

CSA Staff Notice 31-354

Suggested Practices for Engaging with Older or Vulnerable Clients

June 21, 2019

Introduction

The Canadian Securities Administrators (**CSA** or **we**) have prepared this staff notice (**Notice**) in response to concerns raised by registered firms and their registered individuals (collectively, **registrants**) regarding how to address the changing needs and issues they may encounter when working with older or vulnerable clients, including responding to potential financial exploitation and diminished mental capacity.

Canadians are living longer than ever before, and older Canadians are increasingly making up a greater proportion of the total population.¹ As investors live longer, there is a greater need for targeted financial advice and strategies associated with aging,² as well as the need to be more attuned to the sometimes-subtle changes clients may present as they age.

The CSA recognizes that older clients are not a homogenous group and that not all older clients are vulnerable or unable to protect their own interests. Vulnerability can affect a client of any age, take many forms, and can be temporary, sporadic or permanent in nature. Vulnerability can be caused by a number of factors, including a physical, cognitive or psychological limitation, or an illness or injury. While certain parts of this Notice are more focused on the needs and risks that may become relevant to individuals as they age, the suggestions provided in this Notice can similarly be applied to registrants' dealings with vulnerable clients.

We encourage registrants to be mindful of, and adapt their practices to reflect, the diverse circumstances and needs of their clients, especially those who are older or vulnerable. This Notice provides suggested practices on matters that registrants may consider when engaging with older or vulnerable clients, including:

- Red flags of diminished mental capacity
- Red flags of financial exploitation
- Know your client and suitability obligations
- Complaint handling
- Supervisory procedures

¹ Recent Canadian census data shows that approximately 5.9 million Canadians are aged 65 or older, representing nearly 17 per cent of Canada's total population. Source: Statistics Canada, "Canada's population estimates: age and sex" (2015).

² Households led by Canadians aged 65 and older control approximately \$541 billion in non-pension financial assets, representing 39 per cent of total non-pension financial assets held by Canadian households. Source: Statistics Canada, Survey of Financial Security (2016).

- Powers of attorney and limited trading authorizations
- Training employees on identifying potential financial exploitation and diminished mental capacity
- Identifying trusted contact persons
- Establishing written policies and procedures for reporting and escalating issues
- Communicating with older or vulnerable clients

This Notice complements the self-regulatory organizations' senior-focused guidance and resources, including the Investment Industry Regulatory Organization of Canada's (**IIROC**) Notice 16-0114 *Guidance on compliance and supervisory issues when dealing with senior clients* and the Mutual Fund Dealers Association of Canada's (**MFDA**) seniors webpage.³

In developing this Notice, CSA staff considered the following:

- (1) consultations with stakeholders and experts, as well as other research conducted as part of the development of the Ontario Securities Commission (**OSC**) Seniors Strategy,⁴
- (2) the OSC's Senior Suitability Review,⁵
- (3) consultation with the OSC's Seniors Expert Advisory Committee,⁶
- (4) initiatives undertaken in Québec in the 2017-2022 Governmental Action Plan to Counter Elder Abuse, and more specifically guidance published by the Autorité des marchés financiers in May 2019: *Protecting vulnerable clients – A practical guide for the financial services industry*, and
- (5) review of learnings and practices of regulators outside Canada and organizations focused on meeting the needs of older or vulnerable adults.

We encourage registered firms to consider developing and improving their written policies and procedures⁷ based on the suggested practices set out in this Notice. We note that the suggestions in this Notice are not intended to be exhaustive. Registered firms may develop additional policies and procedures, that may be relevant to their business model, as well as the characteristics of their older and vulnerable clients.

³ <http://mfda.ca/investors/for-seniors/>

⁴ OSC Staff Notice 11-779 *Seniors Strategy*

⁵ In 2017, Compliance and Registrant Regulation Branch staff of the OSC conducted a review of 30 Portfolio Managers and Exempt Market Dealers who provided investment advisory services or sold products to a significant portion of clients who were over 60 years old. Please refer to OSC Staff Notice 33-749 *2018 Annual Summary Report for Dealers, Advisers and Investment Fund Managers* for a summary of the Senior Suitability Review findings.

