

July 20, 2020

*Via email*

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Greetings:

**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**

[https://www.osc.gov.on.ca/documents/en/Securities-Category3/csa\\_20200305\\_31-103\\_protection-older-vulnerable-clients.pdf](https://www.osc.gov.on.ca/documents/en/Securities-Category3/csa_20200305_31-103_protection-older-vulnerable-clients.pdf)

We appreciate the opportunity to provide comments on these proposed amendments being the promotion of the use of trusted contact persons, and enabling the placement of temporary holds on transactions of concern. I write on my own behalf and on behalf of MBC Law Professional Corporation's Financial Loss Advisory Group. Our firm routinely represents investors who seek redress from retail financial services firms, both investments and insurance.

We commend the Canadian Securities Administrators ("CSA") for its work on these issues and its ongoing efforts to improve overall consumer protections, with its special focus on the necessary public protection of vulnerable investors. We also commend the Ontario Securities Commission ("OSC") and the Autorité des marchés financiers ("AMF") who are Canadian leaders in engaging investors in policy making and the protection of vulnerable investors.

We have reviewed the submissions of Kenmar and the OSC's Investor Advisory Panel. We agree and adopt their submissions. Rather than repeat them as part of this submission, we will focus on additional comments.

We agree with the CSA's proposal to clarify and extend protections to vulnerable investors. A key aspect of these protections is providing firms and their advisors with the tools that would enable them to take proactive steps to detect and protect vulnerable investors. A strong compliance regime is crucial to these protections and, more generally, the protection of Canadian retail investors. To further enhance investor protection the CSA should require financial advisors to (1) undertake related additional planning for investors, (2) provide additional and ongoing related education to investors (3) undertake additional related training for advisors and (4) additional/enhanced related reporting.

#### **Additional planning for investors**

The CSA's proposal recognizes that any investor is potentially a vulnerable investor and that any vulnerable investor is in turn a potential victim of malfeasance and/or becoming partially or fully incapacitated. Any and all investors may become vulnerable as a result of aging, health challenges, mental challenges and other vagaries of life. This unpredictability is a key factor. We cannot focus reforms only on people of a certain age or with specific known attributes. For reforms and protections to work, industry must be alert to the possibility that any investor may suffer impairment and, as a result, have increased risk of investment self-harm or be susceptible to third-party malfeasance.

Some health and mental changes are not foreseeable. This unpredictability is what creates the need for an Industry that is alert, with systems in place that would enable it to be responsive to these changes. When red-flag events occur, industry must have a robust alert system to recognize these events and be in a position to impose a swift plan of action. This plan would include a strict compliance process that would provide for minimal interference while investigating and protecting and would ultimately have an exit strategy to end any necessary, yet temporary, interference with the rights of the investor.

Planning protective steps are easily added to the current client onboarding process and KYC updates, such that in the case of a triggering event, protective steps can be swiftly taken with minimal restrictions to the rights and interests of the investor. This additional planning is the primary recommendation of our comments.

#### **Additional and ongoing education to investors**

Recognizing that every investor may need these protections, means that they will in turn need to be informed of them. Industry will therefore need to educate every investor at key opportunities about the available protections, the benefits of these protections, and how to empower industry to best activate protections while complying with investor wishes.

Industry must take the lead in this education and must be required to take proactive steps. The education of protections to investors is best delivered during client onboarding and KYC updates. The education should be delivered by both firms and their advisors in plain language educational brochures and mandatory plain language advisor communications. This will require expert drafting of the brochures.

### **Additional Training for advisors**

In addition, the CSA should require mandatory and expert training of advisors. Advisors will need to be well informed on the new proposal in order to both educate and advise investors. Advisors are a crucial link in the protection of investors and will likely be the “first responders” in the event of a red flag. Advisors will need training to ensure consistent recognition of red flags and, in the event of a red flag, to know where and how to seek out expert assistance from their dealers in order to ensure best practices in handling of the red flag. Both steps of early recognition and seeking advice are necessary to turn a regulatory initiative into effective investor protection.

We also support informed investor choice. While believing that the Trusted Contact Person (“TCP”) proposal is in the interest of all investors, we support the right of any informed investor to refuse to appoint a TCP. If an investor exercises their right to refuse to appoint a TCP, we believe a dealer and/or an advisor should be free to terminate the advisor relationship on reasonable notice.

### **Additional/Enhanced Reporting**

An important benefit of the CSA’s proposed reforms is the requirement for enhanced reporting. Enhanced reporting will improve empirical evaluation of the retail market and associated risks. Empirical evaluations in turn will lead to improved market conduct rules and informed policy, regulation and rule making.

### **Concluding submissions**

Kenmar’s comments with respect to the definition of “vulnerable client” highlight the need for improved drafting of the proposal. We support the definition used by the UK FCA which we view as more encompassing. For example, the CSA proposed definition arguably, excludes potential clients and potential harm during the onboarding process. Extension of the definition to include

abuses through firm arbitrage will enable intervention to prevent harm or limit the damage to victims of financial exploitation and other harms at the earliest possible stage. Currently dealer and advisors of the largest Canadian dealers routinely deny any duties are owed in soliciting clients. These dealers defend negligence actions by relying on the concept that no duties are owed before the client account is accepted by the firm, including all events up to that stage in the onboarding process. We commonly see this defence in Commutation of Pension negligence actions. This loophole is harmful to investor confidence in the markets and is contrary to the business advisory model. The UK FCA definition eliminates this unnecessary and unfair loophole.

We specifically support Kenmar's comments about additional vulnerable investor categories and his comments relating to the improvement of proposed Temporary Holds.

In conclusion, we support the CSA's proposal with the amendments suggested above, as they are likely to deter harm to vulnerable investors. We strongly recommend mandatory data gathering and reporting by firms; this is the key to future iterations of this proposal and potential additional protective reforms. We commend the CSA and its member Commissions for these steps to improve capital markets by protecting vulnerable investors.

Please feel free to contact me if any questions.

Sincerely,



Harold Geller