

FAIR

Canadian Foundation *for*
Advancement *of* Investor Rights
Fondation canadienne *pour* l'avancement
des droits *des* investisseurs

Alberta Securities Commission
British Columbia Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Financial and Consumer Services Commission (New Brunswick)
Manitoba Securities Commission
Nova Scotia Securities Commission
Registrar of Securities, Northwest Territories
Registrar of Securities, Yukon Territory
Securities Commission of Newfoundland and Labrador
Superintendent of Securities, Nunavut
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward
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Delivered via email to:

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Re: CSA Notice and Request for Comment – Proposed Amendments to National Instrument 31-103 to Enhance Protection of Older and Vulnerable Clients (the “CSA Proposal”)

FAIR Canada¹ is pleased to provide comments on the CSA Proposal that has been published for public comment and is intended to enhance investor protection by addressing issues of financial exploitation and diminished mental capacity of older and vulnerable clients.

1. General Comments

- 1.1 FAIR Canada is supportive of the CSA's efforts to enhance investor protection of vulnerable clients. Given the demographics of Canada, an aging population and increasing life expectancies, these are important issues to address. As noted in the CSA Proposal, an aging population has created challenges associated with vulnerability, diminished mental capacity and financial exploitation that the financial services sector needs to address urgently.
- 1.2 In 2017, FAIR Canada partnered with the Canadian Centre for Elder Law (CCEL) to produce the Report on Vulnerable Investors² (the "2017 Report"), which focused on the two main areas of challenge for vulnerable investors: (i) elder financial abuse and undue influence; and (ii) diminished capacity.
- 1.3 The 2017 Report recommended that the following six measures be developed and implemented:
 - a) **Trusted Contact Person** - Securities regulators should implement a rule requiring firms to make reasonable efforts to obtain the name and contact information of a trusted contact person (a "TCP").
 - b) **Temporary Hold** – Securities regulators should implement a rule that authorizes qualified individuals in a firm to place a temporary hold on trades and disbursements of funds or securities from the account of a vulnerable client in appropriate (and limited circumstances).
 - c) **Legal Safe Harbour** - Regulators should implement a legal safe harbour that shields firms and their representatives from regulatory liability for disclosure to a TCP or other reporting body or for the use of a temporary hold, in good faith.
 - d) **Conduct Protocol** – Securities regulators should publish a 'Conduct Protocol' that defines key terms and sets out the steps firms and representatives should take to identify and protect vulnerable clients.

¹ FAIR Canada is a national, charitable organization dedicated to putting investors first. As a voice for Canadian investors, FAIR Canada is committed to advocating for stronger investor protections in securities regulation. Visit www.faircanada.ca for more information.

² FAIR Canada and Canadian Centre for Elder Law, Report on Vulnerable Investors: Elder Abuse, Financial Exploitation, Undue Influence and Diminished Mental Capacity. November 2017.

- e) **Education and Training** – It can be difficult to determine whether a person is suffering from diminished mental capacity or financial exploitation. Accordingly, firms should be required to ensure that their representatives have competency-based training in the areas of elder abuse, undue influence, mental capacity issues, enduring powers of attorney and ageism. Securities regulators should take the lead in establishing the content and competencies required of registered individuals and relevant operations, supervisory, legal and compliance staff.
 - f) **Firms Become Familiar with Outside Resources and Responders** - Firms need to learn how and when to appropriately refer a case of suspected elder financial abuse, undue influence or diminished mental capacity to local responders. As there is no single place for reporting these issues in Canada, firms will need to learn the provincial or territorial responders in each area. Such information should be widely available to a registrant's staff.
- 1.4 As part of its stakeholder consultation in preparing the 2017 Report, FAIR Canada and CCEL consulted with a wide range of stakeholders. These stakeholders included: Canadian Public Guardians and Trustees, experts on aging, industry associations and foreign and domestic regulators in the securities industry. We found a broad consensus around the need to address these issues.
- 1.5 We are pleased to see that the CSA Proposal incorporates the measures of requiring registrants to make reasonable efforts to obtain the name and contact information of a trusted contact person and provision for temporary holds on trades and withdrawals or transfer of cash or securities from client accounts when there is reasonable belief that a vulnerable client is being financially exploited or the client does not have the mental capacity to make financial decisions, consistent with the recommendations of the 2017 Report.
- 1.6 Concerns about mental capacity of older adults are often a key concern, for the older adult and/or their supporters, and for firms handling their investments. Older adults are subjected to ageist beliefs, which include the erroneous notion that because people are older, they must have cognitive impairment. This is simply not true. However, the issue of diminished capacity is still a significant issue in the aging Canadian population.
- 1.7 Elder financial abuse is one of the most common forms of elder abuse. Financial exploitation occurs when a person steals or misuses another adult's financial property. It is particularly devastating for older adults, who

are often dependent on their investment savings to pay their living costs and who do not have the means or time to offset significant losses.

