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July 28, 2020

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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

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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* and
Changes to Companion Policy 31-103CP to Enhance Protection of Older
and Vulnerable Clients published for comment on March 5, 2020 (the
Proposed Amendments)
Comments of Borden Ladner Gervais LLP**

We are pleased to provide the members of the Canadian Securities Administrators (CSA) with comments on the above-noted Proposed Amendments. Our comments are those of the individual lawyers in the Investment Management and Disputes practice groups of Borden Ladner Gervais LLP listed below, and do not necessarily represent the views of BLG, other BLG lawyers or our clients.

We commend the CSA for moving forward with the Proposed Amendments. We have long supported the concept of a “trusted contact person” (TCP) and recognized the need for registrants to contact a TCP in appropriate circumstances. We have also advocated in support of registrants being empowered to put certain temporary holds on accounts where they reasonably suspect financial exploitation, diminished capacity of clients or there exist other valid reasons why a particular transaction should not be processed in a client’s account.

We intend our comments to enhance the drafting of the Proposed Amendments so that registrants will have a clearer understanding of the requirements and the CSA guidance. We also urge the CSA to work to provide greater legal certainty to registrants when they follow the Proposed Amendments.

Need for Greater Legal Certainty for Registrants from the CSA

1. Throughout the discussion, particularly in Appendix G, but also in the Notice explaining the Proposed Amendments, the CSA state multiple times that:
 - a. Appointing a TCP and contacting the TCP is subject to privacy and other laws and a registrant must be “mindful of privacy laws” and
 - b. Putting a temporary hold on an account is subject to applicable legal requirements, including privacy laws, other than securities laws, which the CSA explain do not prevent a temporary hold.

In our view, the CSA cannot simply state that other laws may apply and registrants should be aware of them. There is a need for guidance on these matters precisely because registrants are currently subject to potentially conflicting legal obligations that the Proposed Amendments should resolve. To make these statements runs the risk of undermining the Amendments by replicating the current uncertainty. These statements leave a registrant open to client and regulatory criticism and litigation risk unless they obtain legal opinions as to their ability to comply with the rules and adhere to the CSA guidance. We consider this an untenable position for a registrant. What is a registrant to do if it receives an opinion that it cannot comply with the Proposed Amendments as encouraged (*required*) by the CSA? We feel this is an extremely important topic and requires further CSA analysis and guidance. We consider that it is not sufficient for the CSA to point these out in the vague ways set out in the Proposed Amendments. At a minimum, we recommend that the CSA explain how the Proposed Amendments fits within the privacy regime in Canada, and the role that client consent to contact a TCP plays to alleviate privacy concerns. Without this further explanation and guidance, the Proposed Amendments will leave considerable litigation and regulatory risk and uncertainties for registrants, which in this very important area for all Canadians, particularly older Canadians, is unacceptable.

2. The Proposed Amendments do not include the concept of a reasonable due diligence or provide for a safe harbour provision for registrants in appropriate circumstances.

Appropriate circumstances will include where a registrant has exercised sound judgment and made sensible inquiries, but did not detect mental incapacity (which may be expected given that they are not medically trained), other vulnerability or financial exploitation and took appropriate, understandable action in response to the circumstances. Given the nature of the objectives of the CSA, we encourage the CSA to include such a safe harbour or give assurances to registrants that will lessen litigation risk or the risk of adverse regulatory actions.

3. The CSA requests comment on whether or not the Proposed Amendments insofar as they relate to TCPs should apply to individuals who set up an account through a corporate, partnership or trust structure. This question raises difficult legal questions that require further thought and analysis. At a practical level, it may be very difficult for registrants to obtain information about the beneficial ownership of these entities and come to conclusions about the need for a TCP in the circumstances.

The “easier” case will be in circumstances where an individual is the sole director and officer of a corporation, or the sole trustee of a trust, who has the power to appoint an alternate trustee (but has not done so) or a partnership where the general partner is a corporation with the individual acting as a sole director and officer. Even in these circumstances, there will be no need to appoint a TCP if the constating documents of the applicable vehicle allow for the appointment of an alternate decision maker, because the registrant can take instructions from the alternate decision maker for the investment vehicle. These factual circumstances raise significant privacy issues, given the individual’s right to privacy, which would include the individual’s right to create the structure he or she has established for investments. We do not recommend that the Proposed Amendments simply impose the same requirements on the vehicles listed by the CSA in the Notice, given that there will be a range of vehicles with varying degrees of complexity.

