

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

March 5, 2020

Introduction

The Canadian Securities Administrators (the **CSA** or **we**) are publishing, for a 90-day comment period, proposed amendments (the **Proposed Amendments**) to National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (**NI 31-103** or the **Rule**) and Companion Policy 31-103CP *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (**31-103CP**, together the **Instrument**). We are proposing amendments to the provisions of the Instrument relating to business operations and client relationships in order to enhance investor protection by addressing issues of financial exploitation and diminished mental capacity of older and vulnerable clients.

The CSA worked together with the Investment Industry Regulatory Organization of Canada (**IIROC**) and the Mutual Fund Dealers Association of Canada (**MFDA**) (together referred to as the self-regulatory organizations or the **SROs**) to develop the Proposed Amendments. The Proposed Amendments would apply to all registered firms, including IIROC Dealer Members and MFDA Members. We encourage all registrants, including SRO members, to provide their comments on the Proposed Amendments. At a later date, the SROs may propose conforming amendments to SRO rules consistent with the CSA Rule.

This notice contains the following annexes:

- Annex A – Proposed Amendments to NI 31-103
- Annex B – Blackline showing changes to NI 31-103
- Annex C – Changes to 31-103CP
- Annex D – Local matters

This notice will also be available on the following websites of CSA jurisdictions:

www.lautorite.qc.ca
www.albertasecurities.com
www.bcsc.bc.ca
www.fcnb.ca
nssc.novascotia.ca
www.osc.gov.on.ca
www.fcaa.gov.sk.ca
www.mbsecurities.ca

Substance and Purpose

The Proposed Amendments are part of the CSA's initiative to enhance investor protection by addressing issues of financial exploitation and diminished mental capacity of older and vulnerable clients.

Trusted Contact Person

The Proposed Amendments will require registrants to take reasonable steps to obtain the name and contact information of a trusted contact person (**TCP**), as well as the client's written consent to contact the TCP in prescribed circumstances.

The TCP is intended to be a resource for registrants to assist in protecting their clients against possible financial exploitation or if there are concerns about a client's mental capacity. The Proposed Amendments do not prevent registrants from opening and maintaining an account if a client refuses or fails to identify a TCP as long as the registrant takes reasonable steps to obtain the information.

Temporary Holds

In addition, the Proposed Amendments will:

- not prohibit registered firms and registered individuals from placing a temporary hold on the purchase or sale of a security or withdrawal or transfer of cash or securities from a client's account, if the registered firm reasonably believes that either:
 - a vulnerable client is being financially exploited, or
 - with respect to an instruction given by the client, the client does not have the mental capacity to make financial decisions, and
- require registered firms to take certain prescribed steps if they place a temporary hold in the above noted circumstances.

We believe that the Proposed Amendments provide an appropriate balance between a client's autonomy and investor protection, given that registered firms must have a reasonable belief of financial exploitation of a vulnerable client or lack of mental capacity of a client before placing a

temporary hold. We also believe that the Proposed Amendments clarify how firms must proceed if they do place a temporary hold in such circumstances, and that these are steps they must take in order to meet their duty to deal fairly, honestly and in good faith with their clients.

For greater certainty, Canadian securities legislation does not otherwise prevent a firm from placing a hold on a client's account that it is legally entitled to place.

We acknowledge that there are other circumstances under which a firm might place a hold on a transaction, withdrawal or transfer. The Proposed Amendments do not address these circumstances.

In addition, we note that the Proposed Amendments are not intended to create an obligation to place a temporary hold; however, we recognize that firms may be legally required to place holds in certain circumstances.

Background

Canadians are living longer than ever before, and older Canadians are increasingly making up a greater proportion of the total population.¹ As investors live longer, there is a greater need for targeted financial advice and strategies associated with aging,² as well as the need to be more attuned to the sometimes-subtle changes clients may present as they age.

Registrants can be among the first to notice signs of vulnerability, diminished mental capacity and financial exploitation because of interactions they have with their clients and the knowledge they acquire through the client relationship.

