Advocis
The Financial Advisors Association of Canada

July 20, 2020

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

Care of:

The Secretary
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comments@osc.gov.on.ca

Me Philippe Lebel
Corporate Secretary and Executive Director, Legal Affairs
Autorité des marchés financiers
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SENT VIA EMAIL

Dear Sirs/Mesdames:

Re: Proposed Amendments to Enhance Protection of Older and Vulnerable Clients

On behalf of Advocis, The Financial Advisors Association of Canada, we are pleased to provide our comments on the Canadian Securities Administrators' (CSA) proposed amendments to enhance protection of older and vulnerable clients.

1. ABOUT ADVOCIS

Advocis is the association of choice for financial advisors and planners. With more than 13,000 members across the country, Advocis is the definitive voice of the profession, advocating for professionalism and consumer protection. Our members are provincially licensed to sell life, health and accident and sickness insurance, as well as by provincial securities commissions as registrants for the sale of mutual funds or other securities. Members of Advocis are primarily owners and operators of their own small businesses, creating thousands of jobs across Canada. Advocis members provide advice in several key areas, including estate and retirement planning, wealth management, risk management, tax planning, employee benefits, critical illness and disability insurance.

Professional financial advisors and planners are critical to the ongoing success of the economy, helping consumers to make sound financial decisions that ultimately lead to greater financial stability and independence both for the consumer and the country. No one spends more time with consumers than advisors and planners, educating them about financial matters and helping them to reach their financial goals. Advocis works with decision-makers and the public, stressing the value of financial advice and striving for an environment in which all Canadians have access to the advice they need.

2. OUR COMMENTS

EXECUTIVE SUMMARY

We applaud the CSA for acting to protect vulnerable investors. As trusted client-facing professionals, financial advisors are in a key position to identify when clients may be exposed to financial exploitation or experience a change in mental capacity. We are encouraged that regulators are recognizing the importance of the advisor-client relationship and the role that advisors play in serving vulnerable clientele. The proposed amendments align with a broader shift towards professional standards and expectations in the financial advice industry and provide greater protections and benefits for clients of financial advisors.

However, we are concerned that advisors lack adequate protection from the risks of regulatory and legal action when acting in good faith to discharge these new professional obligations or when conscientiously refusing to act when, in their judgment, a situation falls outside their area of expertise. We feel that the proposed amendments would be enhanced by additional guidance offered by the CSA regarding its expectations and specific legal “safe harbour” protections that shield advisors from regulatory and civil liability.

TRUSTED CONTACT PERSON

Advocis supports the requirement to take reasonable steps to obtain the information of a Trusted Contact Person (TCP) for individual client accounts. As certain dealers have proactively started collecting TCP information from clients to address the situations outlined in the consultation paper, we recommend that the CSA review these approaches and include guidance in the Companion Policy that reflects existing best practices.

Specifically, guidance should clearly outline that the TCP is not a substitute for a Power of Attorney (POA) and ensure that dealers and advisors have clear instructions on how and when to contact the TCP or the POA respectively. As a matter of best practice, the TCP generally should not have an interest in the client's account and to avoid any conflict of interest, investors should be encouraged to name different individuals as their TCP and as their POA, although this may not always be possible.

We also suggest that the Companion Policy include guidance with respect to when financial advisors or firms should contact other parties, such as an office of a Public Guardian and Trustee (PGT) or law enforcement, especially where financial exploitation of a vulnerable client is suspected. However, we have heard from our members that third parties such as the PGT and law enforcement are not always engaged and responsive to reports of financial exploitation. We encourage CSA members to engage directly with these third parties to make them aware of the role that the CSA is asking registrants to take, so that these matters are appropriately acted upon when reported. We further encourage the CSA to explore possible regulatory solutions where local gaps exist in the necessary mandate, resources, or will to act in cases of financial exploitation.

Finally, we recommend that the CSA work with federal and provincial governments to ensure that a legal "safe harbour" protection exists for registered individuals and firms who contact a TCP in good faith and in compliance with securities regulation, especially with respect to privacy legislation. The safe harbour should apply both in regards to regulatory and civil liability.

Questions for Comment

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?

Response:

In our view, the same investor protection concerns frequently exist in situations where clients have structured their personal investment plan to include personal holding companies or other closely-held entities over which the client exercises significant control or ownership. However, identifying when the use of a TCP is appropriate may be more challenging for clients that are not individuals, especially where that client is actively operating as a business. Other shareholders and decisionmakers may be involved in managing the company's financials and adhering to the suggested criteria may result in requiring more than one TCP per client that is not an individual, increasing the compliance burden.

We feel that the CSA should engage in further consultations to ensure that investor protection concerns are appropriately addressed when clients structure their investments in personal holding companies or similar entities. This subsequent consultation should deal specifically with the nuances of closely-held entities and how their structure (including familial ownership) intersect with the objects behind identifying a TCP.

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).*

Response:

We recognize the challenge that Dealer Members exclusively providing order execution only services face in obtaining TCP information, especially when OEO dealers are not completing suitability assessments and do not typically maintain an active, engaged relationship with their clients. Also, while robo-advisors may assess suitability, similar challenges exist for assessing a client's mental capacity and vulnerability to financial exploitation as in the OEO channel.

