CFA Societies Canada

Canadian Advocacy Council
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July 17, 2020

VIA EMAIL

British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
Financial and Consumer Services Commission (New Brunswick)
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island
Nova Scotia Securities Commission
Securities Commission of Newfoundland and Labrador
Registrar of Securities, Northwest Territories
Registrar of Securities, Yukon Territory
Superintendent of Securities, Nunavut

The Secretary
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Dear Sirs/Mesdames:

Re: CSA Notice and Request for Comment – Proposed Amendments to National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* ("NI 31-103") and Changes to Companion Policy 31-103CP *Registration Requirements, Exemptions and Ongoing Registrant Obligations* ("31-103CP") to Enhance Protection of Older and Vulnerable Clients (collectively, the "Proposed Amendments")

The Canadian Advocacy Council of CFA Societies Canada[1] (the "CAC") appreciates the opportunity to provide the following comments on the Proposed Amendments.

[1] The CAC is an advocacy council for CFA Societies Canada, representing the 12 CFA Institute Member Societies across Canada and over 18,000 Canadian CFA charterholders. The council includes investment professionals across Canada who review regulatory, legislative, and standard setting developments affecting investors, investment professionals, and the capital markets in Canada. Visit www.cfacanada.org to access the advocacy work of the CAC.
CFA Institute is the global association of investment professionals that sets the standard for professional excellence and credentials. The organization is a champion of ethical behavior in investment markets and a respected source of knowledge in the global financial community. Our aim is to create an environment where investors' interests come first, markets function at their best, and economies grow. There are more than 177,600 CFA charterholders worldwide in 164 markets. CFA Institute has nine offices worldwide and there are 158 local member societies. For more information, visit www.cfainstitute.org.

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General Comments

Scope of Amendments

We understand that the Proposed Amendments are intended to enhance investor protection by addressing issues of financial exploitation and diminished mental capacity of older and vulnerable clients. We appreciate that these are difficult issues for registrants to confront and support the CSA's efforts to address them through the ability to name a trusted contact person as well as offer the ability to more clearly place temporary holds on an account in enumerated circumstances.

In principle, such intervention by firms may be able to prevent harm or limit the damage to victims of financial exploitation. We think the Proposed Amendments are a good first step to help ensure that registrants keep vulnerable client issues top of mind. However, in addition to the Proposed Amendments, we believe the CSA must take a more holistic view to effectively address potential elder and vulnerable client abuse by continuing to develop and consider new approaches to these challenges, while recognizing that registrants with investment expertise may not be best suited to identify psychological symptoms of cognitive impairment.

It is important for registrants to have support from as many resources as possible to help protect vulnerable clients. The Proposed Amendments do not currently address the material negative outcomes for registrants if they act incorrectly on reasonable beliefs.

As a continuing or new policy project, the CSA should consider working with governmental or quasi-governmental agencies specializing in vulnerable persons to create a framework within which the Proposed Amendments could form a part. Advisors could be required to report concerns to an overriding agency with the staff, medical expertise, data and resources to genuinely assist an individual in need, as well as provide guidance to registrants. The medical professionals who identify symptoms and diagnose mental capacity are highly educated professionals with extensive training and experience because of the recognized difficulties in assessing a person's mental capacity. Instead of having to determine whether to accept the information provided by a trusted contact person or continually placing a hold on a client's account, a registrant should be required to report suspected abuse or diminished capacity to such an agency, similar to a "whistleblower" program.

We would thus urge the CSA to consider expanding the Proposed Amendments subsequent to their implementation. Our comments on the Proposed Amendments as currently contemplated, which we support as part of a potential broader policy initiative, follow.

Definition of Vulnerable Investors

The definition of a "vulnerable investor" is proposed to mean a client of a registered firm or a registered individual, who may have an illness, impairment, disability or aging process limitation that places the client at risk of financial exploitation. There

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may be additional clarification that can be provided in the definition. For example, the *Securities Act* (Alberta) ("**Alberta Securities Act**") regulates certain "unfair practices", which is defined to include:

> "taking advantage of a person's inability or incapacity to reasonably protect his or her own interest because of physical or mental infirmity, ignorance, illiteracy, age or inability to understand the character, nature or language of any matter relating to a decision to purchase, hold or sell a security or a derivative" [2].

