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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

Kenmar Associates is an Ontario-based privately-funded organization focused on investment fund investor education via on-line research papers hosted at www.canadianfundwatch.com .Kenmar also publishes ***the Fund OBSERVER*** on a monthly basis discussing investor protection issues primarily for investment fund investors. An affiliate, Kenmar Portfolio Analytics, assists, on a no-charge basis, abused investors and/or their counsel in filing investor complaints and restitution claims.

Kenmar appreciate the opportunity to provide comments on the CSA proposals. These proposals are in the Public interest .*See Elder Financial Abuse 'A Crime Of The 21st Century'* https://www.thestreet.com/annuityman/news/elder-financial-abuse-a-crime-of-the-21st-century

Our comments

Definition of Vulnerable Client

We have an issue with the CSA definition of vulnerable client viz
"vulnerable client" means a client of a registered firm or a registered individual, who may have an illness, impairment, disability or aging process limitation that places the client at risk of financial exploitation "

This is an unduly narrow version of vulnerability. We much prefer the UK FCA definition: "In our Approach to Consumers we define a vulnerable consumer as 'someone who, due to their personal circumstances, is especially susceptible to detriment, particularly when a firm is not acting with appropriate levels of care' (as

presented in our Occasional Paper 8 on Consumer Vulnerability)." https://www.fca.org.uk/publication/guidance-consultation/gc19-03.pdf It is broader and captures what we actually observe most frequently in the investment marketplace.

Vulnerable client categories include clients with :Hearing or visual impairments; Low or erratic income ,Low savings, Low knowledge or confidence in managing financial matters; Low English/French language skills; Learning impairments; Bereavement; Poor literacy or numeracy skills, marital breakdown; Poor or non-existent digital skills and recent immigrants to Canada .

Kenmar support this initiative because it creates incentives to encourage Firms and their Representatives to report potential financial exploitation as early as possible, when their intervention may be able to prevent harm or limit the damage to victims of financial exploitation. NASAA's 2019 Enforcement Report for the first time documented the effectiveness of TCP/Holds. In 2018, the latest available data, states that have enacted legislation based on the NASAA model received more than 400 reports from broker-dealers and investment advisers. These 400-plus reports shed light on victims of securities fraud, elder exploitation, and other seniors who need some form of assistance. https://www.nasaa.org/53844/state-report-and-hold-laws-show-positive-impact-in-fight-against-senior-financial-exploitation/

Trusted Contact Person

The Trusted Contact Person (TCP) is a useful resource for Firm's in administering a client's account, protecting assets and responding to possible financial exploitation. The TCP can also help locate a client that the Firm has been unable to reach.

Kenmar fully support the use of a Trusted Contact Person .We believe, if properly implemented, it can catch some abusive behaviour by persons external to the Firm. We agree with the proposed provisions that require a 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. For the system to work effectively, Firms will have to provide Reps proper training to identify vulnerable clients and a strict protocol on what to do when an abusive incident is detected. Clearly documented policies and procedures will be required.

We recommend that the NAAF have a defined entry block where the client can decide if he/she wants to name a TCP. This would provide objective evidence that a Firm has given its clients an opportunity to name a TCP and the information would be an integral part of the client KYC profile.

As we understand the proposal, the TCP is a complement to, and not a substitute for, a Power of Attorney (POA). The TCP does not have decision making power with respect to, or authority to effect changes to, the client's account by virtue of being the TCP. We assume that a client may name more than one TCP per account and that each unique account may have a different TCP listed.

For Discount brokers, we believe the TCP / Holds approach can be useful to the extent that these Firms have systems designed to monitor unusual/suspicious transactions activity. We appreciate that there is no suitability criteria for DIY investors. Kenmar encourage Discount brokers to seriously consider developing such systems as well as inserting some protective caution alarms for certain products (e.g. CFD's) or services (e.g. use of margin) and expanding their senior investor education/ fraud prevention materials.