Advocis is concerned that the investor protections afforded by tools such as the TCP and temporary holds will not be accessible to clients using OEO dealers or robo-advisors to manage their investments. Without an element of initial and ongoing personal contact that would expose a dealer to potential indicators of a client's mental state or general wellbeing, investors using OEO dealers or robo-advisors will be lacking these additional protections. At the very least, this should be reflected in the disclosure that clients receive when they open an account with an OEO dealer or robo-advisor. However, we recommend that the CSA engage in additional consultations to ensure that vulnerable clients in these channels are sufficiently

informed and protected in the event of financial exploitation or a decline in mental capacity. These non-advised channels raise particular issues regarding how investors participating in these channels can receive adequate protection.

TEMPORARY HOLDS

Advocis supports the proposal to permit the use of temporary holds where registered individuals or firms reasonably believe that a vulnerable client is being financially exploited or does not have the mental capacity to make financial decisions.

However, while advisors may be well-positioned to spot potential indicators of diminished mental capacity, this type of assessment falls outside of most advisors' area of expertise. The term "reasonable belief" suggests a legal test or threshold that may be difficult for an advisor to support or appropriately document without exposure to additional legal risk. Care should be taken to limit advisor regulation to areas where they have the relevant proficiencies and skills to execute these obligations with an appropriate degree of diligence.

As part of the Companion Policy, we believe that the CSA should include guidance on when, especially in scenarios of suspected diminished mental capacity, other tools and resources may be available and appropriate – including the involvement of a client's POA or another resource with specialized expertise, such as a provincial PGT. As noted previously, we encourage CSA members to engage with the PGT office, law enforcement and other relevant parties in their jurisdiction to ensure that the responsibilities of parties are well-understood and cases of financial exploitation can be appropriately and effectively addressed.

Guidance should also acknowledge that clients likely have an existing circle of care, including medical and legal professionals who may be more equipped to make an informed decision on mental capacity. Collaboration with other trusted professionals may be something that should be encouraged and supported, with appropriate balancing of privacy concerns.

Questions for Comment

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?*

Response:

We support the availability of temporary holds where there is a reasonable belief that a client does not have the mental capacity to make financial decisions. We do not believe that temporary holds should be limited to cases of financial exploitation of vulnerable clients. However, we recommend that the CSA include extensive guidance within the Companion Policy to assist financial advisors and dealers with identifying signs of changes in mental capacity and appropriate next steps. While financial advisors may be uniquely positioned to identify when a client is experiencing diminished mental capacity, this is a sensitive and challenging issue that lies outside of the typical financial advisor's core areas of expertise. Especially given the regulatory and legal risks present when making these assessments, financial advisors should be provided with as much guidance and support on this issue as is practicable.

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?*

Response:

Given the comparable risks to vulnerable clients, we are of the view that temporary hold requirements should apply to the purchase and sale of securities and the transfer of cash or securities.

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?*

Response:

Advocis agrees that given the complexity of issues relating to financial exploitation and diminished mental capacity and the time it takes to engage with third parties, a strict time limit on temporary holds could defeat the policy objectives behind issuing them. In our view, it is appropriate to require firms to provide ongoing notice and rationale to clients for every 30 days that a temporary hold is in place. However, we encourage the CSA to include guidance within

the Companion Policy regarding how these decisions should be made, and provide as much clarity as possible regarding when a temporary hold should be maintained or terminated, including what documentation should be collected by the firm in support of any decision.

We also encourage the CSA to be cognizant of circumstances where temporary holds could be exploited by advisors or dealers who are not operating fully in good faith. For example, executing a temporary hold on a major client account at fiscal year end or another key financial milestone could have a significant impact on revenue or asset management reporting. The CSA should take all necessary steps to ensure that a temporary hold is treated as a serious investor protection measure that should only be used in good faith, with appropriate rationale and supporting documentation.

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.*

Response:

Advocis feel that the proposed amendments would be enhanced by specific civil and regulatory "safe harbour" protections for financial advisors and their firms acting in good faith, provided they are acting in accordance with regulatory requirements. Absent these protections, we are concerned that financial advisors may be faced with significant legal and financial risk even when acting to protect vulnerable clients.

Our members work closely with their clients, and often develop ongoing and involved relationships over a period of years. In our consultations, our members expressed enthusiasm for both the TCP and temporary holds as available tools to help protect their clients when there is a diminishment in their mental capacity or a case of financial exploitation. In general, financial advisors have expressed a willingness to take on the responsibility and the challenges associated with protecting vulnerable clients. However, we are concerned that absent appropriate "safe harbour" legal protections, financial advisors and dealers will find it difficult to manage the risks associated with using these tools to their full purpose.

We encourage the CSA to work with federal and provincial governments to ensure that financial advisors and firms have sufficient clarity around the liabilities faced, both civil and regulatory, when acting to protect vulnerable investors.

We look forward to working with the CSA as it continues to explore opportunities to protect older and vulnerable clients within the capital markets. Should you have any questions, please do not hesitate to contact the undersigned, or James Ryu, Senior Director, Legal and Regulatory Affairs at 416-342-9849 or jryu@advocis.ca.

Sincerely,

Greg Pollock, M.Ed., LL.M., C.Dir., CFP
President and CEO

Abe Toews, CFP, CLU, CH.F.C., CHS, ICD.D
Chair, National Board of Directors