

# THE CSA COMES FULL CIRCLE TO PROTECT THE VULNERABLE

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The Canadian Securities Administrators (the “**CSA**”) have published final amendments (the “**Amendments**”) to National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (“**NI 31-103**”) and its companion policy (“**CP 31-103**”) to enhance protection of older and vulnerable clients.<sup>[1]</sup> The Amendments provide registrants with tools and guidance to identify and address diminished mental capacity and financial exploitation of clients and seek to improve the protection registrants can afford clients in such circumstances, including involving a trusted contact person (“**TCP**”) or placing a temporary hold on a specific transaction or entire account.

Part of the CSA’s mandate is the protection of investors from fraudulent, manipulative or misleading practices.<sup>[2]</sup> The CSA acknowledged that seniors are a growing segment of investors in Canada and the associated importance to respond to their needs and priorities in order to fulfill this mandate. As stated by Louis Morisset, the CSA Chair and President and CEO of the Autorité des marchés financiers, “[the Amendments] are an example of the CSA’s focus on enhanced investor protection in action”.<sup>[3]</sup>

The CSA recognizes that registrants are in a unique position to notice warning signs of financial exploitation or vulnerability due to their interactions with clients and the knowledge built by registrants through frequent client interaction. While registrants aren’t expected to make determinations of mental capacity, they are expected to recognize warning signs and the Amendments assist registrants in determining whether financial exploitation is occurring, has occurred or is likely to occur. The Amendments do not include a definition of “mental capacity” presumably because using bright lines wouldn’t capture all circumstances, and instead, CP 31-103 includes guidance on factors a registrant may consider in identifying warning signs that a client lacks mental capacity to make decisions involving financial matters.

## Background

The Amendments were put together by the CSA, the Investment Industry Regulatory Organization of Canada and the Mutual Fund Dealers Association of Canada. All registered firms will be subject to the Amendments, including members of both self-regulatory organizations aforementioned.

An initial form of proposals to amend NI 31-103 and CP 31-103 were published for comment on March 5, 2020.

The comment period resulted in immaterial changes to the original proposals and, having determined no further comment was necessary, the CSA finalized and published the Amendments on July 15, 2021.

Subject to the necessary approvals, the Amendments are expected to take effect on December 31, 2021 concurrently with the Know Your Client (“**KYC**”) provisions of the Client Focused Reforms to NI 31-103 and CP 31-103 introduced by the CSA in October 2019.<sup>[4]</sup> Registrants are expected to comply with the Amendments upon updating their client’s KYC information following December 31, 2021.

For additional information regarding the Client Focused Reforms and KYC requirements, please see our previous bulletins: [CSA Releases Client-Focused Reforms to NI 31-103 in Response to Client-Registrant Relationship Concerns](#) and [Client Focused Reforms – Upcoming Deadline for Registrants to Comply with Conflict of Interest Amendments](#).

## Amendments

Registrants will be required to maintain certain records demonstrating compliance with new requirements and delivery of certain information to clients relating to TCPs and temporary holds. To satisfy these requirements, registrants are encouraged to develop training programs and written policies and procedures.<sup>[5]</sup>

### 1. Trusted Contact Persons

The Amendments have introduced an entirely new section of KYC provisions to NI 31-103 specifically focusing a “TCP” or “trusted contact person,” which is defined as an individual identified by a client to a registrant whom the registrant may contact in accordance with the client’s written consent.

A TCP’s role is to be a resource to for a registrant to assist in protecting a client’s financial interest or assets when responding to potential circumstances of a diminished mental capacity or financial exploitation. Registrants may also utilize TCPs to confirm or make inquiries about the name and contact information of a legal representative of the client, including a legal guardian of the client or an executor of an estate or a trustee of a trust under which the client is a beneficiary. It is important to note that TCPs do not have the ability to transact on a client’s account or to make any other decision on the client’s behalf by virtue of being a TCP.

Registrants should continue to contact their clients first to express their concerns, prior to contacting a TCP. All interactions with a TCP must be done in accordance with the client’s written consent and registrants must also consider applicable privacy legislation. If a TCP is suspected of being involved in the financial exploitation of a client, the TCP should not be contacted and consideration should be given as to whether there are other more appropriate resources from which to seek assistance, such as the police, the public guardian and trustee or an alternative TCP, if named.

A client may appoint more than one TCP on their account. A TCP does not have to be the age of majority in their jurisdiction of residence, but they should be a trusted and mature person with the ability to communicate and engage in difficult conversations with the registrant about the relevant client's personal situation. Clients are not encouraged to select a TCP who is already involved in making decisions with respect to their account, such as a client-designated attorney under a power of attorney or a client's dealing or advising representative.

