

May 2017

Regulators Rethink “Best Interest” Standard for Registrants

On May 11, 2017, the Canadian Securities Administrators (the “**CSA**”) issued [CSA Staff Notice 33-319](#) (“**Notice**”). This Notice outlines the CSA’s consultation process and direction moving forward for [Consultation Paper 33-404 – Proposals to Enhance the Obligations of Advisers, Dealers, and Representatives Toward Their Clients](#) (the “**Consultation Paper**”), which in turn describes proposed amendments to National Instrument 31-103 – *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (“**NI 31-103**”).

The Notice comes after the CSA received an overwhelming response to its initial request for comment regarding obligations of advisers, dealers and representatives. Among its proposals, the Consultation Paper contemplated detailed reforms targeting areas such as the conflicts of interest, Know Your Client (“**KYC**”), Know Your Product (“**KYP**”) and suitability obligations as well as the use of titles and proficiency requirements. More controversially, it also sought comment on a proposed statutory “best interest” standard for all client-related obligations of advisers, dealers and their representatives.

Some Reform Proposals to be Eliminated or Softened

As a result of comments received on the Consultation Paper, the CSA indicated it will be softening or eliminating several of the proposed prescriptive elements of the reforms, including:

- mandatory collection of basic tax information as part of the KYC process;

- KYP requirements that would require an investigation of a “reasonable universe of products”;
- differentiation of KYP based on whether a firm possesses a proprietary or proprietary/non-proprietary product mix;
- requirements for representatives to understand the structure, product strategy, features, costs and risks of each security on their firm’s product list; and
- a default requirement for representatives to conduct a suitability assessment at least every 12 months, or upon the occurrence of a triggering event or significant market event.

Based on feedback received in response to these and other proposals, the CSA plan in several instances to introduce a reasonableness standard or scalability accommodations. These changes are designed to address the imbalance in compliance costs for larger and smaller registrants.

Statutory “Best Interest” Standard Abandoned by Most Provinces but Ontario and New Brunswick will Conduct Additional Study on the Concept

As envisaged in the Consultation Paper, a “statutory” best interest standard was intended to strengthen the obligations owed by advisers, dealers and representatives in the securities industry to clients. While stressing that it was not intended to create a fiduciary duty, the CSA set out what they hoped would be guiding principles in the interpretation of the proposed standard, including:

- acting in the best interest of the client;
- acting with care;
- avoiding conflicts of interest in such a way that prioritizes the client’s best interests; and
- providing full, clear, meaningful and timely disclosure.

Since it was proposed however, the statutory best interest standard has been subject to criticism from numerous industry participants. In addition, provinces including British Columbia, Alberta, Québec and Manitoba expressed doubt regarding the necessity for a statutory best interest standard. As a result, the Notice indicates that the foregoing provinces will not be proceeding with the adoption of a statutory best interest standard.

Despite most jurisdictions abandoning the concept, the Notice makes clear that a statutory “best interest” standard is not completely dead. Ontario and New Brunswick will continue to examine the creation of a statutory best interest standard through additional investigations and consultations with relevant stakeholders.

Next Steps for Consultation Paper 33-404

Moving forward, the CSA will continue with the preparation of draft amendments to NI 31-103 to implement the proposals set out in the Consultation Paper (as amended by the Notice) with the following areas being prioritized: conflicts of interest, KYC, KYP, titles and designations. The draft amendments and related guidance are expected to be published for public comment later this year.

At the same time, the CSA will continue to coordinate policy considerations on this initiative with other efforts currently underway on [CSA Consultation Paper 81-408 – Consultation on the Option of Discontinuing Embedded Commissions](#).

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a cautionary note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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