The proposal requires that a TCP be the age of majority or older. A trusted contact should be someone with sufficient knowledge and standing in the client's life to know what is happening on a personal level. A trusted contact person should be a trusted and neutral person and preferably different than the POA appointee and the dealing Representative. The CSA may wish to elaborate on this in Guidance and in investor educational materials.

We assume that anyone can provide a TCP to a Firm whether or not they are in their retirement years and/or are exhibiting signs of a decline of mental capacity.

When a decision is made to contact a TCP, we recommend that Firms should consider whether other relevant parties such as regulators, law enforcement or the provincial Public Guardian or trustee in the relevant jurisdiction should be contacted. We assume that a Firm has the right not to contact a TCP if that person is suspected of exploiting the client.

We recommend that the CSA should provide an educational Guide for investors regarding the beneficial use of a TCP. See for example -Canadian Fund Watch: **Consider Naming a Trusted Contact Person for your Account(s)** http://www.canadianfundwatch.com/2019/11/consider-naming-trusted-contact-person.html

Temporary Holds

The proposed Rule allows, but does not require, a Firm to place a temporary hold on certain transactions if the Firm reasonably believes that financial exploitation has occurred, is occurring, has been attempted, or will be attempted.

The decision by a Firm to place a temporary hold should only be made by authorized and qualified supervisory and compliance staff. We recommend that Representatives who believe that a temporary hold should be placed on a transaction should follow their Firm's documented policies and procedures regarding the placement of temporary holds. These policies should provide criteria as to when a hold can be released (Q: Is a client's objection to a temporary hold sufficient grounds for lifting a temporary hold?) and if fees, interest charges and other expenses can continue to be charged during the hold period. We recommend a defined time period for the notification of holds –say, no more than two business days after the date that the Firm first placed the temporary hold –the notification can be either in person, orally by phone or in writing (which may be by email), of the temporary hold and the reason for the hold to all appropriate parties.

The CSA proposal that temporary hold requirements can be placed if there is a reasonable belief that, with respect to an instruction given by the client, the client does not have the capability or capacity to make financial decisions is integral to acting in the best interests of clients. We agree that holds should not be limited to cases of financial exploitation of vulnerable clients. This is entirely consistent with contemporary Wealth management principles promoted by Firms and CFR strategic intent. Any individual that is in a vulnerable state needs to be protected from mishandling or dissipating their own assets.

It is quite possible that CFR, if supervised and enforced, could be effective in curtailing mis-selling by registrants to vulnerable clients. As a fail-safe mechanism, we continue to advocate for the CSA to provide OBSI with a binding decision mandate. Low-ball settlements can be a life-altering experience for seniors.

Kenmar agree that the proposed temporary hold requirements should 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. It has been our experience that such transactions can be just as harmful to clients as withdrawals. Harm can also occur when cash or securities are transferred to another account within the Firm such as to a Joint Account. Based on the definition of *Temporary Hold*, we take this to mean that other non-suspicious transactions can continue to take place in the account e.g. transfer to a RRIF account, payment of a fee etc.

We agree with the CSA to not propose a time limit on temporary holds considering the complex nature of issues relating to vulnerable investors, and the length of time it takes to engage with third parties such as law enforcement and the relevant Public guardian and trustee. The proposal to require Firms to provide the client with written notice of the decision to not terminate the temporary hold, and reasons for that decision, every 30 calendar days makes a lot of sense from an investor protection perspective. Firms will need a tracking system to ensure the rule is adhered to and the contact information is kept up to date. It makes sense for the Firm to have policies and procedures that define when to escalate to external authorities such as the Public Guardian.

In response to the question *"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?"* we can only say "It is a start". It is our firm conviction that the harm done to vulnerable clients by registrants is at least equal to the harm done by outside parties interfering with investment accounts.

Some examples include selling a DSC mutual fund which could lead to redemption charges, or a Rep prematurely selling certain securities, which will lead to penalties assessed against the account that cannot be recovered. Exploitation of senior and vulnerable investors can result in the sale of long-held blue-chip stocks with a low tax basis, significantly increasing tax liabilities. Exploitative transactions can also

directly endanger a retired investor's quality of life. One far-too- common example that involves both exploitative sales and purchases is that of a recommendation to an elderly client to liquidate safe, income-producing investments (which may be funding their retirement or medical care) in order to invest in a "hot " IPO or a risky Off-book investment .