We see a benefit in the definition in the Alberta Securities Act as it is broader than the definition in the Proposed Amendments and includes the concept of exploitation. It also references an individual's ability to understand matters relating to certain financial decisions. The definition includes the word "language", which is helpful if a vulnerable individual is convinced to make an investment based on offering documents or advice in a non-native language, which may amount to exploitation. Both the definition in the Proposed Amendments and in the Alberta Securities Act would benefit, however, from more specific criteria.

Red Flag Examples

We would prefer to see some of the more subjective illustrations of financial exploitation set out in the proposed amendments to 31-103CP removed. For example, it is stated that warning signs of financial exploitation might include increasing isolation from family or friends, or signs of physical neglect or abuse. Observations of this nature are quite subjective and may cross into a gray area under privacy legislation. These items are not easily observable and may not directly relate to a client's financial decision-making capacity or ability.

There are similar potential issues with the proposed examples used in 31-103CP for the definition of mental capacity. Warning signs are said to include a reduced ability to solve everyday math problems, which would be difficult to detect in a typical advisor/client interaction. Some of the listed characteristics, such as a change in personality, or increased passivity, anxiety, aggression or other changes in mood, might also be very subjective. The proposed addition also includes a reference of "uncharacteristically unkempt appearance" as a warning sign of a decline in a client's mental capacity. While that may be true it some cases, it may be just as likely to reflect a natural decline in appearance as one ages due to physical difficulty and not representative of an issue with mental capacity. Persons that have less experience with older individuals may unnecessarily focus in on these aspects, which adds risk to the client/advisor relationship.

We wish to reiterate that financial exploitation and diminished mental capacity are very complicated matters and, particularly with respect to identifying "red flags", many advisors will not have the training or background necessary to reliably identify concerns in real time. While the examples provided to advisors are helpful, not every vulnerable person will present in the same way (e.g. diminished appearance, forgetfulness), nor

[2] *Securities Act*, RSA 2000, c S-4, s 92(5)(b).

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may an advisor have a long enough history or frequent enough face to face interactions to identify changes which may be a sign of diminished capacity.

Impact on Advisor/Client Relationships

In the absence of more explicit guidelines, there may be a delayed reaction time as advisors try to assess the situation where a vulnerable investor may be present. Advisors could also be expected to hesitate rather than make the wrong decision about calling out financial exploitation or diminished capacity, for fear of losing the client. An advisor could face serious consequences if they make a judgement or accusation of impairment or abuse based on the typical number of meetings per year with their clients and the subjective red flags resulting in a hold placed on an account. Placing a hold or contacting a trusted contact person with concerns could be an irreversible action that will alter or sever the client relationship and could permanently damage a vulnerable client's trust in the financial system overall. If clients lose trust in their advisor and pull their own accounts, it may lead to a situation where they forego advice to their own detriment. The foregoing could lead to a situation where a vulnerable client has less professional support, less trust in the financial system, and made even more vulnerable to bad actors.

As it is in any advisor's best interests to keep clients and increase assets under management, registrants may feel pressure, in the absence of medical evidence or a direction from an overriding outside agency to the contrary, to conclude that no issues exist. If registrants were permitted to share valid concerns with an overriding agency without fear of breaching other laws or losing their clients, and such concerns were investigated by specialized medical or cognitive specialists, the outcomes desired by the Proposed Amendments may be more likely to be achieved.

We recommend that training on vulnerable clients for registrants should be mandatory to help address some of these issues. It is also important to educate retail clients on the purpose of the trusted contact person and the temporary holds to help preserve the trusted client/advisor relationship. Advisors should also help clients by asking targeted questions and providing examples of fraud/exploitation. Over time, this will help build a relationship where a vulnerable client will hopefully call their advisor for a second opinion if approached with "too good to be true" investment opportunities or if someone is trying to otherwise exploit them financially.