Unfortunately, older Canadians are at a heightened risk of losing money to fraud and abuse. A study commissioned by the CSA in 2017 revealed that Canadians aged 65 or older are the likeliest age group to report being the victims of financial fraud.³ At the same time, many older Canadians are also at risk of financial abuse. This can take the form of theft, misuse or underuse of funds intended for care and other household expenses, or abuses of a power of attorney or other authority over the older person's decision-making. A 2015 national study on the mistreatment of older Canadians found that 2.6 per cent of Canadians aged 65 or older, representing 244,176 Canadians, reported having been a victim of financial abuse in the 12 months prior to when they were interviewed.⁴ This made financial abuse the second most common form of elder abuse in Canada.⁵

Diminished mental capacity also has the potential to endanger the financial security of investors. As the human body ages, it is normal for changes in the brain to take place. However, these changes do not impact everyone in the same way and at the same time. These normal changes in cognition may not have a noticeable effect on one's ability to perform routine financial tasks,

1 Recent Canadian census data shows that approximately 5.9 million Canadians are aged 65 or older, representing nearly 17 per cent of Canada's total population. Source: Statistics Canada, "Canada's population estimates: age and sex" (2015).

2 Households led by Canadians aged 65 and older control approximately \$541 billion in non-pension financial assets, representing 39 per cent of total non-pension financial assets held by Canadian households. Source: Statistics Canada, Survey of Financial Security (2016).

3 Innovative Research Group (commissioned by the CSA), *CSA Investor Index* (2017), at p. 52.

4 National Initiative for the Care of the Elderly, *Into the Light: National Survey on the Mistreatment of Older Canadians* (2015), at p. 55.

5 *Ibid.*

such as paying bills, but they can become more obvious when one faces more complex or unfamiliar contexts, such as financial planning or deciding to buy or sell investments.⁶ Additionally, the risk of Alzheimer's disease and other forms of dementia increases substantially as individuals get older: while only 7 per cent of Canadians over 65 years of age are affected by dementia, this percentage is 35-40 per cent among Canadians over 85 years of age.⁷ The CSA recognizes that older clients are not a homogenous group and that not all older clients are vulnerable or unable to protect their own interests. The CSA also recognizes that not all vulnerable clients are older clients. Vulnerability can affect a client of any age, take many forms, and can be temporary, sporadic or permanent in nature. Vulnerability can be caused by an illness, impairment, disability or aging process limitation. It is important for firms to recognize vulnerabilities in their clients, because vulnerable clients may be more susceptible to financial exploitation.

Canadian Policy Landscape

Over the past several years, Canadian securities regulators have been focusing on addressing issues of financial exploitation and diminished mental capacity affecting older and vulnerable investors. In March 2018, the Ontario Securities Commission (the **OSC**) published OSC Staff Notice 11-779 – *Seniors Strategy*, which included an action plan to respond to the needs and priorities of Ontario seniors.⁸ In June 2018, the Financial and Consumer Services Commission (New Brunswick) released a report on financial exploitation and cognitive impairment, outlining its recommendations as well as results from public feedback on an earlier consultation paper.⁹ In early 2017, the Québec government adopted *An Act to combat maltreatment of seniors and other persons of full age in vulnerable situations as a means of combating abuse*¹⁰ and the Autorité des marchés financiers published *Protecting vulnerable clients – A practical guide for the financial services industry* in May 2019.¹¹

In June 2019, the CSA published CSA Staff Notice 31-354 *Suggested Practices for Engaging with Older and Vulnerable Clients*, which, among other things, encourages registrants to consider asking their clients to provide TCP information.¹²

Similarly, the SROs have taken measures to address these issues. In 2016, IIROC published IIROC Notice 16-0114 - *Guidance on compliance and supervisory issues when dealing with senior clients*.¹³ In October 2019, the MFDA published MFDA Bulletin #0797-P - *Seniors and Vulnerable Clients* which sets out its recommendations in respect of the use of TCPs and the placing of temporary holds on transactions.¹⁴

The CSA acknowledges that in order to protect older and vulnerable clients, it is important to provide registrants with tools and guidance that they can use to take action against financial exploitation and to address issues arising from a client's diminished mental capacity, while being

6 FCA, Occasional paper No. 31, *Ageing Population and Financial Services* (2017), at p. 26.

7 Canada, Senate, *Dementia in Canada: A National Strategy for Dementia-friendly Communities* (Standing Senate Committee on Social Affairs, Science and Technology, 2016), at p. 3.