⁶ The OSC's Senior Expert Advisory Committee provides OSC staff with expert opinions and input on securities-related policy, operational, education and outreach activities that are designed to meet the needs of older investors. The Committee is composed of experts in financial services, medical sciences, law, seniors' advocacy and other fields.

⁷ One of the key findings in the OSC Senior Suitability Review indicated that approximately 90% of the firms reviewed did not have any written policies and procedures for dealing with seniors and vulnerable investors, or on how to identify and address issues such as potential financial abuse, diminished mental capacity and misuse of a power of attorney.

Diminished Mental Capacity: Red Flags

The likelihood that a registrant will encounter clients who suffer from diminished mental capacity has increased with the rising demographic of older individuals. As the human body ages, it is normal for changes in the brain to take place. These changes may not have a noticeable effect on one's ability to perform routine financial tasks, such as paying bills, but can become more obvious when one faces more complex or unfamiliar financial decisions, such as deciding to buy or sell investments. While issues of diminished mental capacity are often associated with aging, we recognize that these factors may affect different individuals at different points in their lives, and to significantly different degrees.

Registrants can be among the first to notice signs of diminished mental capacity. These signs may arise subtly and over time. Examples of warning signs include, but are not limited to:^{8, 9}

- memory loss, such as forgetting previously given instructions or repeating questions,
- increased difficulty completing forms or reviewing disclosure documents,
- increased difficulty understanding important aspects of investment accounts,
- confusion or unfamiliarity with basic financial terms and concepts,
- reduced ability to solve everyday math problems,
- exhibiting unfamiliarity with surroundings or social settings or missing appointments,
- problems with language,
- changes in personality,
- increased passivity, anxiety, aggression or other changes in mood, or an uncharacteristically unkempt appearance.

Financial Exploitation: Red Flags

Research suggests that older Canadians are at a heightened risk of financial exploitation. Canadians aged 65 or older are the most likely age group to report being the victims of financial fraud,¹⁰ and financial abuse is the second most common form of elder abuse in Canada.¹¹ Financial abuse often involves family, friends, caregivers or holders of a power of attorney (**POA**) taking, misusing or underusing assets intended for the older or vulnerable person's care or household expenses.

⁸ Alzheimer's Society of Canada. 2014. *Alzheimer's disease: 10 warning signs*. Toronto.

http://www.alzheimer.ca/sites/default/files/files/national/core-lit-brochures/10_warning_signs_e.pdf

⁹ Investment Funds Institute of Canada. 2018. *Advisor Insights: Meeting the Needs of Investors with Cognitive Decline*. Advisor Insights: June 2018. <https://www.ific.ca/wp-content/uploads/2018/06/Advisor-Insights-Meeting-the-Needs-of-Investors-with-Cognitive-Decline.pdf/19868/>

¹⁰ Innovative Research Group (commissioned by the CSA), *CSA Investor Index (2017)*, at p. 52.

¹¹ National Initiative for the Care of the Elderly, *Into the Light: National Survey on the Mistreatment of Older Canadians (2015)*, at p. 55.

Similar to signs of diminished mental capacity, registrants can be among the first to notice signs of potential financial exploitation. Warning signs that a client could be subject to financial exploitation include, but are not limited to:^{12, 13}

- sudden change of risk profile from low risk/capital preservation to high risk,
- sudden reluctance to discuss financial matters,
- unexplained or sudden withdrawals from accounts or account closures,
- being accompanied to meetings by new or unknown caregivers, friends or family members or having difficulty communicating directly with the client without the interaction of others,
- sudden or unusual requests to change ownership of assets (for example, requesting that investments be transferred to a joint account held by family members, friends or caregivers),
- sudden or unexplained changes to legal or financial documents, such as POAs and wills, or account beneficiaries,
- unusual anxiety when meeting with or speaking to a firm employee (in-person or over the phone),
- unusual difficulty with, or lack of response, to communications or meeting requests,
- limited knowledge about their financial status,
- increasing isolation from family or friends, or
- signs of physical neglect or abuse.

Know Your Client

Under section 13.2 of National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations (NI 31-103)*, registrants have an obligation to take reasonable steps to collect information regarding a client's investment needs and objectives, financial circumstances, risk tolerance and other information to ensure that an investment is suitable for a client (referred to as the "know your client" or "KYC" requirement).

