July 16, 2020

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 of New Brunswick
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island
Nova Scotia Securities Commission
Superintendent of Securities, Newfoundland and Labrador
Registrar of Securities, Northwest Territories
Registrar of Securities, Yukon Territory
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**Re: CSA Notice and Request for Comment – Proposed Amendments to National Instrument 31-103 - *Registration Requirements, Exemptions and Ongoing Registrant Obligations* and Companion Policy to Enhance Protection of Older and Vulnerable Clients**

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## OVERVIEW

The Portfolio Management Association of Canada (**PMAC**), through its Industry, Regulation & Tax Committee, is pleased to have the opportunity to submit the following comments regarding CSA Notice and Request for Comment – Proposed Amendments to National Instrument 31-103 - *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (**NI 31-103**) and Companion Policy (**CP 31-103**) to Enhance Protection of Older and Vulnerable Clients (both, the **Consultation** or the **Proposed Amendments**).

PMAC represents over 280 investment management firms registered to do business in Canada as portfolio managers. In addition to this primary registration, most of our members are also registered as investment fund managers and/or exempt market dealers. PMAC's members encompass both large and small firms managing total assets in excess of $2.8 trillion for institutional and private client portfolios.

## KEY RECOMMENDATIONS

- Establish a regulatory safe harbour for registrants that act in good faith to contact trusted contact persons (**TCPs**) and/or place temporary holds on client accounts (**Holds**) within the requirements of the Proposed Amendments in the short term while in the longer term, work with the necessary federal and provincial stakeholders to establish a legal safe harbour for registrants that act in good faith to contact TCPs and/or place Holds;
- Clarify that the TCP must be of the age of majority in their own jurisdiction of residence, and that the TCP does not need to reside in the same jurisdiction as the client;
- Move from a 30-day notification requirement regarding the status of a Hold to a more principles-based notification framework where status updates would be required for significant developments;
- Enhance third-party supports for registrants and clients in the case of suspected financial exploitation and abuse and/or diminished capacity; and
- Empower investors with information about registration and registration categories through the provision of easier-to-find and understand information on the National Registration Search Database.

## FEEDBACK

### Vulnerable investor protection measures

PMAC is very supportive of the work done by the various members of the CSA in the form of research, registrant and investor outreach and this Consultation to enhance investor protection by addressing issues of financial exploitation and diminished mental capacity of older and vulnerable clients. PMAC has recently published a resource on this issue for member firms titled "PMAC Guidelines to preparing a senior/vulnerable investor policy" which we believe supports the goals of the CSA in helping registrants to create policies, procedures and training to address issues particular to vulnerable and/or senior investors.

Subject to the specific comments in this submission, PMAC believes that it will be beneficial to codify the Proposed Amendments to provide registrants with a set of tools and expectations around TCPs and placing Holds.

Additionally, because Canadian investors interact with firms regulated by the CSA as well as by the Investment Industry Regulatory Organization of Canada (**IIROC**) and the Mutual Fund Dealers Association of Canada (**MFDA**), we are pleased to see that the Proposed Amendments will also apply to firms registered with IIROC and the MFDA.

**Safe Harbours Required**

As fiduciaries, PMAC firms take their client obligations, including privacy obligations, very seriously.

The Proposed Amendments require registrants to take reasonable steps to obtain a client's written consent to contact a TCP in prescribed circumstances and, with respect to that requirement, the CSA has included generic language[1] referencing firms' potential privacy obligations in the Proposed Amendments to CP 31-103. Rather than cautioning registrants about privacy requirements in the CP 31-103, PMAC believes that a "safe harbour" provision within NI 31-103 with respect to privacy obligations would provide certainty and encourage firms to reach out to a TCP when circumstances warrant, which would benefit vulnerable investors. We recommend that the CSA express an intention to establish legal protection for good-faith compliance with the Proposed Amendments.

PMAC continues to have concerns about the interaction between the Proposed Amendments and applicable privacy legislation. The Canadian Centre for Elder Law and the Canadian Foundation for Advancement of Investor Rights set out the dilemma that registrants may face when determining what to do in instances of suspected diminished capacity or financial abuse in the Report on Vulnerable Investors: Elder Abuse, Financial Exploitation, Undue Influence and Diminished Mental Capacity (the **Vulnerable Investors Report 2017**):

> Financial services firms are already concerned about a Catch-22: either they report suspected issues and may possibly be sued for the breach of disclosure of confidentiality or privacy, (including the risk that they have alerted the abused accidentally) or they do nothing and risk being liable for failure to prevent the abuse or taking instructions from someone who may not have the mental capacity to give them[2].

