by investor advocates and registrants alike
- Additional capacity in very specialized areas.

As well, what regulators and investors underappreciate is the frustration of registrants that little seems to be done to address issues that would help investors and registrants, particularly when they cross regulatory boundaries – yes, there are legal barriers between securities, insurance, deposit and pension regulators, but no barriers to these regulators choosing to work together to achieve faster and better outcomes (e.g., to improve consistency, etc.)

Recommendations:

While data collection appears mundane and a lower priority compared to investor protection 'writ large', it is important for: (1) developing good policy, (2) finding solutions faster, and (3) fostering (a) greater trust in the system by investors and registrants, as well as greater success for regulators.

The CSA and other regulatory and quasi-regulatory bodies of competing products and services[viii] should:

- ***Work with volunteers to identify the data fields, definitions and ways easily to make available relevant information (e.g., on the number, cost and cause of financial consumer losses across the CSA, IIROC, MFDA, OBSI, and investor protection funds) and similar regulatory bodies accessible to stakeholders, including investors; then collect and publish data clearly and concisely and on a timely basis[ix].***
- ***Publish information through a single source that compares, in plain language, the nature and regulation of competing products and regulated entities – whether administered under securities, insurance, deposit-taking or pension rules***
- ***Better communicate helpful information – use fines levied to advertise – to investors, for example regarding:***
  - ***a. The availability of free recourse mechanisms (a hand-out at account opening is not enough)***
  - ***b. The need to check if their dealers/advisors/managers or channels they invest through are regulated (a media release once a year is not enough)***
  - ***c. What a reasonable rate of return is, what reasonable asset allocation at different ages are, etc. (with media unregistered personalities and successful investors talking and writing about higher returns and special strategies they've used, there is a lot of 'noise' that can confuse unsophisticated investors).***

3. Targeted Reforms

See Appendix. CP 33-404 questions include ones generally already in effect for some registrant categories and ones that are not – the CSA has indicated the intention to bring the latter to a higher standard where warranted and so not all questions are addressed. **The decision to make further changes to suitability, KYC, KYP, relationship disclosure and conflict of interest management for those already subject to new higher requirements introduced since the 2008 financial crisis should be deferred until results of the CRM2 review underway by the BCSC are available.**

4. Conclusion

I believe that Canada has a good, if not perfect, investment industry and regulatory system, and I value the efforts of Canadian regulators and engaged investor advocates seeking to improve the lot of investors.

While an annoying, but small proportion of registrants take advantage of clients or are not fully competent, advisors are important as they help people with difficult financial decisions in the case of divorce, death, and other life events in ways that robo-advisors and do-it-yourself cannot. Due to the know your client rule, they can help identify diminishing capabilities and financial abuse. As well, regulatory research shows that an advisor reduces the likelihood of investors being taken in by fraud.

I believe there is not sufficient evidence that a best-interests standard should be implemented at this time because CP 33-404 presents:

a. No single regulatory position on a best-interests standard – Part 8 of CP 33-404, explaining the complexities of the issue, is worthwhile reading[x]

b. Insufficient Canada-specific comparative loss, disciplinary and other data (CP 33-404's reference to CSA, MFDA and IIROC complaints does not quantify them as a percentage of the universe or in terms of gravity)

c. No assessment of the impact of a change to a regulatory best-interest standard on access, availability, choice, competition and cost, especially for the small investor

d. No complementary proposal to address abuses by unregulated issuers and unregistered advisors where investors are often left much worse off in terms of losses and without access to easy-to-use free redress mechanisms, for example, a memorable national advertising campaign funded by fines, such as the BCSC's "Take a Shot at Fraud" contest with Canucks event

e. No clear view of what happens when the (partial) common regulator – the CCMRS – goes live or how the new standard would interact with existing rules if there is a conflict between them.

Should the CSA or a group of CSA members decide to proceed with a best-interests standard, it seems wrongly to be focused on the fee/commission-versus-outward-return equation. If my health club were assessed on the basis of amount paid per pound or kilo lost, it sadly would fail miserably, but its value to me encompasses also my physical health, mental well-being, and social connections. Any best interest standard must be couched in terms that encompass *all* of a clients' interests (e.g., even simply encouraging saving) and express the right of an advisor to be paid fairly for the broader definition of value.