To better understand a client's needs and objectives as they age, as part of the KYC process, we encourage registrants to consider requesting and documenting information, such as:

- current employment status and intended retirement date, if not yet retired,
- potential expenses while in retirement (for example, travel plans, property purchases, medical needs and assisted living expenses),
- liquidity needs, such as a breakdown of current expenses, short- and intermediate-term expenses, and whether investments are generating enough income to meet the client's fixed and potential expenses,
- estate planning objectives, including family giving and charitable donations, if any,
- trusted contact person information, and

¹² North American Securities Administrators Association. 2016. *A Guide for Developing Practices and Procedures for Protecting Senior Investors and Vulnerable Adults from Financial Exploitation*. Washington. <http://serveourseniors.org/wp-content/uploads/2016/09/NASAA-Guide-For-Developing-Practices-and-Procedures-For-Protecting-Senior-Investors-and-Vulnerable-Adults-From-Financial-Exploitation.pdf>

¹³ Investment Funds Institute of Canada. 2018. *Advisor Insights: Protecting Investors from Financial Exploitation*. Advisor Insights: June 2018. <https://www.ific.ca/wp-content/uploads/2018/06/Advisor-Insights-Protecting-Investors-from-Financial-Exploitation.pdf/19872/>

- any current wills or POAs of which the registrant should be aware.

Registrants are also required to take reasonable steps to keep their clients' KYC information current.¹⁴ Registrants are encouraged to meet with their older or vulnerable clients more frequently to update their KYC information. Updating the KYC information more frequently puts the registrant in a better position to keep informed of significant changes that may impact their clients' financial circumstances. Examples of such changes could include: diagnosis of a medical condition resulting in increased healthcare expenses, death or incapacity of a spouse that was the primary source of income or entering retirement with an associated loss of employment income.

Updating the KYC information more frequently also puts the registrant in a better position to notice changes that can assist in the identification of diminished mental capacity or financial exploitation. Registrants are encouraged to take note of changes they observe or become aware of regarding a client's:

- health status, whether physical, mental or emotional,
- ability to understand financial information and make financial decisions,
- decision-making style, and
- overall awareness of investing concepts.

Suitability Obligation

Under section 13.3 of NI 31-103, registrants have an obligation to take reasonable steps to ensure that a proposed trade is suitable for a client before making a recommendation or accepting instructions from a client.¹⁵ This obligation applies to all clients regardless of their age and circumstances.

We remind registrants that a client's net worth alone is not determinative of suitability. An investor's age and life stage, among other things, are important factors in assessing whether an investment is suitable.

In assessing suitability of investments for older or vulnerable clients, registrants are encouraged to carefully consider the potential impact of factors such as:

- products that have early withdrawal penalties or otherwise lack liquidity,
- products that have long holding periods,
- new, complex and non-conventional products,
- assuming too much risk, and
- concentration of a particular product(s) in a client's portfolio.

¹⁴ s.13.2(4), NI 31-103.

¹⁵ Please refer to CSA Staff Notice 31-336 *Guidance for Portfolio Managers, Exempt Market Dealers and Other Registrants on the Know-Your-Client, Know-Your-Product and Suitability Obligations* for further guidance on how to comply with these obligations.

Complaint Handling

Under section 13.15 of NI 31-103, a registered firm must document and, in a manner that a reasonable investor would consider fair and effective, respond to each complaint made to the firm about any product or service offered by the firm or a representative of the firm.

We encourage registered firms to be mindful of any difficulties that their complaint handling procedures may pose for older or vulnerable clients. Such procedures may be daunting to these clients and justified complaints regarding the services provided by the firm may be deterred by the factors described in this Notice. These clients may be particularly susceptible to abandoning a justified complaint as a result of a prolonged and unduly complex process.

Supervision

Registered firms are encouraged to consider establishing heightened supervision of accounts and transactions for older or vulnerable clients, including:

- conducting more focused reviews of new account application forms and KYC updates for older or vulnerable clients,
- establishing age-based heightened review criteria for certain investments or product concentrations, and
- if the firm conducts spot checks, incorporating factors such as age and retirement status when selecting client trades or portfolios for review.

