THE INVESTMENT FUNDS INSTITUTE OF CANADA | L'INSTITUT DES FONDS D'INVESTISSEMENT DU CANADA

IFIC Submission

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

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July 20, 2020

Delivered By Email: consultation-en-cours@lautorite.qc.ca, comments@osc.gov.on.ca

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 of 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

Attention:

The Secretary
Ontario Securities Commission
20 Queen Street West
22nd Floor
Toronto, Ontario M5H 3S8

Me Philippe Lebel
Corporate Secretary and Executive Director, Legal Affairs
Autorité des marchés financiers
Place de la Cité, tour Cominar
2640, boulevard Laurier, bureau 400
Québec (Québec) G1V 5C1

Dear Sirs and Mesdames:

RE: CSA Notice and Request for Comment - Proposed Amendments to National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* and Changes to Companion Policy 31-103CP *Registration Requirements, Exemptions and Ongoing Registrant Obligations* to Enhance Protection of Older and Vulnerable Clients

The Investment Funds Institute of Canada (**IFIC**) appreciates the opportunity to comment on the Canadian Securities Administrators' (**CSA**) Notice and Request for Comment - *Proposed Amendments to National Instrument 31-103 Registration Requirements, Exemptions and Ongoing Registrant Obligations* and Changes to Companion Policy 31-103CP *Registration Requirements, Exemptions and Ongoing Registrant Obligations* to Enhance Protection of Older and Vulnerable Clients (**Consultation**).

IFIC is the voice of Canada's investment funds industry. IFIC brings together 150 organizations, including fund managers, distributors and industry service organizations to foster a strong, stable investment sector

where investors can realize their financial goals. IFIC operates on a governance framework that gathers member input through working committees. The recommendations of the working committees are submitted to the IFIC Board or board-level committees for direction and approval. This process results in a submission that reflects the input and direction of a broad range of IFIC members.

We commend the CSA on this initiative to enhance investor protection by addressing the issues of financial exploitation and diminished mental capacity of older and vulnerable clients. Our members deal regularly with areas of concern for these investors, and we welcome regulatory support to provide the best advice and services to clients experiencing financial exploitation or diminished mental capacity.

In this letter we provide our comments on aspects of the Consultation where we believe there is room for further improvement. Our comments on more technical aspects of the Consultation and our responses to certain questions posed by the CSA are set out in Appendix A and B, respectively.

Need for a Safe Harbour for Representatives and Dealers who Rely on the Temporary Hold Provisions

The proposed temporary hold provisions are crucial for representatives and dealers who have concerns that, with respect to the instructions they are receiving from a client, the client does not have mental capacity to make financial decisions. We support the requirement for firm involvement in the decision to impose a temporary hold, and the requirement to revisit the decision every 30 days until a final determination is made concerning the instructions.

However, we believe that few in the industry will rely on the temporary hold provisions without protection from a lawsuit for having made the determination to impose a temporary hold in accordance with the terms set out in the Consultation. Should there be a decline in the value of the assets subject to the hold in the period between the imposition of the temporary hold and its removal, a client, or a proxy, could institute litigation to recover the difference in the value of the assets.

A safe harbour from a legislative requirement is not a new concept. We note that section 138.4(9) of the Securities Act (Ontario) (**Act**) sets out a safe harbour for reporting issuers concerning forward-looking information. It provides that if reporting issuers follow the requirements of that section (including the use of reasonable cautionary language and a reasonable basis for drawing the conclusion or making the forecasts and projections set out in the forward-looking information), reporting issuers will not be liable for damages in an action for a misrepresentation in forward-looking information.

We are aware of at least one National Instrument that contains provisions that are intended to explicitly reduce potential liability. Section 3.9(3) “Standard of Care” of National Instrument 81-107 *Independent Review Committee for Investment Funds* provides that a member of an independent review committee does not breach his or her duty or standard of care if the member exercised the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances, including reliance in good faith on certain documents.