Trusted Contact Person

With respect to the trusted contact person requirements, we believe the Proposed Amendments are an important first step to start a conversation between a registrant and his or her clients. It is commonly suggested that many cases of financial exploitation of seniors is perpetrated by someone close to the vulnerable individual, often a family member. With that background, it may be prudent to recommend where possible that the trusted contact person be an independent person outside of the vulnerable person's immediate family.

When identifying a trusted contact person, the Proposed Amendments would require a client to provide written consent for the registrant to contact the trusted contact

person in enumerated circumstances. The client should also be required by NI 31-103 to acknowledge that the individual has been notified that they are the trusted contact person and has consented to act as such. This may help protect the registrant and facilitate difficult future client discussions, as well as simplify discussions if needed with the trusted contact person if they know the registrant may be contacting them.

We believe the proposed statement in the Companion Policy to the effect that a trusted contact person does not have the authority to transact on the client's account or make decisions on behalf of the client by virtue solely of being named a trusted contact person is an important safeguard that should be maintained.

In addition, the Proposed Amendments suggest that registrants should first speak with the client about concerns about financial exploitation or mental capacity prior to contacting the trusted contact person. However, noting the concerns about the red flag examples set out above, unless the proposed guidance includes more objective criteria, registrants may not be able to make the necessary assessments, or have these sensitive conversations directly with clients.

Books and Records Requirement

The Proposed Amendments would require registrants to maintain books and records to demonstrate compliance with the conditions for placing a temporary hold. There may be inconsistent legislation dealing with how long these records must be kept under securities legislation, privacy legislation, and criminal law requirements. It may be beneficial for registrants if the CSA could highlight other legislation or obligations that they are aware of with respect to these record retention rules. As an example, albeit in a different context, ASC Staff Notice 31-701 *Account Opening Assistance* sets out certain requirements under the *Income Tax Act* (Canada) and anti-money laundering legislation that registrants should be aware of when opening an account, and a similar approach could be taken here.

In addition, the Proposed Amendments indicate that registrants must keep records that demonstrate compliance with the new requirements of NI 31-103. If a client refuses to provide the name and contact information for a trusted contact person, the registrant may make further inquiries about the reasons for the refusal. If the client does not provide any additional information, we query whether a registrant will be able to produce documentation to satisfy their books and records requirement.

Internal Controls

The Proposed Amendments seem to focus on external factors, in that registrants are expected to look out for red flags of financial abuse and diminished mental capacity. However, we believe that enhanced internal controls and supervision of registrants and accounts held by vulnerable clients are also key to preventing exploitation.

A wider framework for vulnerable investors could include more specific policies and procedures to help registrants identify issues such as appropriate investment strategies. Training, as noted above, should be mandatory for client facing registrants as well as

supervisory and compliance staff. While there are some regulations specifying registrants should provide clear and easy to understand information, requirements for even sharper plain language disclosure should be required for vulnerable investors. The importance of maintaining conversation notes should also be emphasized. Registrants that are "advisors to seniors" or those with many retiree clients could be subject to enhanced supervision and spot checks.

We also wish to respond to the following specific questions for comment.

Specific Consultation Questions

Trusted Contact Person

1. *We have proposed that the new paragraph 13.2(2)(e) not apply to a registrant in respect of a client that is not an individual. We acknowledge that some individuals structure their accounts as holding companies, partnerships or trusts for various reasons. Should registrants be required to take reasonable steps to obtain the name and contact information of a trusted contact person for the individuals who, (i) in the case of a corporation, is a beneficial owner of, or exercises direct or indirect control or direction over, more than 25% of the voting rights attached to the outstanding voting securities of the corporation, or (ii) in the case of a partnership or trust, exercises control over the affairs of the partnership or trust?*

   We are not aware of any policy reason to exclude registrants from having to identify a trusted contact person for the stated beneficial owners of a corporation or individuals who exercise control over the affairs of a partnership or trust. For other KYC purposes in NI 31-103, including identification of clients, registrants will have to gather identification information for these individuals in any event, and can easily request information about a trusted contact person at the same time. While that may result in more than one trusted contact person for a client, that is already contemplated by the Proposed Amendments and should not prevent a registrant from attempting to contact the appropriate trusted contact person when it reasonably believes it is required to do so.

