Consultation Paper 33-404

of the Canadian Securities Administrators

Proposals to enhance the obligations of advisers, dealers, and representatives toward their clients

Comments submitted to the following administrators:

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

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Introduction

In April 2016, the Canadian Securities Administrators (the "CSA") published a *Consultation Paper* to "seek comment on proposed regulatory action aimed at enhancing the obligations of advisers, dealers and representatives [hereinafter "registrants"] toward their clients"[1].

In the *Consultation Paper*, the CSA provide a rigorous, clear and well-documented overview of the current situation and of several relevant and promising avenues for change, while highlighting the advantages and difficulties of the proposed reforms. The detailed description of the issues in the client-registrant relationship and the content of the planned standards, as well as their potential impacts, offer useful input for the various stakeholders, including registrants and investors, and help them understand and take a critical view of the proposed reforms.

In this text, we will look, first, at the proposed regulatory best-interest standard, and then formulate comments on some of the proposed targeted reforms. The comments made here are based on the extensive research work carried out since 2007 by the Financial Services Law Research Group at the Faculty of Law of Université Laval, of which the authors are members[2]. The Research Group's work focuses in particular on the legal and organizational supervision of investment services, more specifically securities trading, financial advice, individual and group portfolio management and financial planning.

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1 CANADIAN SECURITIES ADMINISTRATORS, *Consultation paper 33-404 – Proposals to enhance the obligations of advisors, dealers, and representatives toward their clients*, April 28, 2016, (2016), 39 OSCB 3947. (hereinafter "*Consultation Paper*").

2 See the list of the Research Group's publications in the Appendix. More information on the Research Group is available at www.grdsf.ulaval.ca. Recently, the Research Group, working with the Antoine-Turmel Research Chair on Legal Protection for the Elderly, began a major resesarch project on legal protection for the elderly against financial exploitation.

I. Proposal for a regulatory best interest standard

As noted in Part 8 of the *Consultation Paper*, all the CSA jurisdictions, except the British Columbia Securities Commission, are consulting on the potential introduction of a regulatory best interest standard (hereinafter "regulatory best interest standard")[3], It is important to note that some members of the CSA, including the Autorité des marchés financiers (hereinafter the "AMF"), have expressed concerns about the proposal[4].

1. Need for a regulatory best interest standard

We support the proposal to introduce a regulatory best interest standard, more specifically to govern relationships between registrants and "retail clients", in other words individual clients or clients other than institutional investors[5]. As we have shown in several of our publications on the investment services regulation[6], the introduction of this standard in securities regulation is justified in large part by the need to protect the interests of retail clients engaged in a professional relationship characterized by an information asymmetry and power imbalance between registrants and their retail clients, and the clients high level of trust in the registrants.

Two recent studies conducted in Canada, the *National Smarter Investor Study*[7] published in 2015 and the *Smarter Investor Study: BC Report*[8] published in 2016, provide revealing data on the high degree of trust placed by Canadians in the services of their investment representative. The results from these surveys of 2,407 respondents show that 90% have a

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3 *Consultation Paper*, p. 3965-3972.

4 *Id.*, p. 3968-3971.

5 For a definition of "institutional clients", see *Consultation Paper*, p. 3964.

6 Raymonde CRÊTE, Marc LACOURSIÈRE and Cinthia DUCLOS, «La rationalité du particularisme juridique des rapports de confiance dans les services de placement», in R. CRÊTE, M. NACCARATO, M. LACOURSIÈRE and G. BRISSON (ed.), *Courtiers et conseillers financiers – Encadrement des services de placement*, vol. 1, coll. CÉDÉ, Cowansville, Éditions Yvon Blais, 2011, pp. 229-273. [On line] : https://www.lautorite.qc.ca/files/pdf/consultations/anterieures/valeurs-mobilieres/commentaires_33-403/U-Laval-courtiers-conseillers-vol1_33-403.pdf; Raymonde CRÊTE, «La difficile cohabitation des impératifs économiques des gestionnaires de patrimoine et des intérêts des épargnants», in *Les conflits d'intérêts*, Association Henri Capitant, Journées nationales, tome XVII, Lyon, Dalloz, 2013, p. 153-171. [On line] : http://www.grdsf.ulaval.ca/system/files/la_difficile_cohabitation_des_imperatifs_.pdf

7 BC Securities Commission, *National Smarter Investor Study*, Vancouver, nov. 2015.

8 BC Securities Commission, *Smarter Investor Study*, Vancouver, feb. 2016.

"strong or very strong level of trust" in their investment advisor[9]. In the complex field of investment services in which retail clients, in general, do not possess specialized knowledge, they look for an advisor who does have the necessary knowledge in order to obtain advice tailored to their needs and objectives.