Drafting Comments:

1. Section 13.2(2)(e):

- a. The reference to “trusted contact person, who is an individual of the age of majority or older in the individual’s jurisdiction of residence” can be read in two ways. Clarification is necessary to make it clear that “jurisdiction of residence” modifies “age of majority” and does not have the effect of requiring a TCP to live in the same province as the client or the registrant. We initially read this section to have the latter meaning, which meaning would unduly limit who may be a TCP. For instance, given modern means of communication, we see no reason why an adult child living in another province or country cannot be a TCP (particularly where the client may have no one else available for the role of TCP).
- b. We read this section as stating that a registrant has to obtain a TCP from each individual client, no matter the condition of the client at the time of account opening. This should be clarified. The consequences of not being provided with this information by the client should be expanded upon in the proposed Appendix G. The fact that the requirement to obtain the TCP information is in the same

section as the requirements to obtain other KYC and suitability information (all considered vital for account opening and for compliance purposes) may lead a registrant to conclude that it will be improper to open an account without this information, notwithstanding the statements in Appendix G. We recommend that the TCP provisions be drafted as a separate section in the Rule. The Rule should be clear that an account can be opened in circumstances where the client does not wish to provide the information and the registrant documents its reasonable efforts to obtain the TCP information, as well as the reasons provided by the client for declining to name a TCP.

- c. The rule should deal clearly with obtaining a TCP for existing clients who do not yet have one on file with the registrant when the Proposed Amendments come into force. There must be a reasonable and sufficient transition period for existing clients. We think this is even more acute given that the Proposed Amendments are intended to come into force at the same time as the majority of the “client focused reform” amendments to NI 31-103. The CSA should carefully consider the transition and coming into force matters in light of the industry resources to implement and comply with these changes at the same time as dealing with issues arising from COVID-19. We recommend a later coming into force date for the Proposed Amendments.
- d. The Proposed Amendments should also offer clarity on updating existing TCP appointments or refusals to make one. For a client who does not have a TCP when the Proposed Amendments come into force, the registrant presumably could discuss and seek to obtain a TCP at its next meeting with the client to discuss the account and update KYC information (subject to a reasonable transition period). As with new account openings, it should be clear that the registrant may proceed to open or maintain an account for the client, if the client expressly declines to appoint a TCP and the registrant documents that refusal. We recommend that Appendix G also discuss regulatory expectations on the need for registrants to update TCPs during regular KYC/account discussions between registrants and clients. The purpose of updating should be to ensure that the registrant has the correct TCP for the client, along with the TCP’s address and contact information. If a client has previously refused to appoint a TCP, the registrant may discuss the reasons for appointing a TCP and offer the client an opportunity to reconsider the prior decision.
- e. We consider that a TCP cannot be the registered representative who is responsible for the client’s account, nor should it be any other registered representative within that registrant. Appendix G suggests this “should not” be the case, but, given the obvious conflicts of interest inherent in having these individuals be the TCP, we recommend that this be prohibited in the rule. Otherwise, we appreciate the flexibility provided in Appendix G as to who can be a TCP for a client – in contrast to the more restrictive provisions established by the MFDA’s guidance for example.

- f. The drafting is not clear whether the circumstances listed in subparagraphs (i) to (iv) are the ONLY things about which a registrant can contact a TCP. We assume so, but this should be clarified.

2. Section 13.19

- a. The drafting of section 13.19 does not mention the client’s TCP. Can a registrant contact the TCP if it considers this would appropriate, while it is considering placing a temporary hold on the account (assuming the TCP is not the person giving rise to a cause for concern)? We feel that a better tie-in to the TCP is necessary for this section (although we recognize the discussion in Appendix G).
- b. In our view, section 13.19 and Appendix G on the topic of temporary holds establish too onerous pre-requisites for registrants to place temporary holds. We recommend that the CSA consider carefully how much of the discussion in Appendix G is necessary and consider the commentary received from industry participants on this issue.

By way of brief observation and example only, a client may be vulnerable to the misuse of funds by family or friends without suffering from illness, impairment, disability or the aging process, and may find it otherwise be prudent to put a temporary hold on withdrawals. The current definition of vulnerable client and the current pre-requisites for a temporary hold do not encompass this common scenario.

Further, the nature and extent of any temporary hold should be contextual. For example, the sale of securities may mitigate risk particularly in a falling market and therefore should not form part of a temporary hold depending upon the circumstances.

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We hope that the CSA consider our comments as positive and helpful to advance the CSA's considerations of the important matters outlined in the Proposed Amendments. Thank you for considering our comments after the comment deadline of July 20, 2020.

Please contact Rebecca Cowdery at rcowdery@blg.com and 416-367-6340 if you have any questions on our comments or wish to meet with us to discuss any or all of our comments.

Yours very truly,

Borden Ladner Gervais LLP

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(Lawyers in BLG's Investment Management Practice Group and Disputes Group)