The Vulnerable Investors Report 2017 contains 6 recommendations, 3 of which the CSA have adopted in the Proposed Amendments and/or through the Client Focused Reforms, notably: obtaining a TCP from clients, providing firms with the ability to place a Hold and mandatory education and training for employees. However, the recommendation to establish a legal safe harbour in the Vulnerable Investors Report 2017 is noticeably absent from the Proposed Amendments. That recommendation reads as follows:

> "Regulators should implement a legal safe harbour that shields firms and their representatives from regulatory liability if they act in good faith and exercise reasonable care in making a disclosure about a client to his or her designated TCP or specified government agency or securities commission or other designated reporting body. In addition, a regulatory legal safe harbor should be extended to the firm and their representatives for placing a temporary hold on disbursements or trades from the account of a vulnerable client, provided the firm and its representatives act in accordance with the regulatory requirements (which are discussed in this report) including the applicable provisions of a regulator-approved conduct protocol.

[1] Regarding TCPs, the CP 31-103 states: "When contacting a TCP, registrants should be mindful of privacy obligations under relevant privacy legislation and client agreements relating to the collection, use and disclosure of personal information". Regarding Holds, the CP 31-103 states: "Firms should also assess their contractual and statutory privacy obligations before contacting the TCP, other individuals or organizations with the intent of sharing or obtaining personal information regarding a client".

[2] Vulnerable Investor Protective Action and Legal Safe Harbour Project

Canadian governments at provincial and federal levels should undertake legislative law reform to provide for a legal safe harbour from civil liability where the regulatory requirements are met including reform of the PIPEDA legislation. While beyond the scope of this project, it is also strongly recommended that the PIPEDA sections dealing with 'financial abuse' intervention undergo separate law reform to provide clarity of language and terminology, and to ensure that the responders indicated in the PIPEDA section match up with provincial responses and legal terminology.

In the meantime, courts should give administrative deference to the securities regulatory regime when determining whether there is any civil liability (including breach of privacy laws) resulting from placing a temporary hold on trades or disbursements or disclosures to third parties as set out above, to the firm and/or its representatives in accordance with the framework and requirements set out in the report.

Firms and their representatives should be protected from claims of breach of privacy or other breaches of obligations that might otherwise arise from a disclosure to the TCP or a securities regulator or other authority (government agency or police) if they act in good faith and exercise reasonable care in making such disclosure or in respect of notifications as a result of holds on disbursements or trades. In order to obtain the benefits of a safe harbour, the firm and its representatives must have acted with reasonable care and in accordance with:

a) the regulatory requirements established by the securities commissions;
b) the applicable provisions of an accepted conduct protocol by the securities commissions; and
c) investment firms must have undertaken appropriate education and training of all staff, representatives and qualified individuals on elder abuse, financial exploitation of vulnerable investors, undue influence and diminished mental capacity issues."

While we acknowledge that privacy legislation is not within the jurisdiction of the CSA, we nonetheless feel that a more explicit safe harbour from civil and regulatory liability for firms and individual registrants who contact TCPs, place Holds and/or report suspected financial abuse is required. PMAC strongly urges the CSA to amend the Consultation to include a regulatory safe harbour when firms follow the spirit of the Proposed Amendments, and to urge the necessary legislative changes federally, provincially and territorially to implement a safe harbour from civil liability on an expedited basis.

PMAC notes that the U.S. Federal Senior Safe Act protects "covered financial institutions," which includes investment advisers (the U.S. equivalent of portfolio managers), and associated persons called "eligible employees" from liability in any civil or administrative proceeding for reporting a case of potential exploitation of a senior citizen to a list of specific government agencies (a "covered agency,"), provided that they have been trained to identify and report exploitative activity against seniors before making a report, and that the report is made in good faith and with reasonable care. We note that the Consultation briefly references the CSA's consideration of the U.S. policy landscape, noting that the CSA adopted certain elements of the U.S. regime where appropriate for Canada.

In the absence of introducing an explicit safe harbour for firms and their registered individuals, it would be helpful to better understand why the CSA did not adopt this aspect of the U.S. Seniors Safe Act.

