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Delivered by email

TO:
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

C/O:
The Secretary
Ontario Securities Commission
20 Queen Street West, 22nd Floor
Toronto, ON M5H 3S8

and

Me Philippe Lebel
Corporate Secretary and Executive Director, Legal Affairs
Autorité des marchés financiers
Place de la Cité, tour Cominar
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Request for comment on proposed amendments to National Instrument 31-103 and Companion Policy 31-103CP

Enhancing Protection of Older and Vulnerable Clients

Dear Members of the Canadian Securities Administrators:

We provide these joint comments in response to your request for comments. Each of our law practices include a significant focus on registrant regulation. We appreciate the opportunity to offer comment informed by both our experiences as former securities regulators and as counsel to the registrant community.

General comments

We encourage the Canadian Securities Administrators (CSA) to use only the term "vulnerable" when describing the class of investors that will get additional protections when the amendments are finalized and brought into force and effect. Using "age" and "vulnerability" together could lead to ageism instead of considered assessment of the facts in a particular client scenario.

We are also concerned that the amendments may lead to the assumption that registrants have an obligation to identify vulnerability. We suggest that registrants should observe client behaviour and patterns, but since they are not trained to identify vulnerability and lucidity in a person with dementia can fluctuate, should not be required to determine whether a client is vulnerable.

The "trusted contact person" concept carries risks with it. This person may have little or no information about the client's arrangements for personal representation and for financial decision making. This person could be the individual exploiting a vulnerable client.

To mitigate these risks, we recommend the CSA consider additional amendments to allow registrants to request information about a client's arrangements for incapacity.

To ensure this information request is well-founded and does not contravene privacy laws (i.e. ask only for that information required to carry out the service you provide), a registrant would have to disclose to a client that providing the information is to guard against an unanticipated mental incapacity and that if the client chooses not to provide the information, it will not prevent the registrant from serving the client (though it could put the client at risk should mental incapacity be an issue in future).

The CSA might want to consider, as well, that a registrant that later communicates with a trusted contact ought to understand whether that individual has a conflict of interest with the client or with other people close to the client. For example, is the trusted contact a beneficiary of the client's estate? Are there other family members in conflict with the trusted contact about what is best for the client?

We note that a portfolio manager acting under discretionary trading authority need not be included in the temporary hold requirements, only the requirement to take reasonable steps to get a trusted contact person's information on record.

We recommend that exempt market dealers in a transactional, rather than ongoing, relationship with a client, be subject only to the requirement to take reasonable steps to get information about a trusted contact person on record. These exempt market dealers do not have any insight into a client's ongoing mental capacity or vulnerability to exploitation. It is unnecessary to provide these dealers with a temporary hold mechanism.

Finally, we recommend that in advance of implementing the amendments, regulators, their advisory committees, and industry work on procedures that will be optimally effective. This will ensure that regulators', investors', and registrants' expectations all align, preventing misunderstanding or, worse, unintended legal risk.

Responses to questions

1. Assuming the trusted contact person requirement is implemented, it should apply to corporations, trusts, and partnerships that are closely held and are, in effect, part of an individual's personal investment plan. Know-your-client questionnaires often ask whether a corporation is a personal holding company in any event. We recommend that the trusted contact person be connected to the individual with instructing authority. It would be unwieldy for a registrant to have, for example, up to four trusted contact persons (assuming four 25% owners/beneficiaries) and it would be outside the scope of a registrant's responsibility to keep current information on all 25% or more owners/beneficiaries.

   If a closely held corporation, trust, or partnership is operating a business, it is not appropriate to request a trusted contact person. It is the responsibility of the business owners and managers to ensure a succession plan for an operating business, not a registrant's responsibility.

   The definitions of "financial exploitation" and "vulnerable client" could be revised to achieve this outcome; sub-section 13.2(8), which applies only to clients who are individuals, would also need amendment.

2. IIROC order execution only (OEO) investment dealers should not be required to take reasonable steps to get trusted contact person information.