The studies also highlight revealing data on the effects of this high level of trust on clients' attitudes and behaviour, in particular concerning checks on their advisor's background and compensation, and the reading of statements. A majority (53%) of Canadian respondents had not conducted a background check on their advisor[10]; half (50%) had discussed their advisor's compensation once only or never[11]; over three-quarters (78%) explained that they had never or almost never discussed compensation because of their trust in their advisor ("I trust that it is fair and reasonable")[12]; almost half (48%) who never or almost never read their statements explained that this was because they trusted their advisor ("I don't need to read my investment statements very often because I trust that my advisor is taking care of my money")[13]; over one-third (34%) considered that they did not need to understand the risks and advantages of their investments if their advisor did[14].

As pointed out in the *Consultation Paper*, the high level of trust and reliance shown by most clients creates a gap between their expectations and the obligations of their advisors (the "expectations gap"), since the clients assume that their advisor is acting or, at least, is expected to act, in their best interests[15]. This expectations gap may exacerbate the "agency problem" inherent in the client/registrant relationship and lead to suboptimal results for clients".[16] The introduction of a regulatory best interest standard could help reduce the expectations gap. The *Consultation Paper* also mentions several other advantages that could result from a regulatory standard, which we fully support[17].

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9 *National Smarter Investor Study*, note 7, p. 45; *Smarter Investor Study: BC Report*, *id.*, p. 49.

10 *Smarter Investor Study: BC Report*, note 8, p. 25.

11 *Smarter Investor Study: BC Report*, *id.*, p. 27

12 *National Smarter Investor Study*, note 7, p. 21.

13 *Smarter Investor Study: BC Report*, note 8, p. 37.

14 *Smarter Investor Study: BC Report*, *id.*, p. 40.

15 *Consultation Paper*, p. 3956.

16 *Id.*

17 *Consultation Paper*, p. 3966-3968.

2. The proposed regulatory standard as a “duty of care”

The consulting jurisdictions specify that the regulatory best interest standard would not be "a restatement or formulation of a fiduciary duty" which, in common law, involves strict duties of conduct and leads to potentially harsh remedies in the event of registrant misconduct[18]. As mentioned in the *Consultation Paper*, the proposed standard would be preferable to a fiduciary duty since the content of a regulatory best interest standard would be more comprehensive and tailored to the client-registrant relationship[19]. In this context, the consulting jurisdictions are considering placing the regulatory best interest standard within the general framework of a **regulatory standard of care**[20]. As indicated in Appendix H of the *Consultation Paper*, the proposed regulatory standard of care would have the following guiding principles: 1) act in the best interests of the client; 2) avoid or control conflicts of interest in a manner that prioritizes the client's best interests; 3) provide full, clear, meaningful and timely disclosure; 4) interpret law and agreements with clients in a manner favourable to the client's interest where reasonably conflicting interpretations arise; 5) act with care. It is important to note that in both common law and Québec civil law, the four first guiding principles are generally associated with the duty of loyalty, and not with a standard of care.

Although we understand the drawbacks of a statutory fiduciary duty, as applied in common law, we believe it is not advisable, from the point of view of Québec law, to describe the proposed best interest standard as being part of a general standard of care. This is because the new standard of care is difficult to reconcile with, and even incoherent compared to, the interpretation and application of the standards of care and loyalty found in Québec’s principles of law and in the specific rules imposed on registrants, such as investment dealers, mutual fund dealers and their representatives[21].

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18 *Id.*, p. 3965.

19 *Id*.