- 1.8 Older adults who need support, often receive it from family, friends or caregivers who assist with daily tasks and decision-making. This makes these older adults particularly vulnerable to undue influence whereby the decision-making process is subverted by manipulation. While undue influence in the investment context is often exerted to the financial benefit of the influencer, this is not always the case.
- 1.9 The CSA Proposal is an urgently needed measure to establish consistent minimum regulatory requirements and expectations for the securities industry that provides clarity to firms, registered representatives and investors to protect older and vulnerable clients from financial exploitation.

Questions Posed in the Request for Comments

Trusted Contact Person

- CSA Q 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?**
- 2.1 FAIR Canada believes that the TCP should apply to an individual who, in the case of a corporation, is a beneficial owner of or exercises direct or indirect control or direction of the corporation. Similar requirements to determine whether a TCP exists for an individual with comparable interests in a partnership or a trust.
- 2.2 While clients who use holding companies, partnerships or trusts as part of their financial and tax planning may tend to be individuals with higher net worth, that does not mean that these individuals can not be vulnerable investors subject to financial exploitation.

- 2.3 As we stated in the 2017 Report, we believe registrants should use reasonable efforts to obtain a TCP for every non-institutional client.

CSA Q 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).

- 2.4 FAIR Canada recommends these requirements apply to dealers offering order execution only (“OEO”) services. There is no justification to exempt OEO dealers from the amendments to the KYC requirements to require the dealer to take reasonable steps to obtain the name and contact information of a trusted contact person (TCP) and the clients written consent to contact the TCP in prescribed circumstances.
- 2.5 We believe that OEO dealers can monitor accounts, aided by technology, to ascertain unusual trading and/or requests for withdrawals or transfers of cash or securities from client accounts that may be indicative of financial exploitation of vulnerable clients or that may indicate a client with diminished mental capacity. OEO dealers should be required to take reasonable steps to review unusual trading or other transactions in client accounts and to make appropriate inquiries, including potentially contacting the TCP.
- 2.6 OEO dealers should be permitted to place a temporary hold on the client account if there is reason to believe that the client is vulnerable and is being financially exploited or the client does not have mental capacity to make financial decisions.
- 2.7 Additionally, many OEO firms have a wealth of data that can be analyzed to detect changes in trading and investment patterns of clients. This can facilitate detection of mental capacity issues of investors on OEO and/or financial exploitation. FAIR Canada recommends that OEO dealers recognize that they have a role in combatting exploitation of vulnerable investors.

Temporary Holds

CSA Q 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?

2.8 FAIR Canada is supportive of the use of temporary holds as a method of protecting vulnerable clients, including those clients where a registrant has a reasonable belief that a client lacks mental capacity to make financial decisions. We believe the temporary hold requirement should apply in these circumstances and not be limited to financial exploitation.

CSA Q 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?

2.9 FAIR Canada believes the temporary hold requirements can be appropriate for a broad range of transactions – including a purchase or sale of securities and the transfer of cash or securities to another firm. Accordingly, FAIR Canada supports extending the temporary hold requirements in these circumstances.

CSA Q 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?

2.10 FAIR Canada does not believe a prescribed time limit on temporary holds is necessary and a notice requirement for investors is appropriate.

2.11 FAIR Canada recognizes that issues relating to financial exploitation and diminished capacity can be complex. The appropriate solution will vary depending on a number of factors. Requirements for documentation of holds and reasons for not terminating holds is appropriate. FAIR Canada believes it would be constructive to include guidance in the Companion Policy. In large measure, the time limit on a temporary hold will be dependent on the facts that arise in each set of circumstances.

CSA Q 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.

2.12 FAIR Canada suggests that registrants report to the relevant member of the CSA on temporary holds. We believe strongly that there is a value to collecting data on this issue so that policy solutions can evolve as needed.

3. Other Comments

Definition of “Mental Capacity”

3.1. The CSA Proposal defines “mental capacity” as follows:

“mental capacity” means the ability to understand information or appreciate the foreseeable consequences of a decision or lack of decision’

3.2. In the investment context, a client must be capable of understanding relevant information and appreciate the consequences of their decisions. Low financial literacy along with increasing product complexity create some interesting challenges as clients age.

3.3. Mental capacity is a spectrum. While the Companion Policy expands on concepts of mental capacity and provides examples of warning signs of a decline in mental capacity, FAIR Canada encourages the CSA to recognize the nuanced nature of changes in mental capacity. In the context of aging and cognitive changes, the 2017 Report noted that:

“With the normal aging process, cognitive abilities that are associated with skills, knowledge and experience gained over time remain stable while fluid

abilities regarding reasoning and problem solving in novel situations tend to decline with age...”³

The guidance in the Companion Policy on mental capacity is helpful in providing examples of warning signs of changes in mental capacity, but FAIR Canada urges the CSA to emphasize to registrants the need for training, particularly scenario-based training.