Establishing heightened supervision of accounts and transactions for older or vulnerable clients could be helpful in identifying unsuitable transactions or abusive practices involving these clients.

Powers of Attorney and Limited Trading Authorizations

Registered firms are encouraged to have written policies and procedures for identifying accounts of clients that:

- have a POA,
- have limited trading authorizations (**LTA**), and/or
- are under public guardianship or trustee services.

If the registered firm retains POAs on file, we suggest that the firm consider developing policies and procedures for ensuring that POAs are current and satisfy any applicable requirements under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, including those requirements relating to third-party determinations.

Registrants should consider the legislation that governs POAs in the jurisdiction where a client resides and the characteristics of the different types of POAs available in that jurisdiction, such as whether a POA endures after a finding of incapacity. The legislation, and the scope of the decisions that are authorized under a POA, can affect a registrant's ability to take instructions from that attorney.

When accepting instructions from a POA, the client's investment needs and objectives, financial circumstances, risk tolerance and other relevant information still need to be considered in determining whether investments are suitable for that client.

Registrants should also be mindful that POAs and LTAs may be abused and are encouraged to develop policies and procedures for addressing potential abuses as well as training employees of warning signs, which include:

- sudden or frequent changes to a client's POA followed by a change in account activity,
- multiple conflicting POAs, or
- large or unusual withdrawals being made by a person with a LTA or a POA.^{16, 17}

In cases of abuse of POAs and LTAs, it is useful to have the contact details of a trusted contact person for the registrant to contact. Suggested practices on the use of a trusted contact person are provided later in this Notice.

Training on Identifying Potential Diminished Mental Capacity or Financial Exploitation

Registered firms are encouraged to develop training programs for their employees on recognizing the potential warning signs that a client could be suffering from diminished mental capacity, how these changes can affect a client's financial decision-making abilities, and the implications that these changes may have for the client.

Registered firms are also encouraged to develop training programs to assist their employees in detecting and responding to potential financial exploitation of their older or vulnerable clients, including training to identify warning signs that a POA or LTA is being misused to exploit a client.

Identifying a Trusted Contact Person

Registrants may consider asking their clients to provide one or more trusted contacts who can be contacted if the registrant has concerns that the client may be suffering from diminished mental capacity or be subject to financial exploitation.

The trusted contact person (**TCP**) should be an adult (typically a family member, close friend or caregiver) who the client trusts with their personal information. Ideally, the TCP would not have an interest in the client's account or assets and would not be involved in making financial decisions with respect to the client's account (for example, a POA).

When collecting TCP information, we encourage registered firms to consider developing appropriate policies and procedures for:

- collecting and documenting TCP information and keeping this information up-to-date (for example, as part of the KYC process),
- obtaining the written consent of the client to contact the TCP, and any restrictions regarding under what circumstances the TCP can be contacted and what type of information can be shared, and
- documenting any discussions with a client's TCP.

¹⁶ Elder Abuse Ontario. 2017. *Forms of Abuse: Financial Abuse*. Toronto. <http://www.elderabuseontario.com/what-is-elder-abuse/forms-of-abuse/#Financial>

¹⁷ National Initiative for the Care of the Elderly. 2016. *Preventing and Intervening in Situations of Financial Abuse: Ontario*. Toronto. <http://www.nicenet.ca/tools-preventing-and-intervening-in-situations-of-financial-abuse-ontario>

We suggest that prior to contacting a client's TCP, the registrant be attentive to:

- communicating information to the TCP only in accordance with the client's consent, applicable privacy legislation and any confidentiality or non-disclosure agreements, and
- possible circumstances under which a TCP may be perpetrating abuse of the client.

We suggest that registrants encourage their clients to notify their TCPs that they have been identified as such and explain the circumstances under which they may be contacted.

Establishing Policies and Procedures for Reporting and Escalating Issues

Registered firms are encouraged to establish written policies and procedures for employees to follow in order to escalate concerns if they suspect a client is suffering from diminished mental capacity or if they suspect a client is being financially exploited. We suggest that these policies and procedures clearly establish lines of communication to ensure proper reporting.