2. *For IIROC Dealer Members exclusively offering order execution only services, please comment on any specific considerations or factors that may impact the appropriateness of the proposed framework in the order execution only service context, particularly the requirement to take reasonable steps to obtain TCP information under new paragraph 13.2(2)(e).*

We believe it is important that execution only brokers be permitted to place temporary holds on accounts if a reasonable belief exists that the client does not have the mental capacity to make financial decisions. While challenges will exist given the nature and frequency of the contact with clients, this should also not absolve the Dealer Member from the obligation to take reasonable steps to obtain the information related to a trusted contact person. These Dealer Members would need to ensure that such information is updated in accordance with the requirements related to the client profile.

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Temporary Holds

3. *We have proposed that the new temporary hold requirements apply to holds that are placed if there is a reasonable belief that, with respect to an instruction given by the client, the client does not have the mental capacity to make financial decisions. We have heard from stakeholders that an individual that is suffering from diminished mental capacity is more susceptible to financial exploitation, and, because of their diminished mental capacity, may need to be protected from mishandling or dissipating their own assets. Should the temporary hold requirements apply to holds that are placed where there is a reasonable belief that the client does not have the mental capacity to make financial decisions or should they be limited to cases of financial exploitation of vulnerable clients?*

We believe that the temporary hold requirements should apply where there exists a reasonable belief that the client does not have the mental capacity to make financial decisions rather than just be limited to cases of financial exploitation of vulnerable clients. If there is this belief of diminished capacity, the temporary hold period will allow a registrant the opportunity to investigate, contact the TCP or escalate to an appropriate authority, and thus reduce the opportunity for the mishandling or dissipation of assets.

4. *We have proposed that the new temporary hold requirements apply to holds that are placed, not only on the withdrawal of cash or securities from an account, but also on the purchase or sale of securities and the transfer of cash or securities to another firm. We have heard from stakeholders that transactions and transfers, in cases of financial exploitation or diminished mental capacity, can be just as harmful to clients as withdrawals. Should the temporary hold requirements apply to holds that are placed on the purchase or sale of securities and the transfer of cash or securities to another firm?*

We believe that the temporary hold requirements should apply to holds that are placed on the purchase or sale of securities and the transfer of cash or securities to another firm. A bad actor could quickly become aware of ways in which to circumvent the hold period and convince a client to transfer the cash or securities to another firm and at that time exploit the individual. By not closing this potential 'loophole' the Proposed Amendments would leave the client vulnerable to financial exploitation at another firm.

5. *We have not proposed a time limit on temporary holds considering the complex nature of issues relating to financial exploitation and diminished mental capacity, and the length of time it takes to engage with third parties such as the police and the relevant public guardian and trustee. Instead of a time limit on the temporary holds, we are proposing to require firms to provide the client with notice of the decision to not terminate the temporary hold, and reasons for that decision, every 30 days. Should we prescribe a time limit on temporary holds? Or is the notice requirement proposed by the CSA sufficient to protect investors?*

With respect to temporary holds, the Proposed Amendments would require a registered firm to further review the facts, once a hold is placed, that caused the firm or individual to place the temporary hold. Additional rules and guidance with respect to this

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"internal investigation" and what is expected of registrants during this period would be welcome. For example, NI 31-103 could require that an internal investigation be completed within a specified number of days to ensure that assets are not tied up indefinitely.