There are many recommendations to protect vulnerable investors that we have made to regulators that, if implemented, would materially improve vulnerable client protection. Example: A requirement of at least an annual review of KYC for vulnerable clients and retirees.

The bigger picture -protection of Vulnerable Clients from registrants

While we appreciate the efforts by the CSA to safeguard vulnerable clients from external forces, we take this opportunity to remind the CSA that the vulnerable clients of Firms are also subject to financial assault by dealing representatives and are material. For example, it took 20 years, but the CSA finally are taking steps to protect senior investors from the harmful effects of DSC mutual funds. These victims were vulnerable due to undue trust in the system, misleading "advisor" titles, a lack of financial literacy and short time horizons. Tens of millions of dollars have been incurred by investors via early redemption penalty fees. See MFDA DSC Sweep report http://mfda.ca/wp-content/legacy/bulletins/pdf/Bulletin0670-C.pdf We sincerely hope that the CSA will respond faster in future but at least, if current OSC proposals survive industry attack, DSC funds won't be able to be sold to clients over 6o years old ,even in maverick Ontario.

From our perspective. the biggest risks to vulnerable clients are unsuitable investments, unsuitable leveraging, Off-book transactions, financial fraud committed by Representatives and diminished cognitive capability that affects their financial decision-making. Other notable risk factors are complex products/strategies, deficient financial literacy, and social isolation. The consultation paper does not provide hard data regarding the incident rate of external client exploitation at investment dealers due to illness, impairment, disability or aging but we do have some data from OBSI on the disproportionate percentage of complaints they receive from seniors (38%) and we have empirical data on the harm Firms have inflicted on investors, including seniors.

Take Discount brokers for example. The Investment Industry Regulatory Organization of Canada's (IIROC) final *Guidance on Order Execution Only Services and Activities* aims to set out the sorts of products and services that discount brokers can provide to clients under the existing rules. The CSA may wish to review this guideline for its effectiveness in protecting vulnerable clients. We note that no securities regulator intervened when investors, including many seniors, were exploited for years by Discount brokers charging for services and advice they could not and did not provide. It has taken bold Class action initiatives to finally get Regulators to protect vulnerable Discount broker clients. One estimate of the annual losses incurred by investors runs to $250,000,000 who needlessly owned mutual funds with 1% trailing commissions.

Much more has to be done to reduce the risk of harm to vulnerable clients by Firms and their representatives.

The main vulnerable client areas for Firm focus should be:

- Detection and prevention of Off-book transactions
- Detection and prevention of personal financial dealings
- Improved recruitment practises and conduct standards for those personnel facing vulnerable clients
- Education and training of dealer staff facing vulnerable investors
- An KYC process that is senior-specific
- Constrain the use of misleading titles e.g. "Seniors Specialist"
- Immediate termination of any employee who uses a pre-signed form or adulterates documents previously signed by a client
- A professional standardized approach to risk need, tolerance and capability assessment ("risk profiling")
- Increased emphasis on investor compensation in sanction decisions
- Documented Rules for validating and accepting POA's
- Closer attention to Red flags that arise during the creation or modification of a POA, such as an apparent lack of connection between the client and the person being granted the POA or inconsistencies between KYC and the POA.
- Conduct fraud prevention seminars in libraries, community centers and retirement residences.

We encourage Firms to address issues not in the current proposals- change of address requests, a vital component to account protection and fraud detection; and change of beneficiary which could alter financial distributions upon death.

