CSA seek to require registrants to help defend clients against financial exploitation

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On March 5, 2020, the Canadian Securities Administrators (CSA) published for comment proposed amendments to National Instrument 31-103 Registration Requirements, Exemptions and Ongoing Registrant Obligations (NI 31-103) designed to enhance investor protection by requiring registrants to address potential financial exploitation, as well as diminished mental capacity, of older and vulnerable clients. In the publication, the CSA highlight how registrants can be well positioned to identify signs of financial exploitation, vulnerability and declining mental capacity in clients. The CSA propose changes to NI 31-103 relating to two steps that can and should be taken by registrants to address concerns about financial exploitation or a client's mental capacity:

- Identifying for each individual client on opening an account, a trusted contact person (TCP) – and raising any future concerns about the client with that person; and
- Imposing a temporary hold on the account in circumstances where the registrant considers there to be issues regarding the client of the nature discussed in the proposals.

The comment period on the proposals ended July 20, 2020 (extended due to the on-going COVID-19 pandemic). While we completely support the spirit and objectives of the proposals, we will be providing the CSA with comments reflecting enhancements and practical considerations so that registrants will better understand what they must do and what can be reasonably accomplished.
The proposals along with some of our brief observations are outlined below.

As is the case with many of the recent CSA pronouncements regarding registrants, the actual rules are relatively straightforward, albeit we think amendments are necessary. However, there is much to consider in regards to the CSA's expectations as to how the rules should be complied with. In the case of these proposals, this guidance is provided in a separate schedule to the Companion Policy to NI 31-103.

The proposed amendments build on the publication of CSA Staff Notice 31-354 Suggested Practices for Engaging with Older or Vulnerable Clients last year, as well as other regulatory publications, guidance and reviews. If implemented, the proposals will

impact the operations of all registered firms, including dealer firms that are members of IIROC and the MFDA. The CSA explain that they expect IIROC and the MFDA to consider amending their rules to put in place these requirements for members, in the meantime, the proposed rules in NI 31-103 would apply to SRO member firms (once made final).

We understand that the CSA intend for these proposals to come into force at the same time as the "client focused reforms" to NI 31-103 become fully effective on December 31, 2021.

BLG has long supported the notion of registrants requesting clients to provide them with details of a TCP so they can be contacted in appropriate circumstances. We have also given advice to many clients about the necessity to put a hold on an account if there are concerns about financial exploitation or the mental capacity of a client. Arthur Fish, a partner in our Estates group, continues as a long-time contributor on the OSC's Seniors Expert Advisory Committee and is a powerful advocate of the concepts behind the proposals.

Trusted contact person

Under the proposed amendments, registrants will be required to take reasonable steps to obtain from each individual client the name and contact information of a TCP resident in the same province or territory as the client and the written consent of the client to contact the TCP in certain circumstances. This includes when the registrant has concerns about the possible financial exploitation of the client or the client's mental capacity.

The CSA explain that a TCP is intended to be a resource for a registrant to assist it in protecting a client's financial interests. However, when communicating with a TCP, registrants must consider privacy obligations under relevant legislation and client agreements relating to the collection, use and disclosure of personal information.

While the requirement, as currently proposed, would only apply to individual clients, the CSA have requested feedback on whether it would be appropriate for the requirement to apply more broadly. In particular, because individuals may invest indirectly through holding companies, family trusts or similar entities, the CSA have asked whether the trusted contact person requirement should apply in respect of individuals that control non-individual clients, such as corporations, partnerships and trusts.

We question the requirement for a TCP to be resident in the same jurisdiction of the client as currently drafted (this would rule out an adult family member or friend of the client resident in another province or country). We also question the requirement for each client, no matter the age or condition of the client, to be requested to provide this information on account opening, although we understand the regulators reluctance to mandate that registrants single out specific categories of clients and obtain TCP information from only those clients. There is loose language about what a registrant should or can do if a client says they do not wish to provide this information. We consider registrants may need more guidance on this point.

We also note that there is no transition proposed with respect to existing clients of a registrant. Are they required to contact each existing client and obtain the necessary information about a TCP and if so, is there an expected time frame for completion? We will recommend that this issue be addressed by the CSA in finalizing the proposals. There is no guidance within the proposals on expectations for how and when this information should be monitored and updated, other than that registrants "should" have policies and procedures to address this issue. We recommend that a TCP should be considered and discussed with the client during regular account discussions and KYC updates held between a client and the registrant. The CSA explain that a TCP "should" not be the client's dealing or advising representative and we will recommend that this be prohibited given the obvious conflicts of interest. We also note that the MFDA, in particular, has recommended that the TCP not be an attorney for the client acting under a power of attorney or a person who has an interest in the account (*e.g.* as a beneficiary). These conditions are more restrictive, which may limit a client with few outside acquaintances from naming a TCP. However, they may be more sensible conditions.

As with many if not all regulatory requirements, documentation will be vital regarding any discussions by a registrant with a client about designating a TCP and with a TCP about the client.

Temporary holds

The proposed amendments clarify that the CSA consider that Canadian securities legislation does not prevent a registered firm from placing temporary holds on transactions in circumstance where the firm has a reasonable belief that a vulnerable client is being financially exploited or that a client lacks mental capacity. We note somewhat opaque wording is also included in the proposed Companion Policy to the effect that temporary holds may be placed on accounts by registrants "where they are otherwise legally entitled to place" such holds. We consider further discussion about the CSA's intentions in using these words is necessary. Account documentation and client agreements will likely need to recognize the circumstances when a registrant may place a temporary hold on an account. Clients should provide consent in advance to temporary holds in order to protect the registrant, as well as the client. The amendments also set out certain steps that a registered firm would need to take if it imposes such a hold on a transaction, including documenting the relevant facts that triggered the temporary hold, communicating the temporary hold to the client and conducting a review of the relevant facts before terminating the hold or refusing to proceed with the transaction. Presumably, a registrant would also be able to contact the TCP in these circumstances, but this is not specifically referred to in the proposals.

Impact on registered firms

If the proposed amendments are implemented, registered firms will need to ensure appropriate policies and procedures are in place, including recordkeeping, to comply with the new requirements in NI 31-103, as well as the enhanced regulatory expectations reflected in the proposed amendments to the related Companion Policy. In addition, registered firms will need to update their account opening documents, including the relationship disclosure information provided to clients and account agreements, which will need to describe the circumstances in which the firm may

contact the client's TCP or place a temporary hold on a transaction in the client's account. Firms will also need to provide appropriate training to their representatives on recognizing the signs of diminished mental capacity and financial exploitation, and the steps that should be taken when there is cause for concern.

Please contact your BLG lawyer or the authors of this Bulletin if you have any questions about the proposed amendments or current regulatory expectations relating to the protection of older and vulnerable clients, including the implications for your firm and its operations.

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