With respect to the targeted reforms, there is value in bringing categories not at the most demanding regulatory level to that level (with principled exceptions as CP 33-404 says). However, the goal of 'simple, concise and plain language' must guide any drafting, and "net-new" requirements should await the findings of the CRM2 assessment review underway.

I hesitate to make this final point, but was encouraged by the word "aspirational" in CP 33-404 and so, in anticipation of Canada's 150th birthday next year, I will express my hope for a present to investors. Governor General David Johnston said in 2011:

> "When I was installed as governor general…, I entitled my remarks: "A Smart and Caring Nation: A Call to Service." In 2017, we will celebrate the 150th anniversary of Confederation, and I have been inviting Canadians across the country to imagine what a smarter, more caring nation might look like in [then] six years' time, and how we can turn our vision into a reality.
>
> I now make a formal request to you, members of the [Canadian Bar] Association who best represent the legal profession *[for our purposes, replace 'members of the Canadian Bar Association who best represent the legal profession' with 'stakeholders in the investment industry']*, to please join together in this dream for our 150th anniversary as a nation. I suggest our birthday present be to ask ourselves: how do we craft a new definition of the lawyer *[insert appropriate title for investment industry stakeholder categories]* as professional?"

The Oxford dictionary defines a confederation as "an organization that consists of a number of parties or groups united in an alliance or league." In a globally connected complex world, it seems impractical to deny the interconnectedness of finance, law, tax, and perhaps other laws and the multiple touchpoints of each of these with the Canadian investment services consumer. I can think of no better present to our confederation of people, especially at this juncture when the pendulum has swung from youth to the baby boomers who may pass on large amounts to family and other beneficiaries, and at this time of great technological change, than moving from our current ping-pong policy-making approach that has

appeared to me often to be needlessly adversarial – perhaps this is just due to the nature of our legal system – to a more co-operative one in the future.

If Canada aspires to do the very best for its people, it would be even better to engage with legal and accounting (and medical) professionals and investor advocates directly as at present tax, security and other legal issues that are inter-connected at times have been ignored. The OSC is to be congratulated for adopting such an open-tent approach in the creation of its Seniors Advisory Committee. I am persuaded that working together in a forum of trust and respect will better help the Canadian investor.

Thank you very much for considering my submission (with apologies to the reader, and channeling French mathematician/philosopher Blaise Pascal, 'If I had had more time, I would have written less').

Yours respectfully,

Barb Amsden

Appendix

Answers to CP 33-404 Questions

Like other respondents, I have not answered all individual questions but used the table on pages 3954-5 in the OSC pdf version as a clearer framework for responses.

<table>
<tr><th>Obligation</th><th>Summary of Areas Without Explicit Requirements</th></tr>
<tr><td>Conflicts of Interest
(questions 1 – 3)</td><td>No explicit requirement to prioritize the interests of the client when responding to conflicts – Refer cover letter and best-interests questions below.
No explicit requirement that:
disclosure related to conflicts of interest is fully understood by the client, including the implications and consequences of the conflict
An expanded requirement can lead to too much disclosure that investors will tune out, helping neither advisor nor investor. Also, CP 33-404 and other studies cite the paradox of investors still investing even knowing of considerable conflicts. Finally, while there are concerns about financial literacy, investors also suffer from a lack of basic and “legal” literacy. Dr. Weinstein of the Brondesbury Group, commissioned in the past on investor issues by the OSC, said at a public event that investors can absorb about an index-card’s worth of information at one time. Given the challenges, it would seem appropriate to ask such a plain-language expert for a brief simple definition that can be consistently and broadly used.
registrants must have a reasonable basis for concluding that a client understands such disclosure
This is difficult to achieve and document: if a client understands – which is most likely with the brief plain-language explanation recommended immediately above – that’s good; if not, examiners and Canada’s current case-made-law and redress mechanisms must protect the investor.
Only explicitly applies to firms, not representatives
Agree should explicitly apply to both.</td></tr>
<tr><td>Know Your Client
(questions 4 – 6)</td><td>No explicit requirement to collect certain key elements of investment needs and objectives and financial circumstances (e.g., amount and nature of debts)
Note that in requiring investors to also provide a perspective on personal debt, securities regulators may be imposing a further duty for which advisors will not be explicitly paid, just as tax and other regulatory authorities expect advisors and their firms to undertake work – while that work is desirable as it brings a general social benefit, it is not evident that this will keep financial advice affordable and accessible to investors.
No explicit requirement around developing risk profiles for clients
This remains an evolving area that would benefit from joint work involving regulator, registrants, academics and advocates: I believe there is a ‘risk’ that the focus on risk profiles will drive investors into what may be overly conservative investments when what is needed is that most difficult to find regulatory grail of a ‘balance’.
No explicit requirement that the original KYC information, and any material change, is confirmed in writing with a signed copy provided to the client
Reference to dating and signing by both the client and the representative and a copy being provided to the client is well intended, however, having a dated/signed copy is likely to protect an advisor more than the investor; adds to</td></tr>
</table>