As for regulators, we believe the following actions would be very effective in protecting vulnerable clients:

- Redefine *vulnerable client* per FCA standard
- Make searching Firm and individual registration and disciplinary history more investor-friendly and fulsome
- Do not permit dealing Reps to act as POA's , executors or beneficiary of a non-family member client
- Increase Rep proficiency standards re de-accumulation accounts such as RRIF's
- Require a minimum KYC update period of one year for vulnerable clients
- Hold Dealers responsible in cases of Off-book transactions
- Introduce tougher rules for dealer complaint handling
- Give OBSI a binding decision mandate
- Provide objective Suitability criteria for fee-based accounts
- Add a requirement to document recommendations whenever a DSC fund is recommended to a vulnerable client
- Update constraints on " Free lunch seminars" targeted at seniors and retirees
- Adjust sanctions based on whether or not harmed clients were compensated
- Establish a Code for the treatment of vulnerable investors

- Consider establishing a Senior's Helpline based on the FINRA Model (see their report https://www.finra.org/investors/insights/finras-senior-helpline)
- Increase cooperation with insurance regulators to reduce regulatory arbitrage
- Dramatically increase fines and sanctions for those who exploit vulnerable clients

In April 2017, FINRA announced that the National Adjudicatory Council (NAC) revised FINRA's Sanction Guidelines to include a new principal consideration titled "Consideration for Vulnerable Customers." The NAC is FINRA's appellate tribunal for disciplinary cases and is a 15-member committee composed of industry and non-industry members. The new principal consideration reaffirms that financial exploitation of senior and other vulnerable customers should result in strong sanctions. While FINRA's decisions have acknowledged that exercising undue influence is an aggravating circumstance on a case-by- case basis, the new principal consideration makes clear that the Sanction Guidelines contemplate coverage for vulnerable individuals or individuals with diminished capacity. We encourage the CSA and SRO's to take similar stands.

Summation

Kenmar believe these proposals, if implemented by Firms, can help deter harm to vulnerable clients**.** We assume a Firm may disclose information related to the suspected financial exploitation of a vulnerable client to an associated financial institution but not to other financial institutions .

We strongly recommend that the **C**SA require some basic incident record keeping by Firms as regards the use of TCP advisories and statistics on temporary holds. Such information would be invaluable in establishing public and regulatory policy and allow objective assessment of the CSA proposal effectiveness.

Firms should provide access to or copies of records that are relevant to the suspected or attempted financial exploitation of a vulnerable client to agencies charged with administering provincial adult protective services laws and to law enforcement, either as part of a referral to the agency or to law enforcement, or upon request of the agency or law enforcement pursuant to an investigation.

While we totally support the TCP/Temp Hold initiative, the CSA must realize it is dealing with an industry with a less than a stellar reputation. See *The Edelman trust barometer Canada 2020* The Edelman trust barometer Canada 2020 places Financial services towards the bottom end of the trust scale with just 56% saying they trust the industry, down 8 percentage points from 2019. This puts the industry between telecoms (52%) and consumer packaged goods (57%) but well behind technology (68%) and professional services (67%). Education ranks the highest (70%). https://www.edelman.ca/sites/g/files/aatuss376/files/2020-02/2020%20Edelman%20Trust%20Barometer%20Canada%20-%20FINAL.pdf

In October 2019, IIROC published Guidance advising firms to review their retail client account agreements and to change or remove clauses that absolve them of

liability, or that are inconsistent with regulatory obligations. During reviews of agreements from a variety of firms, IIROC discovered clauses that raised regulatory concerns by excluding a firm's liability for losses, including those caused by the firm, or relieving a firm from its securities law obligations, such as suitability. These Firms are trying to avoid accountability. Can such Firms be expected to be watchmen over others when they themselves are exploiters?

We urge the CSA and SRO's to put a priority on vulnerable client protection over their registrants. We believe this will have a huge payoff for all stakeholders.

Permission is granted for public posting.

If there are any questions, do not hesitate to contact us.

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Palumbo fined $120,000 for taking cash from elderly clients | Sault Star
A Sault Ste. Marie mutual fund representative who misappropriated nearly $200,000 from three clients who were seniors, and gambled away more than half of that cash, faces a stiff six-figure fine and is permanently barred from any securities-related business. The three victims were 64, 78 and 84. MFDA considers them to be vulnerable clients. Their ages were considered "an aggravating factor worthy of a greater sanction." Palumbo falsified their signatures and submitted documents without their consent, the hearing found.
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