8 *Seniors Strategy*, OSC SN 11-779, (2018) 41 OSCB 2268.

9 Financial and Consumer Services Commission of New Brunswick, *Recommendations and Results of Consultation: Improving Detection, Prevention and Response to Senior Financial Abuse in New Brunswick* (June 2018).

10 *An Act to combat maltreatment of seniors and other persons of full age in vulnerable situations as a means of combating abuse*, L-6.3, Québec, 2017.

11 *Protecting vulnerable clients – A practical guide for the financial services industry*, AMF, (2019).

12 CSA Staff Notice 31-354, *Suggested Practices for Engaging with Older and Vulnerable Clients*(2019) 42 OSCB 5555.

13 IIROC Notice 16-0114, *Guidance on compliance and supervisory issues when dealing with senior clients* (2016).

14 MFDA Bulletin #0797-P, *Seniors and Vulnerable Clients*(2019).

mindful of the client's autonomy. We believe that the Proposed Amendments are a step towards achieving these goals.

U.S. Policy Landscape

In recent years, the North American Securities Administrators Association¹⁵ and the Financial Industry Regulatory Authority¹⁶ have taken steps to address issues of financial exploitation of older and vulnerable clients. In drafting the Proposed Amendments, CSA staff considered these two regimes and adopted certain elements of these frameworks that were appropriate for the Canadian landscape.

Summary of Proposed Amendments

CSA Staff have organized the Proposed Amendments into two topics: 1) Trusted Contact Person and 2) Temporary Holds. Unless otherwise noted, section references in the summary below are to provisions in NI 31-103.

Trusted Contact Person

The CSA proposes to amend section 13.2 [*Know your client*] of NI 31-103 by adding a new paragraph 13.2(2)(e) that would require registrants to take reasonable steps to obtain from the client the name and contact information of a TCP and the written consent of the client to contact the TCP in circumstances set out in the Rule. We also propose to provide guidance in 31-103CP with respect to our expectations for the use of the TCP. This requirement would not apply to a registrant in respect of a client who is not an individual.

In addition, the CSA proposes to amend section 14.2 [*Relationship disclosure information*] of NI 31-103 by adding a new paragraph 14.2(2)(1.1) that would require a registered firm to disclose to a client the circumstances under which the firm might disclose information about the client or the client's account to the TCP.

Temporary Holds

The CSA proposes to add a new section 13.19 [*Conditions for temporary hold*] to NI 31-103 that would:

- not prohibit registered firms and registered individuals from placing a temporary hold on the purchase or sale of a security or withdrawal or transfer of cash or securities from a client's account, if the registered firm reasonably believes that either:
 - a vulnerable client is being financially exploited, or
 - with respect to an instruction given by a client, the client does not have the mental capacity to make financial decisions, and

¹⁵ NASAA, *NASAA Model Act to Protect Vulnerable Adults from Financial Exploitation*, <https://bit.ly/2E4XYt6>.
¹⁶ FINRA, *Senior Investors*, <https://bit.ly/2Yxn3pS>.

- require registered firms to take certain prescribed steps if they place a temporary hold in the above noted circumstances.

We also propose to provide guidance in 31-103CP with respect to our expectations for the use of temporary holds.

The Proposed Amendments would add definitions of “financial exploitation”, “mental capacity”, “temporary hold” and “vulnerable client” to section 1.1 of NI 31-103. The CSA proposes to add guidance to 31-103CP on the signs registrants may observe if a client is being financially exploited or is suffering from diminished mental capacity.

The CSA proposes to amend section 11.5 [*General requirements for records*] of NI 31-103 by adding a new paragraph 11.5(2)(s) to require firms to maintain records to demonstrate compliance with the proposed section 13.19.

The CSA also proposes to amend section 14.2 [*Relationship disclosure information*] of NI 31-103 by adding a new paragraph 14.2(2)(p) that would require a registered firm to provide clients with a general explanation of the circumstances under which the firm or registered individual may place a temporary hold and a description of the notice that will be given.