<table>
<tr><th>Obligation</th><th>Summary of Areas Without Explicit Requirements</th></tr>
<tr><td></td><td>the length of rules and costs; and goes beyond the regulators’ description of a principles-based system.
No explicit requirement that registrant take reasonable steps to update KYC information at least once a year
Agree with an annual review, but suggest this be worded “update or confirm” and that reasonable means can include an e-mail or other technology-based option.
Note: The questions include additional questions not in this table
Registrants should have tax proficiency, however, investors for privacy and memory/knowledge reasons often do not fully disclose. So, rather than to “their client’s basic tax position”, reference should be made to knowledge of “basic investment-related tax rules”. I appreciate that the regulators recognize the important link for investors between investment and taxes, even if tax rules do not fall under securities law. Awareness of generic tax provisions is part of the value registrants provide.
New standard account forms should only be considered if the forms have been identified as a cause of problems – no evidence was presented on the problems this is trying to solve or benefit: while not in their interests and anathema to lawyers, not carefully reading forms other than to fill in fields is sadly a reality for many investors.</td></tr>
<tr><td>Know Your Product (questions 7 – 15)</td><td>Although KYP is a key element of the suitability analysis, it is not an explicit, stand-alone requirement (currently embedded for representatives as an element of proficiency that applies only when a recommendation is made, but not explicitly when the client initiates the order)
No explicit requirement for representatives to know about all the products on their firm’s product list, how each product compares to the others, and all fees, costs and charges connected to the product, the client’s account and the product and account investment strategy
No explicit role for the firm in meeting the KYP requirement
No explicit requirements for shelf development by the firm
This entire segment should be the subject of face-to-face discussion, rather than ping-pong policy development where proposals are put forward, responses are sent, etc. Particular care should be taken not to cause conditions that further impact the continued existence of small independent competitors that may serve investors very well.</td></tr>
<tr><td>Suitability (questions 16-22)</td><td>Requirement is primarily “trade”-based (i.e., based on a product order or recommendation to buy or sell only)
No explicit requirement to consider product/account costs against the client’s investment needs and objectives
No explicit requirement to conduct a suitability review for recommendations or decisions to hold or exchange securities
No explicit requirement to conduct a suitability review for recommendations not to purchase, sell, hold or exchange securities
No explicit requirement for representatives to recommend the product from their firm’s shelf that is most likely to meet the investment needs and objectives of the client compared to the other products on the firm’s shelf
No explicit requirement to consider the investment strategy and other basic financial strategies as part of the product-focused suitability analysis
No explicit requirement that suitability be conducted upon certain key events, including at least once a year</td></tr>
</table>