We urge the CSA, and the provincial governments as required, to provide a safe harbour for representatives and firms who make a reasonable decision to impose a temporary hold if they follow the requirements otherwise applicable to temporary holds.

Clarify that Collecting Information about a Trusted Contact Person is not an Element of the Know Your Client Requirement

The proposed trusted contact person (**TCP**) amendments are currently incorporated in section 13.2 of National Instrument 31-103 “Know your client”. While we agree that from a timing perspective it is best to collect the TCP information at the same time as collecting or updating the information currently required under section 13.2(2), we think the TCP information should be separated from the existing know your client

(**KYC**) information. A failure to collect the information set out in current section 13.2(2) can result in a deficiency finding on an audit or even lead to disciplinary action. TCP information is specifically identified in 31-103 Companion Policy as important information to collect, but "registrants are not prevented from opening and maintaining a client account if the client refuses or fails to identify a TCP". If the requirement remains as part of section 13.2(2) the refusal by a client to provide TCP information could result in a deficiency finding on an audit.

As a result, IFIC recommends that the TCP amendments be included as new section 13.(2)(2.1) and indicate that at the time the KYC information is being collected or updated under 13.2(2) a registrant should also take reasonable steps to obtain the TCP information.

A Role for the CSA in Training Representatives Concerning Vulnerable Investors

Determining whether a client is being financially exploited or has diminished mental capacity is difficult because it is subjective and nuanced. This expertise is not currently widespread within the investment funds industry although it is a crucial expertise that firms are developing. It is an expertise best informed by those who are experts in elder law and protecting vulnerable investors.

Because the understanding of financial exploitation and diminished mental capacity is based on subjective elements, it would be best for the investment funds industry and its clients if there could be a commonality of understanding across the industry and securities regulatory authorities of the elements of financial exploitation and diminished mental capacity, as well as their applicability to client situations.

We recommend that the CSA develop, in partnership with elder law experts, a training course on these topics, which would be available to all industry participants. There is precedent for this suggestion. We note that on page 5 of the Ontario Securities Commission's (**OSC**) *Statement of Priorities Report Card* for 2019-2020 it is stated that the OSC "partnered with Elder Abuse Prevention Ontario to deliver training and education to staff who interact with older individuals, such as when receiving inquiries and complaints, or when conducting compliance reviews or enforcement matters." We commend the OSC for this partnership with Elder Abuse Prevention Ontario and strongly urge the CSA to work in a similar partnership with elder law experts to develop a national course on financial exploitation and diminished mental capacity.

OSC Qualitative and Quantitative Analysis of the Anticipated Costs of the Proposed Amendments

IFIC consistently advocates for the OSC and the CSA to adopt robust cost-benefit analyses in advance of proposing new regulatory instruments, and we acknowledge the OSC's cost-benefit analysis in Appendix D of the Consultation. While our members do not hesitate to incur the costs that will be involved in instituting policies and procedures to establish TCPs and to utilize temporary holds where appropriate, we believe the estimate of the costs to do so in Appendix D is incomplete and/or inaccurate in places. We provide the following examples to help guide future cost-benefit analyses.

In our view, it is significantly inaccurate to assert that updating policies and procedures, KYC forms and RDI documents, existing IT systems and internal training programs can be accomplished in 21 hours. It will be many multiples of 21 hours to update existing documents and, particularly, to develop and hold training programs relating to the temporary hold provisions. All of this work will require the involvement of multiple subject matter experts from various parts of the registered dealer and numerous meetings to coordinate information flow and ensure consistency of approach.

The estimate of 30 minutes to train a registered individual on both the TCP and temporary hold provisions severely underestimates the resources that will be devoted to both developing and delivering training on these two critical initiatives. Understanding financial exploitation and diminished capacity, as well as the concepts relating to them such as mental capacity, cannot be accomplished in 30 minutes.