As part of the KYC process, registrants will be required to take reasonable steps to obtain the name and contact information of a TCP from individual clients, as well as obtain the client's written consent to contact the TCP in specified circumstances. Registrants will also be required to take reasonable steps to keep TCP information current, which includes updating the information within a reasonable time after becoming aware of a significant change in a client's personal circumstances. While registrants will be required to take reasonable steps to obtain such information from clients, clients will not be required to identify a TCP in order to open an account. In the event a client refuses to identify a TCP, registrants are encouraged to request such information on an ongoing basis as KYC is updated.

NI 31-103 does not prescribe the steps to be taken by registrants in satisfying these obligations, but unsurprisingly, CP 31-103 has been updated to provide helpful guidance. What is reasonable in the circumstances is at the discretion of the registrant, however, CP 31-103 encourages registrants to explain the role of a TCP, request the contact information for a TCP from a client and potentially make inquiries into a client's reasons for refusing to provide a TCP. Registrants are also encouraged to train their employees and adopt written policies and procedures to assist them in satisfying the new requirements. Such TCP requirements do not strictly apply to non-individual clients, but registrants may obtain such information from such clients if they so wish.

## 2. Temporary Holds

Registrants had expressed concerns to the CSA regarding regulatory repercussions when placing temporary holds in the past. To address these concerns, the Amendments create a regulatory framework for registrants that allows them to place temporary holds on transactions, withdrawals or transfers in certain prescribed circumstances.

"Temporary hold" is a hold that is placed on the purchase or sale of a security on behalf of a client or on the withdrawal or transfer of cash or securities from a client's account. Temporary holds may only be imposed where the registrant has a reasonable belief that there is financial exploitation of a vulnerable client or where there are concerns about a client's mental capacity to make decisions involving financial matters. Temporary holds may not be imposed for inappropriate reasons, such as a to delay a disbursement for fear of losing a client or where a registrant has decided not to accept a client order or instruction because it does not meet the

criteria for a suitability determination.

Though the defined term uses the word “temporary”, temporary holds are not actually required to be temporary. To reinforce this, the Amendments remove the paragraph in NI 31-103 which required registrants to “ultimately terminate the temporary hold and decide to proceed or not proceed with the purchase or sale of a security or withdrawal or transfer of cash or securities”. Temporary holds are not intended to be a hold on an entire client account, unless appropriate.

Registrants will be able to impose temporary holds even if a client has not appointed a TCP, as long as they do so in accordance with the modified NI 31-103. If a client has appointed a TCP, registrants will not be required to contact the TCP prior to imposing a temporary hold. This is an important feature of the Amendments that seeks to address concerns relating to the potential involvement of TCPs in the financial exploitation of clients.

In circumstances where a registrant places a temporary hold, such registrant will be required to document the facts and reasons that caused the hold and provide notice and the reasons to the client as soon as possible. Registrants must review the relevant facts after placing the temporary hold, and continue to do so on a frequent ongoing basis, to determine if continuing the hold is appropriate. The Amendments modify CP 31-103 to provide guidance on what a registrant’s review should entail, including verifying if the reasons for placing the temporary hold remain present and considering additional information as it becomes available to assist in the determination of whether or not to continue the temporary hold.

Registrants will be required to either revoke the temporary hold or provide the client with notice of their intent to continue the temporary hold and reasons for such decision within 30 days of imposing the temporary hold and if not revoked, every 30-day period thereafter. If a registrant: (i) no longer has a reasonable belief that financial exploitation of a vulnerable client has occurred or is occurring, or may be attempted; or (ii) no longer has a reasonable belief that a client does not have the mental capacity to make decisions involving financial matters, the temporary hold must end. A registrant may also decide to end the temporary hold for other reasons, such as if it decides to accept the client instructions with respect to the transaction, withdrawal or transfer.

If you have any questions with respect to the application of the Amendments, including potential application of privacy laws, please contact a member of [McMillan’s Capital Markets and M&A Group](#).

[1][ps2id id='1' target=''] *CSA Staff Notice of Amendments to NI 31-103 and to CP 31-103 to Enhance Protection of Older and Vulnerable Clients*, (2021) 44 OSCB 5887.

[2][ps2id id='2' target=''] [CSA, “Our Mission” \(last visited 27 July 2021\)](#).

[3][ps2id id='3' target=''] [CSA, “Canadian securities regulators publish final amendments to enhance protection of older and vulnerable clients” \(15 July 2021\)](#).

[4][ps2id id='4' target=''] *CSA Staff Notice of Amendments to NI 31-103 and to CP 31-103 – Reforms to Enhance the Client-Registrant Relationship (Client Focused Reforms)*, (2019) 42 OSCB (Supp-1).

[5][ps2id id='5' target=''] For more guidance on this topic, see *CSA Staff Notice 31-354 Suggested Practices for Engaging with Older or Vulnerable Clients* (21 June 2019).

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### **A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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