Obligation	Summary of Areas Without Explicit Requirements
	It appears that these items essentially describe what is already in SRO rules, and in the case of SROs, any changes should await the result of the CRM2 assessment that is currently underway.
Relationship Disclosure *(questions 23-27)*	• No explicit requirement for firms to provide disclosure about the general nature of the client-registrant relationship in easy to understand terms • No explicit requirement for firms to provide disclosure about the nature and impact on the client of the firm's approved product list or restricted category of registration, as applicable **Note: A concise plain-language description that could optionally be used might help. Note that in industry discussions of CRM2, an intelligent, respected, native English-speaker asked what 'remuneration' meant in the phrase "The investment dealer's remuneration on this transaction has been added to the price in the case of a purchase or deducted from the price in the case of a sale." For any required text, a non-financial plain-language expert should be used.**
Proficiency *(questions 28 – 29)*	• No explicit ongoing continuing education requirement **A continuing education requirement, such as exists for at least IIROC registrants, is critical.** • Less, or no, emphasis on the areas that lack certain explicit obligations set out in this table **Should be part of the continuing education requirement – suggest working with industry associations and education providers to ensure this forms part of a concise "annual refresher/update" course qualifying for CE credits.**
Titles and Designations *(questions 30-33)*	• Limited regulation on client-facing titles has allowed proliferation of dozens of confusing and competing titles **Keep it simple – while there are confusing and competing titles, it is less clear to me that titles have caused problems for the average investor and spending more time on this may take time away from more important issues; it is more important that personal marketing material not be deceiving: for example, an advisor should not be marketing himself as 'award-winning' if the award is for sales, rather than on service or some other directly investor-relevant measure.**
Role of UDP and CCO *(question 34)*	• No explicit requirement for ultimate designated persons (UDPs) and chief compliance officers (CCOs) in the context of key compliance and oversight obligations, such as the compliance obligations relating to conflicts of interest and suitability **Keep it simple – the lengthy text in the table of questions is evidence of a rules-based approach that will generate a checkbox response, when a principle-based approach would be interpreted more broadly.** **I agree on the importance of "tone from the top"; in this, examinations should look more closely at firms where a substantial amount of income comes from a small number of earners.**
Statutory Standard of Conduct *(questions 35 – 38)*	• Limited guidance that explains what regulators' expectations are and how this standard is used separately from, and together with, more targeted obligations We note that the analysis may be different in respect of certain obligations in the SROs' rules, and, as a result, there is some inconsistency (in law and/or application) across platforms (CSA jurisdictions, IIROC and/or MFDA). Ideally, there would be no, or only principled, inconsistency across these platforms. **See cover letter – there is not sufficient data to support this. Comments on each of the contemplated principles are provided below in case such a standard proceeds:**

Obligation	Summary of Areas Without Explicit Requirements
	1. Act in the best interests of the client and 2. Avoid or control conflicts of interest in a manner that prioritizes the client's best interests – ***With respect to the principles for a best interest standard discussed, there should be a clear written expression that 'best interests' means taking into account not just fees and return, but also other services of value to the client, with the right for advisors to be paid for services also articulated in the rule.*** 3. Provide full, clear, meaningful and timely disclosure ***– The word "full" should be replaced by 'concise'; the word 'meaningful' captures the concept of full in the sense of all information an investor might usefully need to make a decision, whereas fully can imply 'in exhaustive detail'.*** 4. Interpret law and agreements with clients in a manner favourable to the client's interest where reasonably conflicting interpretations arise – ***it is not clear why this needs to be separately addressed and 'interpret law' could be very broad-reaching (does it include tax law?), an example should be given or this should be deleted.*** 5. Act with care ***– Already a requirement.***
Questions 39-68	Some of these cover the same general areas as those above do; others are all addressed under SRO rules; most of the remainder are areas where CSA-only regulated parties should be raised at least to the SRO standard. With respect to Part 5 of CP 33-404, which identifies the five key investor protection concerns in connection with the client-registrant relationship that are part of the best-interest standard are listed below with comments. 1. **Clients are not getting the value or returns they could reasonably expect from investing:** CP 33-404 notes "Failure of registrants to consider all relevant factors, including product costs and investment strategies (such as leverage or active over passive) in their suitability analysis may prevent clients from meeting the goals of their investment activity." ***Comment:*** This cited wording appears to limit 'value or returns' to those associated with fees and strategies. While fees and returns are important and easier to measure, this does not mean there is no value, or that investors do not value, other aspects of their financial advisor or dealer relationship. These include advice on the right tax vehicle or account, transfer of financial literacy, time savings, peace of mind, analytical skillset the client lacks, etc. Any best interest standard must fully consider the investor's all-round needs, including access to affordable investment services. 2. **Expectations gap**: CP 33-404 says "[m]ost investors incorrectly assume that their registrants must always provide advice that is in their best interest. As a result, clients have misplaced reliance or trust on their registrants." ***Comment:*** A presentation slide shown to investors by OSC-commissioned Ascentum said: "Many professionals, such as lawyers and doctors, are obligated to act in the best interest of their clients. This means more than just being honest and straightforward with you – it's about putting your interest first, even before their own financial gain." Another by Brondesbury Group (2012) said "Some 7 out of 10 investors believe their advisor has a legal duty to put the client's best interests ahead of his or her own. They rely on their advisor to select the best