Finally, our members disagree that it would take, on average, 1 minute and 20 seconds to collect trusted contact information from a client once they are contacted. This assumption does not take into account the requirements in the trusted contact proposal itself about the amount of information that must be communicated to a client about the purpose for collecting and using the information in advance of actually collecting the information.

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IFIC appreciates this opportunity to provide the CSA with our comments on this important initiative. Please feel free to contact me by email at pbourque@ific.ca or by phone at 416-309-2300—I would be pleased to provide further information or answer any questions you may have.

Yours sincerely,

THE INVESTMENT FUNDS INSTITUTE OF CANADA

By: Paul C. Bourque, Q.C, ICD.D
President and CEO

APPENDIX A - TECHNICAL COMMENTS

1. **Introductory language section 13.2(2)(e).** The introductory language to proposed section 13.2(2)(e) requires that the trusted contact person must be "an individual of the age of majority or older in the individual's jurisdiction of residence". We do not believe the TCP should have to be of the age of majority, since there is no trading being done on the account by the TCP. Further, we do not believe the TCP must be in the "individual's jurisdiction of residence." There is no trading activity being conducted by the TCP which might require this geographic restriction.

2. **Privacy considerations.** We are concerned that the requirement for the client to provide contact information for the TCP may raise privacy considerations. Perhaps the Companion Policy could indicate that firms should consider whether the client should obtain the TCP's prior consent to provide any personal information to the firm.

3. **Section 13.19(1).** Currently this section provides that "a registered firm, or a registered individual whose registration is sponsored by the registered firm, must not place a temporary hold…unless the firm reasonably believes". As the temporary hold provision is permissive, please consider redrafting the section to provide that a firm or individual "may" place a temporary hold "if" the firm "reasonably believes".

4. **Appendix G--Part 13 - Assisting Vulnerable Clients, "Conditions for temporary hold".** This section states "We expect registered firms to have written policies and procedures". As the Companion Policy is guidance only we suggest this be redrafted to state "Registered firms may have written policies and procedures which contemplate some or all of the following". Further, as it is the client's decision whether to provide the information or participate in it being updated, firms should only be guided to use reasonable efforts to collect and update the information and document the TCP collection process.

APPENDIX B - 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?**

It is sufficient for the proposed new paragraph 13.2(2)(e) apply only in respect of clients which are individuals.

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).

While our members do not offer order execution only services, we believe that careful consideration will need to be given to how a dealer which does not provide advice can obtain TCP information.

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?

It is unclear why a temporary hold should only be available in the case of financial exploitation; as noted, individuals suffering from diminished mental capacity may also need to be protected from mishandling or dissipating their own assets. Dealers and representatives should have the ability to do the analysis as to whether to apply a temporary hold when there is concern about the financial exploitation or about diminished mental capacity.

We therefore strongly urge the CSA to provide that the temporary hold requirements can apply both in the case of financial exploitation and in the case of diminished mental capacity to make financial decisions.

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 strongly support the ability to place a temporary hold in all the situations outlined in this question and, for greater certainty, on account closings. To the extent it is not clear from the current language that a transfer of cash or securities includes a transfer to another firm and account closings, we would encourage the CSA to make this explicit

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?

We agree with the requirement to provide notice of the decision not to terminate the temporary hold, and reasons for that decision, every 30 days. Given that we recommend that a temporary hold may be imposed both in cases of financial exploitation and in the case of diminished mental capacity, we are concerned with the efficacy of the notice in the latter case. The Companion Policy might encourage firms to consider if any other notices would be appropriate in the case of diminished mental capacity.

To the extent the use of the term “notice” might be interpreted to mean written notice delivered by way of mail, we encourage the CSA to clarify that each firm should make its own determination as to the best method of delivery of the notice to a client, which may, for example, be by telephone.

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 noted in our letter, in the absence of a safe harbour provision for dealers and representatives who rely on the temporary hold provisions, we are concerned that these provisions will not be embraced as fully as they might otherwise be.