20 *Id., appendix H.*

21 In Québec's general law, the duties of loyalty and diligence are stated expressly in the rules applicable to mandate, the administration of the property of others and the contract for services. See art. 2138 C.C.Q. (mandate); art. 1309 C.C.Q. (administration of the property of others), art. 2100 C.C.Q. (contract for services). In Québec's *Securities Act*, see sections 160 and 160.1.

According to the principles of law set out in the *Civil Code of Québec*, the duty to act in the client's best interests is expressly linked to the duty of loyalty, rather than the duty of care[22]. In Québec law, the relationship between a client and his or her investment advisor is generally governed by the legal rules on mandate, which require the advisor, as the mandatary, to "act honestly and faithfully in the best interests of the mandator" (the client)[23]. A similar duty of loyalty also appears in the principles applicable to administrators of the property of others and the directors of legal persons, such as business corporations[24]. Québec's *Securities Act*, in turn, in section 160, expressly requires people registered as dealers, advisers or representatives "to deal fairly, honestly, loyally and in good faith with their clients."

The duty to act with loyalty, as set out in the principles of Québec's general law and in its securities statute, leads to other specific obligations, such as the obligation to avoid conflicts of interest, to disclose any conflicts to the client, to respect the confidentiality of the information provided by the client, to refrain from using property or information obtained for the purposes of a mandate to benefit the mandatary or a third party, and to act with transparency, impartiality and integrity[25].

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22 See art. 2138, 1309 and 2100 C.C.Q. As the consulting jurisdictions recognize in the *Consultation Paper*, the best interest standard is interpreted, under certain legislative provisions, as a fiduciary duty: see *Consultation Paper*, p. 3965 and note 33. Concerning the interpretation of directors' duties under s. 122 of the *Canada Business Corporations Act*, see the Supreme Court decision *Peoples Department Stores Inc. (Trustee of) v. Wise*, in which it interprets the directors' duty of loyalty as a "fiduciary duty". (parag. 32).

23 Similarly, in Québec general law, the rules governing the administration of the property of others, which are sometimes applied to describe the legal nature of the client-registrant relationship, impose a similar duty of loyalty. Concerning the legal nature of the client-registrant relationship, see Raymonde CRÊTE, «Les manifestations du particularisme juridique des rapports de confiance dans les services de placement», in R. CRÊTE, M. NACCARATO, M. LACOURSIÈRE and G. BRISSON (ed.), *Courtiers et conseillers financiers – Encadrement des services de placement*, vol. 1, coll. CÉDÉ, Cowansville, Éditions Yvon Blais, 2011, 275, [On line] : https://www.lautorite.qc.ca/files/pdf/consultations/anterieures/valeurs-mobilieres/commentaires_33-403/U-Laval-courtiers-conseillers-vol1_33-403.pdf

24 See art. 1309 C.C.Q. (administration of the property of others), art. 322 C.C.Q. (directors of legal persons).

25 R. CRÊTE, «Les manifestations du particularisme juridique des rapports de confiance dans les services de placement», préc., note 23, pp. 302-310.

In addition to the duty of loyalty mentioned above, Québec's principles of law and the *Securities Act* require registrants to act with care[26]. The *Securities Act* states that registrants "are required to act with all the care that may be expected of a knowledgeable professional acting in the same circumstances."[27] Several specific obligations are covered by this general duty of care, such as the "*know your client rule*" and the "*suitability rule*".

This brief summary of the Québec law applicable to registrants shows that they are subject, first, to a fundamental duty of loyalty, expressly linked, in the general principles of law, to client's best interests, and secondly to a duty of care. If the consulting jurisdictions opt for the solution proposed in the *Consultation Paper*, which defines the main standards of conduct (the five guiding principles) under a general standard of care, there would be a risk of confusion for registrants, investors and regulatory authorities. Also, harmonization with the general principles of Québec law would be difficult, and even incoherent, especially concerning the duty of loyalty. We should also point out that one of the five guiding principles under the new standard of care is to "act with care". This double reference to the duty of care in the proposed guiding principles could also lead to confusion between the general and the specific standard.