6. *Are the Proposed Amendments regarding temporary holds adequate to address issues of financial exploitation of vulnerable clients or diminished mental capacity, or does more need to be done to ensure these issues are addressed? The CSA will consider next steps based on the input received.*

As mentioned in the notice accompanying the Proposed Amendments, in the United States the North American Securities Administrators Association members have adopted and advocate for states' adoption of a model Act, the *NASAA Model Act to Protect Vulnerable Adults from Financial Exploitation* ("**Model Act**")[3]. The Model Act uses the term "eligible adult", which refers to a person 65 years of age or older, or a person subject to the relevant state's Adult Protective Services statute. One alternative framework that could be considered, like that suggested by the Model Act, would involve mandating the use of an overarching agency outside of the CSA which specializes in the area of vulnerable investors, as set out in our introductory comments. Such an agency could investigate further (or outsource the investigation, as appropriate) and the individual client would never know that the registrant made the initial call to the agency, thus preserving the advisor/client relationship.

The Model Act also contains an explicit exculpation from liability for advisors who disclose potential financial exploitation. Such an explicit "safe harbor" would also be helpful in the Proposed Amendments. Registrants who are otherwise required to try to gather additional KYC information upon opening an account or during regular updates to gauge potential exploitation or diminished mental capacity might otherwise determine that the amount of work required is not commensurate with their potential remuneration, leaving the potential vulnerable individual without ongoing financial advice.

If the Proposed Amendments are implemented, it will be very important to monitor them in practice for the first few years to determine if additional safeguards or clarifications are required. Policy work, which is continuing in other jurisdictions, including by NASAA, should also be considered and followed as global practices and regulations evolve.

As a general matter, we are also concerned about the interaction of the Proposed Amendments and privacy legislation, including the *Personal Information Protection and Electronic Data Act* ("**PIPEDA**"). As noted in the Proposed Amendments, registrants should be mindful of privacy legislation and client agreements relating to the collection, use and disclosure of personal information. It would be helpful to gain clarity from the CSA and privacy regulators that the trusted contact person requirements will not generally breach Canadian privacy requirements and such comfort should be given directly in NI 31-103. The investor protection measures of the Proposed Amendments are likely to be ineffective if firms are wary of breaching their privacy obligations.

[3] NASAA Model Legislation or Regulation to Protect Vulnerable Adults from Financial Exploitation, online: North American Securities Administrators Association <http://serveourseniors.org/wp-content/uploads/2015/11/NASAA-Model-Seniors-Act-adopted-Jan-22-2016.pdf>.

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More specifically, PIPEDA involves "Ten Principles[4]" regarding the collection, use and disclosure of personal information. The second principle, Identifying Purposes, provides that the purposes for which the personal information is being collected must be identified before or at the time of collection. Collecting, recording and controlling the information to assess financial exploitation or concerns about mental capacity is a grey area that may benefit from collaborative guidance from the CSA and the Office of the Privacy Commissioner of Canada and its provincial counterparts to ensure compliance with both types of rules.

PIPEDA's fourth principle, Limiting Collection, provides that the collection of information must be limited to what is needed for the purposes identified by the organization. The guidance in 31-103CP could be expanded to include specific limits on why and what information on the registrant's client can be collected, particularly with respect to subjective information such as personality traits and physical appearance.

The last two PIPEDA principles relate to Individual Access and Challenging Compliance. For firms trying to gather additional information about vulnerable clients to make an informed decision, it would be helpful if privacy legislation confirmed that such collection could be made without having to disclose the information at that time to the individual under consideration, pursuant to their privacy right to access or correct errors or omissions in their personal information. As an example, under the *Personal Information Protection Act* (Alberta), a firm may refuse to provide access to personal information upon request if the information was collected for an investigation or legal proceedings[5]. We query whether a firm could rely on this or a similar category when investigating cases of potential exploitation or vulnerability. It might be helpful to have guidance address this key investor protection area to ensure that the Proposed Amendments are effective.

Concluding Remarks

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

(Signed) *The Canadian Advocacy Council of*
CFA Societies Canada

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[4] PIPEDA fair information principles, online: Office of the Privacy Commissioner of Canada <www.priv.gc.ca/en/privacy-topics/privacy-laws-in-canada/the-personal-information-protection-and-electronic-documents-act-pipeda/p principle/>.
[5] *Personal Information Protection Act,* SA 2003, c P-6.5, s 24(2)(c).
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