Questions for Comment

In addition to comments on any aspect of the Proposed Amendments, we invite views on the questions below. Please provide a specific response.

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?
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).

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?
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?
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?
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.

Transition

Subject to the nature of comments we receive, as well as any applicable regulatory requirements, we are proposing that if approved, the Proposed Amendments would come into force at the same time as the Client Focused Reforms relating to know your client.

We invite your comments on this implementation plan.

Local Matters

Annex D includes, where applicable, additional information that is relevant in a local jurisdiction only.

Request for Comments

We welcome your comments on the Proposed Amendments.

Please submit your comments in writing on or before June 3, 2020. If you are not sending your comments by email, please send a CD containing the submissions (in Microsoft Word format).

Address your submission to all of the CSA as follows:

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

Deliver your comments only to the addresses below. Your comments will be distributed to the other participating CSA members.

The Secretary
Ontario Securities Commission
20 Queen Street West, 22nd Floor
Toronto, Ontario M5H 3S8
Fax: 416-593-2318
comments@osc.gov.on.ca

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
Fax: 514-864-8381
consultation-en-cours@lautorite.qc.ca

We cannot keep submissions confidential because securities legislation in certain provinces requires publication of the written comments received during the comment period. All comments received will be posted on the websites of each of the Alberta Securities Commission at www.albertasecurities.com, the Autorité des marchés financiers at www.lautorite.qc.ca and the Ontario Securities Commission at www.osc.gov.on.ca. Therefore, you should not include personal information directly in comments to be published. It is important that you state on whose behalf you are making the submission.

Questions

Please refer your questions to any of the following:

Jenna Virk
Senior Legal Counsel, Legal Services
Capital Markets Regulation Division
British Columbia Securities Commission
604-899-6884
jvirk@bcsc.bc.ca

Bonnie Kuhn
Senior Legal Counsel
Market Regulation
Alberta Securities Commission
403-355-3890
bonnie.kuhn@asc.ca

Curtis Brezinski
Compliance Auditor, Capital Markets
Securities Division
Financial and Consumer Affairs Authority of Saskatchewan
306-787-5876
curtis.brezinski@gov.sk.ca

Steve Gingera
Legal Counsel
Manitoba Securities Commission
204-945-5070
Steven.Gingera@gov.mb.ca

Andrea Maggisano
Senior Policy Advisor
Investor Office
Ontario Securities Commission
416-204-8988
amaggisano@osc.gov.on.ca

Namita Balgi
Policy Advisor
Investor Office
Ontario Securities Commission
416-204-8985
nbalgi@osc.gov.on.ca

Martin Picard
Analyste expert à l'encadrement des intermédiaires
Direction de l'encadrement des intermédiaires
Autorité des marchés financiers
514-395-0337 and 1-877-525-0337
martin.picard@lautorite.qc.ca

Deborah Gillis
Senior Legal Counsel/Conseillère juridique
Financial and Consumer Services Commission/Commission des
services financiers et des services aux consommateurs
506-643-7112
Deborah.Gillis@fcnb.ca

Chris Pottie
Deputy Director, Registration & Compliance
Nova Scotia Securities Commission
902-424-5393
Chris.Pottie@novascotia.ca

Steven Dowling
Acting Director
Government of Prince Edward Island, Superintendent of
Securities
902-368-4551
sddowling@gov.pe.ca

Renée Dyer
Superintendent of Securities
Office of the Superintendent of Securities, Service NL
709-729-4909
ReneeDyer@gov.nl.ca

Jeff Mason
Superintendent of Securities
Department of Justice, Government of Nunavut
867-975-6591
jmason@gov.nu.ca

Jeremy Walsh
Policy Officer, Legal Registries
Office of the Superintendent of Securities,
Northwest Territories
867-767-9260 ext. 82205
Jeremy_Walsh@gov.nt.ca

Rhonda Horte
Securities Officer
Office of the Yukon Superintendent of Securities
867-667-5466
rhonda.horte@gov.yk.ca