As an alternative solution, the CSA could adopt the guiding principles proposed in the *Consultation Paper* under the general heading "Standards of conduct for registrants" or "Obligations of registrants". A second option would be to adopt, as a fundamental principle, a regulatory best interest standard, which would then be the basis for other standards of conduct, such the duty to act with loyalty, honesty and care. In other words, the adoption of the best interest principle would be the ultimate objective in the client/registrant relationship, while the other guiding principles (avoiding conflicts of interest, acting with care, etc.) would be considered as ways for registrants to meet that objective.

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[26] For the principles of the general law, see art. 2138 C.C.Q. (mandate); art. 1309 C.C.Q. (administration of the property of others) and 2100 C.C.Q. (contract for services). Concerning the duty of care, see R. CRÊTE, «Les manifestations du particularisme juridique des rapports de confiance dans les services de placement», note 23, pp. 310-315.

[27] Québec's *Securities Act*, section 160.1.

3. Concerns expressed by some CSA members concerning the regulatory best interest standard

3.1 Legal uncertainty

One of the criticisms of the regulatory best interest standard voiced in the *Consultation Paper* by some CSA members concerns its vagueness, which, in their view, could create legal uncertainty[28]. We recognize that the general nature of the principle can lead to several different interpretations and applications that, *a priori*, are difficult to circumscribe. The same applies to several of the general duties, such as the duties of good faith, loyalty, honesty, care and fairness, provided for in Québec's general principles of law and in several specific statutes, such as the *Securities Act*.

All of these fundamental principles, described by some authors as "variable content concepts", are an integral and essential component in any legal system, whether in Québec, Canada or abroad[29]. Because of their imprecision, they offer the flexibility needed to adapt to a range of situations and to the economic and social changes that occur over time. In the investments services industry, where change is rapid and constant, this flexibility has the advantage of increasing its ability to adapt to new realities while taking into account the particular circumstances and regulatory objectives pursued. In comparison, a regulatory approach mainly or solely based on specific rules could work against this kind of adaptation and lead to a legal void because of the rules' specific and limited scope.

It is important to note that this approach, based on the adoption of general principles, should be viewed in a comprehensive perspective. Securities regulation already incorporates a mixed approach characterized by the existence of general standards of conduct and a set of specific obligations that guide registrants and the supervising authorities as to the meaning and scope of the general standards. In addition, the targeted proposals and the indications given in the Appendix to the *Consultation Paper* could be extremely useful in assisting registrants in the interpretation of the proposed standard and on the concrete actions needed

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[28] *Consultation Paper*, p. 3969, 3970.

[29] Chaïm PERELMAN and Raymond VANDER ELST (ed.), *Les notions à contenu variable en droit*, Bruxelles, Établissements Émile Bruylant, 1984.

for its application. These signposts could encourage registrants to review their policies and practices, in particular to avoid or manage conflicts that could harm their clients' interests.

3.2 Expectations gap between clients and registrants

According to certain consulting jurisdictions, the proposed best interest standard "may exacerbate the expectations gap between clients and registrants because of the existing restricted registration categories and proprietary business models permitted in Canada."[30] They go on to state that "For those business models that are closer to the “salesperson” end of the spectrum, it would be impossible to impose a regulatory standard on these registrants that is truly a “best interest” standard."[31] They then add that "the proposed standard will not prohibit certain fundamental conflicts" and that registrants "will continue to be able to: sell a limited range or type of investment products (these registrants have the clear limitation that there may be nothing in the limited range of products they offer that is actually in the investor’s “best interest” to buy)."[32]

As mentioned above, it is true that there is currently an expectations gap between clients and registrants in the sense that clients, due to their high level of trust, assume that their advisor is acting or, at least, is expected to act, in their best interests[33]. Ideally, the adoption of a best interest standard should not exacerbate the gap but help reduce it, provided the regulators give registrants some indications of how they are expected to apply this fundamental obligation. As effort has been made to achieve this goal, as reflected in the suggestions made in the Appendix to the *Consultation Paper*. The jurisdictions can also consider the possibility of adopting rules or guidelines that take into account the specific context of restricted registration categories and proprietary business models. It must be remembered that the general "best interest" principle, because of its flexibility, is open to various different interpretations and applications. Taking into account the specific context of restricted registration categories and proprietary business models, the regulators and the registrants could assess the areas of risk and attempt to identify the steps needed to improve