Obligation	Summary of Areas Without Explicit Requirements
	investment for them and most believe the advisor will recommend what is best for the client even <u>at the expense of their own commission</u>." At the same time, CP 33-704 notes that 'A common theme from these meetings [consultations with registrants] was that most representatives believe they already act in their client's best interests – what may be at issue is that few advisors or investors are lawyers and understand the concept in the way that a lawyer would. As Professor Bullard was quoted earlier as saying – this may not even make a difference. There are multiple factors regulators require dealers to consider in terms of "best execution"; I am not aware that "best interests" is determined on just one factor: the cost of a particular investment. Presumably fiduciaries are not expected to provide their services for free or operate at a loss overall. Despite the opprobrium cast on embedded trailers in mutual funds, when total investment holdings are few, the correspondingly low compensation earned by the financial advisor, the fact that it declines if markets fall, the diversification offered, the low or absence of a cost of acquisition and additional benefits can make this the best option for the small investor, even though the fees may exceed those paid by a do-it-yourself investor by ETFs through a discount broker. Recognizing that this is the subject of another regulatory study, eliminating an embedded fee option risks, for the investor starting out, the loss of a source of low-cost advice and "nudge"-type discipline to keep saving. If payment of a separate fee leads to people reducing saving or not having access to the right advice when needed, it is a false economy. The amount paid as an embedded fee at the low-end of the asset-holding spectrum is cheap insurance for advice on a range of possible life events. • **Conflicts of interest**: The cited research suggests that disclosure may have a counter-intuitive effect of increasing reliance on advice where the client is told of conflicts of interest. ***Comment:*** I have seen research on this and understand the challenge for regulators of identifying when conflict disclosure is effective and when it may have a contrary effect. My experience suggests that while some may not disclose – which is demonstrably wrong – others may overdisclose to avoid regulatory second-guessing. Given investor available time, financial literacy, interest level, etc., conflict disclosure should be concise. This was addressed further above. • **Information Asymmetry**: CP 33-404 says that as the current regulatory framework is, in many instances, less effective than intended in mitigating the consequences of the information and financial literacy asymmetry, ensuring clients understand the information and advice they receive should shift onto registrants. ***Comment:*** The difficulty with information asymmetry is that is applies in all professions, indeed in all businesses, charities, with government bodies and in many other interactions. The fact that others have more information is why we pay them. That said, it is right to focus squarely on this issue in the case of investors, as their investments will be a big factor in their future quality of life, however, small investors can be equally at risk in the cases of home and car

Obligation	Summary of Areas Without Explicit Requirements

	purchases, dealing with the Canada Revenue Agency, etc. "Ensuring understanding" can be extremely time-consuming, difficult to achieve and harder to prove – the teaching professions struggles daily to ensure student understanding, and other professions are not expected to have to do so. The best place to start addressing this issue is making people better consumers in generally. This area would benefit from joint work and better ways to get investor attention.
	