Conduct Protocol

- 3.4. The 2017 Report also advocated for firms to establish a conduct protocol (the “Conduct Protocol”). A Conduct Protocol, as described in the report, would set out the steps that firms and representatives should take to identify and protect vulnerable clients.
- 3.5. The CSA Proposal does enumerate an expectation that registered firms have written policies and procedures that address:
 - a) Protocols around identifying, documenting and contacting a TCP;
 - b) Financial exploitation or lack of mental capacity;
 - c) Delineate firm and individual responsibilities for addressing concerns;
- 3.6. These expectations are included in the Companion Policy. We suggest this expectation be included in the amendments to NI 31-103 in order to ensure that these are requirements that can be enforced by securities regulators where necessary.
- 3.7. In addition to what the CSA Proposal currently proposes for policies and procedures, we recommend that such policies and procedures be required to address: (i) undue influence; (ii) warning signs of undue influence, financial exploitation and diminished capacity; (iii) a process for conducting internal reviews when financial exploitation, undue influence or issues of mental capacity are suspected; and (iv) reporting these matters to a public guardian and trustee, public curator and/or police.

Education and Training

- 3.8. There is a value and need for guidance and resources on issues relating to vulnerable investors for registrants. Competency-based training in the areas of elder abuse, undue influence, mental capacity, enduring powers of attorney and age-ism is critical to ensuring that registrants are able to provide sound financial advice and service to older and vulnerable clients.

³ *Ibid* at 22, citing The Big Window, “The Ageing Population: Ageing Mind Literature Review”, 2017, at 11, online at: <https://www.fca.org.uk/publication/research/ageing-mind-literature.pdf>.

- 3.9. As we've noted previously in these comments, the CSA Proposal should also include minimum proficiency requirements for registrants in this area.
- a) FAIR Canada believes that the regulatory safe harbour proposed in the CSA Proposal should be tied to the proficiency requirements for firms and individual registrants.
 - b) FAIR Canada urges CSA members, the IIAC and CBA to consider meaningful partnerships with clear, measurable goals and objectives to develop effective education and training tools that are updated regularly.

Expectations of Firms and Individual Registrants

- 3.10. The CSA Proposal does not include expectations of firms to monitor the conduct of their individual registrants and staff. While there are fitness standards and high expectations of individual registrants in the investment industry, not all registrants live up to those standards. FAIR Canada believes the CSA Proposal should include guidance in the Companion Policy for firms on how CSA members expect registrant firms to deal with individual registrants who may be deficient in their dealings with vulnerable clients.

Canadian Adult Protective Agency

- 3.11. Elder abuse, financial exploitation, vulnerable investors and diminished mental capacity are broad social issues. We commend the CSA's efforts to address them in the investment context. However, given the complexity and broader social impact of these issues, FAIR Canada re-iterates the recommendation from its work with CCEL that an adult protective agency is in order. Such an agency can triage and help direct individuals or organizations to the appropriate regulatory authority.
- 3.12. While such an agency may be beyond the purview of the CSA, the CSA and the financial industry can help to advocate for such an agency. Pushing for a modern adult protective agency that utilizes the most effective and least intrusive interventions is a logical and beneficial complement to the mandate of CSA members to protect investors.
- 3.13. The 2017 Report noted that such an agency could look at numerous U.S. initiatives for Canada to emulate. In particular, the National APS system is one model of how such an agency might function. Alternatively, building out the Canadian Anti-Fraud Centre to respond to and report on allegations of financial exploitation is another model.

National Seniors Strategy

3.14. Canada's population is aging. These demographics create challenges that impact all sectors of society. The U.S. Consumer Financial Protection Bureau has noted:

“Experts and professionals in the field agree that increased multidisciplinary community collaboration and interagency cooperation is vital to addressing the problem of elder abuse, especially financial exploitation.”⁴

3.15. A national seniors strategy is necessary in Canada and CSA members are important stakeholders in such a strategy.

We thank you for the opportunity to provide our comments and views in this submission. We welcome the public posting of this submission and would be pleased to discuss this letter with you. Please feel free to contact Doug Walker should you have any questions or require further explanation at douglas.walker@faircanada.ca.

Sincerely,



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Canadian Foundation for Advancement of Investor Rights

⁴ CFPB, “Report and Recommendations: Fighting Elder Financial Exploitation through Community Networks”, Office for Older Americans at 13, online at: https://files.consumerfinance.gov/f/documents/bcfp_fighting-elder-financial-exploitation_community-networks_report.pdf