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30 *Consultation Paper*, p. 3969.
31 *Id.*
32 *Id.*
33 See note 15 and corresponding text.

the client/registrant relationship. It is important for retail clients, when offered a restricted range of products or proprietary products, to have an opportunity to know and assess the advantages and disadvantages of this type of distribution in light of their investment needs and objectives. And if, as suggested by certain consulting jurisdictions, "these registrants have the clear limitation that there may be nothing in the limited range of products they offer that is actually in the investor's "best interest" to buy"[34], they could inform their clients accordingly in order to give them an opportunity to opt for other types of investment services.

II. Proposed targeted reforms

As mentioned above, in Part 7 of the *Consultation Paper*, the CSA present various proposals for targeted reforms to improve the client/registrant relationship. These proposals address the following topics: conflicts of interest, "Know Your Client" obligations, "Know Your Product" obligations, suitability, relationship disclosure, proficiency, titles and designations used by representatives, the role of the ultimate designated person (UDP) and the chief compliance officer (CCO), and the statutory fiduciary duty when client grants discretionary authority. Overall, we agree with these proposals for targeted reforms provided that they help ensure the integrity, loyalty, transparency, care and proficiency of registrants in order to better serve their clients' interests. Although it is impossible for us, in the time available, to comment on all of the topics addressed in Part 7, we would like to submit a few remarks on some of them to provide input for the consulting jurisdictions.

1. Know Your Client

In the *Consultation Paper*, the CSA specify a range of measures that can be used by firms and representatives to fulfill their "Know Your Client" duty[35]. Besides finding out about their clients' investment needs and objectives, the CSA suggest gathering information on the client's:

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[34] *Consultation Paper*, p. 3969.
[35] *Consultation Paper*, Appendix B, p. 3982-3984.

> "financial circumstances, including the amount and nature of all assets and liabilities, including the basic features of the client's indebtedness (such as the applicable interest rate on a loan). Information relating to the client's financial circumstances also includes net worth, income, current investment holdings, employment status, liquidity needs, spousal and dependents status, and basic tax position (we acknowledge that firms and representatives are not engaged in tax planning services unless they undertake this service explicitly)."[36]

While recognizing the relevance of all this data from a "know your client" point of view, we believe that the collection of so many elements could, in some cases, raise expectations for the client that could not be met because of the limited scope of the services offered. For example, when services are offered by a mutual fund dealer who is not also a certified financial planner, the client could be led to believe that all the information disclosed will be used by the representative to analyze the client's overall financial situation in order to propose a comprehensive approach, including the tax implications of the strategies proposed. To avoid any misunderstanding of this nature, it will be important for the representative to explain clearly the limited scope of his or her services and, depending on the client's needs, to suggest a referral to a duly certified financial planner. In light of the client's financial situation, the representative could also suggest the possibility of consulting an investment dealer offering mixed or non-proprietary products.

2. Suitability

According to the CSA proposals, to meet the suitability obligation, registrants must ensure that a transaction satisfies three components of suitability: 1) basic financial suitability; 2) investment strategy suitability; 3) product selection suitability[37]. The *Consultation Paper* contains several suggestions to guide registrants on ways to meet their obligation. These include investigating the basic financial strategies that clients could use to meet their investment needs and objectives, given their financial circumstances and risk profile[38]. Depending on the circumstances, the registrant should inform the client of other financial strategies beyond transacting securities that could be more suitable. The registrant must "identify a basic asset allocation strategy for the client (and evaluating any other proposed

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36 *Id.*, p. 3982.
37 *Consultation Paper*, Appendix E, p. 3989.
38 *Id.*

investment strategy) that is most likely to achieve the client's investment needs and objectives."[39]

In light of these indications from the CSA concerning the content of the suitability obligation, it seems reasonable to ask if, because of its extent, it is adapted to the services provided by registrants offering a restricted range of products, such as mutual fund dealers. Some of the means suggested for meeting the principal obligation of suitability exceed the field of competency of these dealers and their representatives, as defined for their registration category. Other CSA indications may also lead to exaggerated expectations on the part of clients relying on the services of mutual fund dealers. However, we recognize that this risk may be mitigated by requiring mutual fund dealers and their representatives to inform clients in writing and verbally of the restricted scope of their services and products[40].