   OEO dealers do not provide suitability recommendations. The trusted contact person concept is a tool for registrants concerned that their clients are unable to make sound investment decisions or are being exploited by others. An OEO dealer monitors client trading activity for capital markets gatekeeper concerns and for market integrity concerns related to trading activity. If an OEO dealer is required to take reasonable steps to get a trusted contact name on the account, what next? The OEO dealer does not have regular communications with a client about investment

decisions and has very little information, as a result, that would position the dealer to be able to protect a client against exploitation or failing mental capacity.

We recommend that OEO dealers communicate to their individual (and personal holdings) clients that it is important they have arrangements in place should they unexpectedly lose capacity to make financial decisions. The information could be provided in the Relationship Disclosure Information statement, as a short discussion about the risks of direct investing through an OEO dealer.

3. The temporary hold requirements should be confined to situations of potential financial exploitation.

   While registrants' relationships with clients may give them a view into mental capacity, and it may be reasonable for them to take reasonable steps to prepare for mental incapacity, if registrants have the ability to put a hold on a trade because they are concerned about mental capacity, this will actually open up new legal risks. The availability of the tool will naturally lead to expectations, particularly with 20/20 hindsight, that it be used. It will often be the case that the registrant's information is too deficient for it to make an informed decision about whether or not to place a temporary hold for mental incapacity.

   Registrants can document their disagreements with trading instructions, require clients to sign a waiver of their suitability recommendations, and/or decide to exit a client with whom they do not agree on investing strategy and decisions. Together with potentially having a trusted contact person and/or specific information about plans for financial decision making in the event of mental incapacity, the registrant does not need the additional tool of a temporary hold.

   The risks your stakeholders identified are important and deserve attention. However, it is also important to remember that individuals may have medical, legal, and accounting advisors available to them who will each have a part of the puzzle, as well as trusted family and friends. A registrant does not have these other proficiencies and skills. Securities regulators should design any additional requirements and tools for registrants mindful of the many investor protection requirements already imposed on registrants.

4. The temporary hold requirements should not be extended to purchases and sales of securities. Registrants can document their recommendations against a trade, then require the client to waive the suitability recommendation and/or exit the client. In addition, if a trusted contact person and/or specific mental capacity information is on record, the registrant can take steps to quickly come to a view about potential exploitation and the appropriate next steps to take.

   If a registrant suspects financial exploitation and has reason to believe the client is being coerced or manipulated into moving the account, we recommend the registrant be required to share its concerns and the reason for those concerns with

the recipient registered firm. This will enable a new firm to conduct a know-your-client interview that provides specific assurance about possible exploitation and make a client on-boarding decision that reflects the new firm's assessment.

5. The requirement to provide notice to a client at 30-day intervals is a better choice than putting a time limit on renewing temporary holds.

6. It is unnecessary to impose additional requirements. Registrants should educate and train their people to recognize and address potential exploitation or mental incapacity without imposing an obligation on registrants to recognize either. The requirement to take reasonable steps to get a trusted contact person's information on record, our recommendation that registrant's canvas a client's arrangements for financial decision making in the event of mental incapacity, and temporary hold requirements when a registrant has grounds to suspect financial exploitation are useful additions to a registrant's means of assessing and addressing vulnerability issues.

Courtesy drafting comments

We suggest, as a courtesy, that references to "lack of decision" be replaced with either "failure to make a decision" or "inaction", as the language is somewhat more active.

In paragraph 13.2(e)(ii), you need only refer to mental capacity; the balance of that paragraph could be deleted without changing the meaning.

We recommend that sub-section 13.19 (1) be reframed into positive language. For example:

> *A registered firm … may place a temporary hold in relation to the financial exploitation of a vulnerable client if the firm reasonably believes: …"*

To make sub-section 13.19(2) more concise, it could read:

> *If a registered firm reasonably believes that a client does not have the mental capacity to make financial decisions, the firm or a registered individual sponsored by the firm may place a temporary hold with respect to a client's instruction.*

In sub-section 13.19(3), we wonder if the notice ought not to be going, in addition to the client, to the client's trusted contact person or, even better, legal representative? Given the guidance in the Companion Policy, we assume this was an oversight.

Conclusion

We hope you find these comments constructive and are available to discuss them, should you find that helpful.

Yours truly,

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