	• **Clients are not getting outcomes that the regulatory system is designed to give them:** CP 33-404 cites as concerns opaqueness in the suitability assessment, requirements for more clarity to assist in effective enforcement, barriers to obtaining redress for a registrant breach, and lack of effective compliance and enforcement in certain cases. This phrase, which admirably aims to be concise, is difficult to parse and would be worthwhile discussing further
	  • Two aspects reference enforcement and all reputable parties agree with the importance of making enforcement more effective – it would be good to see effective developments on this front.
	  • As to the lack of clarity of suitability assessments, refer above.
	  • With respect to barriers to obtaining redress, it is not clear what is meant. Having successfully used two of the mechanisms (MFDA and OBSI) that provide free assistance where possible to unsophisticated investors bringing claims, I believe that the issue is less the mechanisms or absence of a best-interests standard (OBSI is not limited by securities law; CSA members, IIROC and MFDA have powers of suasion), and more about getting the message out about the facilities' existence using more effective means.

[i] Daniel Gallagher, SEC Commissioner, in a July 21, 2015 letter on the Department of Labour fiduciary proposal proposal, says "It [the Fiduciary Proposal] brazenly dismisses both suitability as a proper standard of care for brokers and the FINRA arbitration system as a mechanism to resolve disputes between financial professionals and their clients…. High net worth broker-dealer clients will be moved into fee-based advisory accounts and will pay a premium to the existing commission structure. Less well-heeled customers will be "fired" by their brokers or jettisoned to robo-advisers. I find it very convenient that the disparate impact the proposed rule will have on low to moderate income workers has received scant attention from supporters of the proposal."

[ii] IIROC Rule 1402 – Standards of Conduct states that:

(1) A Regulated Person
  - (i) in the transaction of business, must observe high standards of ethics and conduct and must act openly and fairly and in accordance with just and equitable principles of trade, and
  - (ii) must not engage in any business conduct that is unbecoming or detrimental to the public interest.

(2) Without limiting the generality of the foregoing, any business conduct that:
  - (i) is negligent;
  - (ii) fails to comply with a legal, regulatory, contractual, or other obligation, including the rules, requirements, and policies of a Regulated Person;
  - (iii) displays an unreasonable departure from standards that are expected to be observed by a Regulated Person; or
  - (iv) is likely to diminish investor confidence in the integrity of securities, commodities or derivatives markets

  may be conduct that contravenes one or more of the standards set forth in subsection 1402(1).

[iii] http://www.chicagotribune.com/business/ct-personal-finance-financial-advisers-20160301-story.html

[iv] http://www.americanbar.org/content/dam/aba/publications/dispute_resolution_magazine/Gana_Lufrano_TheInconsistentDisputeResolutionProcessforInvestmentAdvisers.authcheckdam.pdf

[v] Presenting on September 10, 2015 to the House of Representatives Committee on Financial Services Subcommittees on Capital Markets and Government Sponsored Enterprises, and Oversight and Investigations.

[vi] A 2011 study by investor advocate FAIR Canada showed: 44% were due to unregulated people; 26% were registered with the Canadian Securities Administrators (CSA); 16% with the Mutual Fund Dealers Association (MFDA) and 15% with the Investment Industry Regulatory Organization of Canada (IIROC).

[vii] Others, beyond lawyers and accountants/auditors, with fiduciary or quasi-fiduciary standards that have betrayed their clients include doctors, chartered financial analysts (CFAs), academics and engineers (think of VW's cheating on pollution emissions tests).

[viii] The Joint Forum of Financial Market Regulators, comprised of the Canadian Council of Insurance Regulators (CCIR), the Canadian Securities Administrators (CSA), and the Canadian Association of Pension Supervisory Authorities (CAPSA). It also includes representation from the Canadian Insurance Services Regulatory Organizations (CISRO) shows 2013 as the date of the latest 'What's New' posting.

[ix] Note: The BCSC's InvestRight website Enforcement Round-Up is a useful tool, with case summaries in plain language in appended news releases, for pure commentary. Of note, it was a financial institution that tipped of the regulator to the possible existence of one case of fraud.

[x] CP 33-404 cites immediate impact as a benefit of a best-interest standard. To the extent that bad actors will sadly always exist, it won't stop them; to the extent the courts will have to review and perhaps redefine case law, it won't be immediate; to the extent that many advisors believe that they meet a best-interests standard, this is irrelevant; to the extent that there are well-intentioned advisors that aren't always acting in an investors' interests because of a lack of knowledge, more direct routes would be more successful.