We further believe that, despite the CSA's statement in the Consultation that "there is nothing in Canadian securities legislation that prevents registered firms and individuals from placing a temporary hold that they are otherwise legally entitled to place", additional comfort is required for firms that place a Hold over client assets, including potentially reporting the firm's reasonable belief of financial exploitation and/or diminished capacity to an external body. The Vulnerable Investors Report 2017 recommended the imposition of a regulatory safe harbour with respect to temporary holds and PMAC urges the CSA to provide additional comfort to firms of their ability to place such holds, when complying with the Proposed Amendments in good faith.

We believe that further clarity and discussion on the issue of regulatory and legal safe harbours will be critical for firms and, ultimately, will empower registrants to help their vulnerable investors through contacting a TCP, imposing a Hold and/or reporting suspected financial exploitation to an appropriate external body.

**Consultation Questions**

PMAC has the following comments on certain of the questions set out in the Consultation, as well as some other general comments. The questions are numbered as they appear in the Consultation.

**A) Trusted Contact Persons**

To eliminate confusion as to the requirements regarding who can be a TCP, we believe additional clarity is required in the drafting of Section 13.2(2)(e). While PMAC believes that the CSA intends that the TCP should be a person of the age of majority in the *TCP's* own jurisdiction of residence, there has been some confusion as to whether the CSA intended that the TCP must be of the age of majority and live in the *client's* jurisdiction of residence. The latter would be unduly onerous for many clients and we do not believe this is what the CSA intended. We offer the following alternative drafting for consideration:

> 13.2(2)(e) obtain from the client the name and contact information of a trusted contact person, who is an individual of the age of majority or older in the ~~individual's~~ trusted contact person's jurisdiction of residence, and the written consent of the client for the registrant to contact the trusted contact person to confirm or make inquiries about any of the following […]

**B) Temporary Holds**

> **Question 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?

Because the decision to impose a Hold requires a firm to hold a reasonable belief and firms must act in the best interest of clients, we do believe that where a client may not have the mental capacity to make financial decisions, a firm should be permitted to place a Hold in accordance with all of the requirements of the Hold provisions in the Proposed Amendments and the firm's own policies and procedures.

> **Question 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?

PMAC believes that the wider the scope of Hold powers provided in the Proposed Amendments, the more each firm will be able to assess the appropriate scope for each Hold on a case-by-case basis, thereby potentially improving the range of actions a firm can take to protect a client's assets. With respect to transfers, PMAC believes the CSA should provide additional comfort and guidance in the CP 31-103 about the expectation and ability for firms to share information with receiving institutions about suspected financial exploitation and/or financial abuse. Once a registrant has identified red flags about a client and begins to ask questions, it is possible that the client's assets will be transferred to a new firm where it may take time for the new firm and its registrants to identify those same red flags as to capacity and/or diminished expectation (or these may not be identified by the new firm). Additional guidance and assurances that firms will be protected from liability for any reasonable delays (and changes in markets) that may occur while conducting due diligence on a transfer out to another firm and from sharing reasonably held suspicions of financial exploitation and/or diminished capacity would be helpful for firms. We believe that this information sharing should also be expressly covered by the safe harbour.

> **Question 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?

Firms do not believe that imposing a time limit on Holds would be beneficial to investors. Firms can think of several situations in which, notwithstanding best efforts by the firm to ascertain whether a client has diminished mental capacity or is the subject of financial exploitation, the answers are not within the firm's ability to generate and the firm must rely on third parties. Requiring a Hold to be lifted after an arbitrary period of time could result in investor harm and/or rushed and incomplete analyses of each case.

Moreover, PMAC members are concerned that requiring notice every 30 days of the decision not to terminate a Hold could be very onerous and costly without ultimately bringing new information to the investor. Moreover, since firms have the ability to select which portion of the client's assets should be subject to the Hold, there is room for firms to ensure that the client is still able to access

funds for routine disbursements such as long-term care costs, living costs, etc. PMAC strongly encourages the adoption of a less prescriptive timeframe for providing notice of a decision of whether to terminate a Hold to allow firms to balance the need to communicate with clients on this important issue while not being made to generate a report that may or may not have new, or readily available, information every 30 days.

> **Question 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.

As discussed above, PMAC believes that more express liability protections for firms and individual registrant that adhere to the requirements in the Proposed Amendments would enhance firms' comfort when imposing Holds as well as to more effectively and efficiently resolve and lift these Holds by being able to communicate information to outside agencies such as the police and regulatory authorities, and, in the case of transfers, with other registrants and financial institutions.