For all registrants, we entirely support the proposal to require representatives to take costs into account when assessing suitability[41].

3. Relationship disclosure

The CSA suggest amending NI 31-103 to require firms to disclose the actual nature of the client-registrant relationship in easy-to-understand terms, in particular concerning conflicts of interest, the offer of proprietary products only or a mixed/non-proprietary list of products, and restricted registration categories[42]. For the services provided by mutual fund dealers, this information could be extremely useful to allow clients to properly understand the real nature of the relationship, and especially the restrictions on the products and services offered. However, if the firm provides the information in writing only when an account is opened, the question is whether the client will realistically read the documentation and, if so, will understand the repercussions of the services offered on his

39 *Id.*, p. 3960.
40 *Id.*, p. 3961-3962 and Appendix F.
41 *Id.*, p. 3990.
42 *Consultation Paper*, p. 3961-3962 and Appendix F.

or her investment needs and objectives. Because of the high degree of trust retail clients place in their advisors, they will probably not read all the documentation provided.

Taking into account the realities of the client/advisor relationship, it would be advisable to require representatives, at the first meeting, to verbally explain to the client their qualifications and areas of proficiency, along with the certification they hold, conflicts of interest, the compensation of the representative and firm, and the true nature and scope, whether restricted or not, of the products and services offered. For example, the representative of a firm offering only proprietary products should explain in plain language that "their product list is restricted to proprietary products and they will only recommend proprietary products; and as a result, the suitability analysis conducted by the firm and its representatives does not consider[43]" a full range of products, some of which could be more appropriate to meet the client's investment needs and objectives. Depending on the client's financial situation, it is also important for the representative to mention the possibility of taking advantage of the services offered by other professionals, such as financial planners and investment dealers (members of the Investment Industry Regulatory Organization of Canada, or IIROC), so that the client can obtain advice better suited to his or her investment needs and objectives.

In short, the firm and its representatives should act transparently at the first meeting with clients, to allow them to make an enlightened choice about the most appropriate type of investment services. In addition to the firm's obligation in terms of relationship disclosure, the CSA should require representatives, at the first meeting with a client, to explain verbally, in plain language, any information provided in writing by the firm, so that the client is aware of their qualifications and areas of proficiency, along with the certification they hold, conflicts of interest, the modes of remuneration of the representative and firm, the nature and scope, whether restricted or not, of the products and services offered, and possible alternatives in terms of investment services.

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[43] *Id.*, p. 3962.

4. Proficiency

As proposed by the CSA, the proficiency obligations contained in Canadian securities regulation should be enhanced. Specific training programs, whether those offered initially as a prerequisite for the registration of representatives or those provided for skills upgrading purposes, need to be reviewed[44].

Prior to registration, candidates should receive a solid basic training on the fundamental objectives and principles underlying the applicable rules, so that they fully understand their rationale and the scope of the various rules and control measures imposed on representatives. The training would also provide an opportunity to explain the respective missions of the various supervisory bodies and the links between them. Given the number and complexity of the standards applicable to the investment services industry, initial training should be designed to help representatives "see the forest and not just the trees".

This training must ensure that representatives properly understand the specific nature of their "professional" relationships, characterized by a high degree of trust that in turn requires compliance with strict obligations of proficiency, loyalty, transparency and care[45]. It should also make them aware not only of possible breaches of their obligations, but also of the sometimes considerable negative impacts on clients and the investment services industry as a whole[46]. The investment advisors we have interviewed on this topic are aware