It would be useful for these policies and procedures to include detailed warning signs of diminished mental capacity and financial exploitation that would trigger a registrant's escalation of a potential issue related to a client.

We also encourage registered firms to establish written policies and procedures to determine when and how suspected abuse of a POA should be escalated to the appropriate external authorities, for example, to the Office of the Public Guardian and Trustee (**PGT**),¹⁸ or to local law enforcement agencies pursuant to Section 331 of the *Criminal Code - Theft by person holding power of attorney*. Registered firms may consider developing standardized forms to record potential or suspected financial exploitation, which may be used to collect information internally or share externally if making a report to a regulatory or law enforcement authority. This type of report may include:

- the client's name,
- relevant dates,
- a description of the events or observations that led to the report,
- a description of the steps the registrant has taken or plans to take in response to the event,
- a description of why the registrant believes the situation should be reported, and
- any relevant documentation related to the issue at hand to ensure that the internal stakeholders and any outside organization receiving the report have all the necessary information.¹⁹

We suggest that registered firms maintain up-to-date contact information of provincial support services and responders and that they make that information available to their employees.

¹⁸ Note that the various provincial/territorial PGTs differ considerably in their authority and capacity to respond to concerns of financial exploitation. There are also differences in PGT mandates which could limit their ability to take action.

¹⁹ North American Securities Administrators Association. 2016. *A Guide For Developing Practices and Procedures For Protecting Senior Investors and Vulnerable Adults From Financial Exploitation*. Washington. <http://serveourseniors.org/wp-content/uploads/2016/09/NASAA-Guide-For-Developing-Practices-and-Procedures-For-Protecting-Senior-Investors-and-Vulnerable-Adults-From-Financial-Exploitation.pdf>

Communicating with Older or Vulnerable Clients

Registrants are encouraged to review their methods of communication with older or vulnerable clients and be aware of issues relating to vision, hearing and mobility that may affect a client's needs when it comes to communicating with a registrant.

We encourage firms to give deference to the client to select their preferred method of communication (for example, in-person meetings or discussions via telephone) to facilitate their ability to participate in a meeting comfortably.

A registrant advising older or vulnerable clients may need to engage in discussions about changes in income, living arrangements, health care needs and physical and cognitive changes, as well as conversations regarding diminished mental capacity and the increased susceptibility to financial exploitation. Clients may feel uncomfortable discussing these issues or may become defensive when they are raised. Registered firms are encouraged to develop training programs and policies and procedures that provide their employees with the necessary tools to initiate these difficult conversations with clients.

We encourage firms to develop, organize and present written communications with the needs of older or vulnerable clients in mind. Several guides to drafting in plain language and designing accessible, inclusive communications have been produced by a variety of organizations, and we encourage registrants to make use of these resources in designing written and online communications.²⁰

Registrants are encouraged to document their conversations with older or vulnerable clients and provide written summaries or follow-up information after all discussions. This may help to assist clients that have difficulties with recalling information and may also help to prevent any misunderstandings.

Next Steps

The CSA is actively engaged in developing a flexible and responsive regulatory approach to address issues of financial exploitation and diminished mental capacity among older and vulnerable clients. The suggested practices outlined in the Notice are one measure taken by regulators to assist registrants in serving older or vulnerable clients.

²⁰ See e.g.: (i) Multiculturalism and Citizenship Canada. 1991. *Plain Language, Clear and Simple*. Ottawa; (ii) Royal National Institute for the Blind. 2006. *See it Right: Clear Print Guidelines*. London, U.K.; (iii) Public Health Agency of Canada. 2010. *Age-Friendly Communication: Facts, Tips and Ideas*. Online Catalogue no. HP25-11/2010E-PDF. Ottawa. <https://www.canada.ca/content/dam/phac-aspc/migration/phac-aspc/seniors-aines/alt-formats/pdf/publications/public/various-varies/afcomm-commavecaines/AFCComm-Commavecaines-eng.pdf>; (iv) U.S. General Services Administration. 2011. *Federal Plain Language Guidelines*. Washington, D.C. <https://www.plainlanguage.gov/howto/guidelines/FederalPLGuidelines/FederalPLGuidelines.pdf>

Questions

Please refer your questions to any of the following:

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