The Report on Vulnerable Investors 2017 acknowledges the lack of clarity that firms are concerned about, stating:

> Stakeholders agreed that the lack of clarity about the legal ramifications of taking protective action is a profound and significant deterrent to firms taking supporting and protective steps to help vulnerable investors. Stakeholders unanimously (save for one stakeholder who thought the safe harbour should only be regulatory), agreed that a legal safe harbour provision, which shields firms and representatives from both regulatory and civil liability for acting in good faith to protect a vulnerable investor, is absolutely critical[3].

While outside the jurisdiction of the CSA, PMAC believes that additional resources are required to assist firms in reporting and/or assessing potential financial exploitation or diminished mental capacity. Without external resources with expertise in criminal, social, mental health and forensic accounting or cyber skills, firms are unlikely to be able to do more than identify red flags and take certain limited steps to determine whether a client is at risk of or the target of financial exploitation or experiencing a decline in mental capacity. Members grapple with the challenges posed by asking advisers to be on the front lines of detecting the red flags of diminished mental capacity. Additional resources from the CSA or external bodies that provide principles-based guidance, plain-language educational materials surrounding these issues would be welcome.

> **Transition Question:** If the Proposed Amendments were to be approved, they would come into force at the same time as the Client Focused Reforms relating to know-your client. Comments on this transition plan?

Subject to greater clarity around Holds, firms are comfortable with the Proposed Amendments coming into force at the same time as the Client Focused Reforms relating to Know-Your-Client.

[3] Report on Vulnerable Investors 2017 at page 68

**Empower Investors**

Additionally, while PMAC agrees that registrants are often at the forefront of being able to identify and flag potential financial exploitation or diminished mental capacity, PMAC would like to reiterate the importance of easy-to-access and understand information about who investors are trusting with their assets. The SEC views the Senior Safe legislation as going hand-in-hand with increased investor awareness of registration categories. SEC Chairman, Jay Clayton noted:

> Financial professionals can provide a critical frontline role in identifying and reporting senior financial exploitation … [The SEC] also encourages all investors, including our most vulnerable, to ensure they are dealing with a registered investment professional[4].

We believe that bolstering protection for vulnerable investors is an incredibly important – and multi-faceted – issue. In addition to the role that registered firms and individuals play in identifying potential financial exploitation and/or diminished mental capacity, we believe that the CSA have a crucial role to play in helping investors understand to whom they are entrusting their assets. PMAC has long called for improvements to the CSA's National Registration Search (**NRS**) to empower investors to research and understand their registrant. For example, the NRS should be modified such that:

- It no longer requires the exact spelling of a registrant's name to locate the firm and/or individual;
- On the search results page for each registrant, explain in plain language the registrant's category of registration along with a simple-to-understand explanation of the types of services the registrant can provide as well as of the duty of care to which that registration category is subject;
- On the search results page for each registrant, clearly set out any terms and conditions on registration along with a plain language explanation of the reason for those terms and conditions. I.e.: are they imposed as standard terms & conditions because an individual is a Client Relationship Specialist, or because the firm is an on-line adviser, or, are the terms and conditions the result of disciplinary action and, if so, a plain language explanation of the disciplinary action; and
- Provide information across agencies including CSA members, SROs and other regulatory bodies such as those that regulate insurance and mortgage investment representatives.

**CONCLUSION**

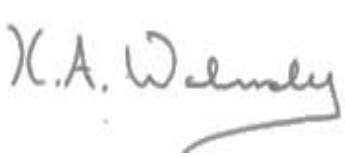
We would like to thank the CSA for the opportunity to respond to this Consultation and for providing a draft framework to help registrants help their vulnerable clients. While we have commented on several aspects of the Proposed Amendments, we believe that the key element for the CSA to address is that safe harbours are required to make the Proposed Amendments more impactful and to enable firms to solicit information about clients and report suspected financial abuse or diminished mental capacity for the benefit of these clients without fear of liability.

If you have any questions regarding the comments set out above, please do not hesitate to contact Katie Walmsley at (416) 504-7018.

[4] SEC, NASAA, and FINRA Issue Senior Safe Act Fact Sheet to help promote greater reporting of suspected senior financial exploitation, May 2019

Yours truly,

**PORTFOLIO MANAGEMENT ASSOCIATION OF CANADA**



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