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[44] Concerning the training provided for registrants, see Geneviève BRISSON, Priscilla TACHÉ, Hélène ZIMMERMANN, Clément MABIT and Raymonde CRÊTE, *La réglementation des activités de conseil en placement – Le point de vue des professionnels*, vol. 3, coll. Cédé, Cowansville, Éditions Yvon Blais, 2010, p. 94-100. [On line] : https://www.lautorite.qc.ca/files/pdf/consultations/anterieures/valeurs-mobilieres/commentaires_33-403/U-Laval-Conseil-placement-vol3_33-403.pdf; Raymonde CRÊTE, Mario NACCARATO, Cinthia DUCLOS, Audrey LÉTOURNEAU, Clément MABIT and Geneviève BRISSON, «La prévention des manquements professionnels : pistes de réflexion et d'action sur l'encadrement juridique et organisationnel des services de placement», in R. CRÊTE, M. NACCARATO, M. LACOURSIÈRE and G. BRISSON (ed.), *Courtiers et conseillers financiers – Encadrement des services de placement*, vol. 1, coll. CÉDÉ, Cowansville, Éditions Yvon Blais, 2011, 575, pp. 597-599. [On line] : https://www.lautorite.qc.ca/files/pdf/consultations/anterieures/valeurs-mobilieres/commentaires_33-403/U-Laval-courtiers-conseillers-vol1_33-403.pdf.

[45] Concerning the "professional" nature of investment services, see R. CRETE, M. LACOURSIERE and C. DUCLOS, «La rationalité du particularisme juridique des rapports de confiance dans les services de placement», note 6.

[46] Concerning the negative impacts of breaches of duty by registrants, see Raymonde CRÊTE, Mario NACCARATO, Cinthia DUCLOS, Audrey LÉTOURNEAU and Clément MABIT, «L'encadrement légal et les types de déviance dans les services de placement», (2010) 35 *Gestion* 35-48, p. 35, 36.

of their obligations and the impacts of their actions, but it appears important to consolidate and generalize this aspect[47].

Special attention must also be paid to the training provided for the registrants' managers. This is because of the crucial role they play, in-house, in the dissemination and internalization of the values, principles and rules that promote relations that are mutually satisfactory for the various stakeholders involved. It is also important to note that, based on data from a Research Group study on the attitudes of investment dealer representatives, the compliance officers within the firms involved were seen as a positive influence because of their proximity to the representatives[48]. As the primary and closest supervisors of the representatives, managers and compliance officers must properly understand the objectives, meaning and scope of the regulations in order to relay relevant information to the representatives.

In short, if effective training is provided for both representatives and managers at investment services firms, they will be able to properly understanding the specific nature of their relationship with clients and the importance of complying with high standards of professional ethics[49].

5. Titles and designations

The *Mystery Shopping for Investment Advice*[50] report published in 2015 by the Ontario Securities Commission (OSC), Investment Industry Regulatory Organization of Canada (IIROC) and Mutual Fund Dealers Association of Canada (MFDA), focuses in particular on the problems relating to the use of various business titles and designations used by advisors. The *Consultation Paper* comments one of the report's conclusions as follows:

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47 G. BRISSON, P. TACHÉ, H. ZIMMERMANN, C. MABIT and R. CRÊTE, *La réglementation des activités de conseil en placement – Le point de vue des professionnels*, note 44, p. 100-115.

48 *Id.*, p. 109.

49 CFA INSTITUTE, *A Crisis of Culture – Valuing Ethics and Knowledge in Financial Services*, The Economist Intelligence Unit, 2013, [On line]: https://www.cfainstitute.org/about/research/surveys/Documents/crisis_of_culture_report.pdf

50 OSC, IIROC, MFDA, *Mystery Shopping for Investment Advice – Insights into advisory practices and the investor experience in Ontario*, sept. 2015, p. 8, 26, 54, 55, 95 [On line]: http://www.osc.gov.on.ca/documents/en/Securities-Category3/20150917-mystery-shopping-for-investment-advice.pdf.

"the variety of business titles used by representatives (48 different titles were used across all platforms) creates confusion concerning proficiency and representatives' status and responsibilities within their firms."[51] To avoid confusing clients, the CSA propose amending *NI 31-103* to more strictly regulate the use of business titles and designations by representatives[52].

We fully agree that amendments are needed to avoid confusion as to the representatives' proficiency and responsibilities. However, although we recognize the relevance of the proposed amendments, we doubt that the use of the business titles suggested will, realistically, be sufficient to allow retail clients to make the necessary distinctions between the various representatives. For consumers, the functions of investment advisor and portfolio manager are probably the predominant elements in the relationship with a representative, but this does not mean that clients are aware of the limits on the respective proficiencies of the representatives concerned. It is also important to mention that the proposals submitted by the CSA deal only with the business titles used in the securities field, excluding the other titles used in the financial services industry, such as those used in the insurance and financial planning sectors. In the complex world of financial services, it is important to take into account the use of all these titles, a source of additional confusion for consumers[53].

Overall, this problem once again highlights the need to require firms and representatives to be more transparent with their clients. As mentioned above, in addition to requiring firms to give clients information about the client-registrant relationship, the CSA should require representatives, at the first meeting with a client, to disclose and explain verbally their qualifications and the type or types of certification they hold, as well as the restricted or

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51 *Consultation Paper*, p. 3950.

52 *Id.*, p. 3963 and Appendix G.

53 Raymonde CRÊTE and Cinthia DUCLOS, « Le portrait des prestataires de services de placement », in R. CRÊTE, M. NACCARATO, M. LACOURSIÈRE and G. BRISSON (ed.), *Courtiers et conseillers financiers – Encadrement des services de placement*, vol. 1, coll. CÉDÉ, Cowansville, Éditions Yvon Blais, 2011, pp. 108-112. [On line] : https://www.lautorite.qc.ca/files/pdf/consultations/anterieures/valeurs-mobilieres/commentaires_33-403/U-Laval-courtiers-conseillers-vol1_33-403.pdf.

unrestricted scope of or the services they offer and possible alternatives in the field of investment services.

6. Statutory fiduciary obligation

The CSA propose amending securities legislation to impose a statutory fiduciary duty on registrants when they manage the investment portfolio of a client through discretionary authority granted by the client[54]. In our opinion the scope of this obligation should be extended to include registrants who offer services as investment advisors, even if they do not have discretionary authority over the portfolio.

Even if a registrant, such as the representative of an investment dealer, is required to obtain the client's consent before making investment on the client's behalf, it is likely that a retail client, because of his or her high level of trust, will follow the representative's advice. The Supreme Court of Canada has referred to this power dependence dynamic and the importance of reliance in *Hodgkinson* v. *Simms*[55], mentioning that a client may implicitly delegate his or her decision-making power to an investment advisor simply by always taking the advisor's advice on how to act[56]. Because of the client's trust, the investment advisor will play a role that is more extensive than that originally agreed upon, because of this implicit power to manage the client's portfolio in a discretionary manner.

Conclusion

In the dynamic and evolving universe of the investment services industry, the regulatory authorities must constantly review and amend the regulatory framework for investment services to ensure that it matches the realities and needs of both industry and consumers and helps ensure care, transparency, loyalty and integrity in the client-registrant relationship.

The publication of the CSA *Consultation Paper* offers a key opportunity for stakeholders to study and comment on the observations and concerns raised by the CSA concerning

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54 *Consultation paper*, p. 3964.
55 [1994] 3 SCR 377.
56 *Id.*, p. 431, 432. (J. Laforest); see also *Lemay* c. *Carrier*, 2006 QCCS 5652, parag. 27, 45 et 46.

certain aspects of the regulatory framework. In response to the CSA's invitation and based on our research as members of the Financial Services Law Research Group, we are pleased to be able to take part in this consultation process by submitting our comments on some of the questions raised in the *Consultation Paper*.

As we have noted, the CSA raise relevant points and makes promising suggestions concerning ways to enhance registrants' obligations and improve their relationship with their clients. Given the major economic and social issues connected with the client-registrant relationship, the proposals submitted by the CSA are a highly valuable initiative.

Appendix

Publications by the Financial Services Law Group

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BRISSON, G., P. TACHÉ, H. ZIMMERMANN, C. MABIT and R. CRÊTE, *La réglementation des activités de conseil en placement – Le point de vue des professionnels*, vol. 3, coll. Cédé, Cowansville, Éditions Yvon Blais, 2010, 186 p. [On line] : https://www.lautorite.qc.ca/files/pdf/consultations/anterieures/valeurs-mobilieres/commentaires_33-403/U-Laval-Conseil-placement-vol3_33-403.pdf.

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