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

CANADIAN CENTRE FOR ELDER LAW

CONSULTATION PAPER ON VULNERABLE INVESTOR PROTECTIVE ACTION

I. Introduction

1. Who is FAIR Canada

The Canadian Foundation for Advancement of Investor Rights (**FAIR**) is an independent national charitable organization dedicated to strengthening investor protection in securities regulation. As a voice for Canadian investors, FAIR Canada provides information and education to the public, governments and regulators about investors' rights and protections in Canada's capital markets. FAIR Canada seeks to advance the interests of investors and the integrity and fairness of Canadian capital markets by, among other things: (1) making submissions to securities regulators, stock exchanges, governments and other bodies on priorities, policy, legislative change and enforcement to advance the interests of investors; (2) proactively identifying emerging issues that affect investors and seeking reform to mitigate harm to investors; and (3) identifying actual conduct by issuers, registered persons and other market participants that is, or may be, detrimental to investors and, where appropriate, encouraging action to enhance investor rights and protections. For more information visit www.faircanada.ca.

2. Who is the Canadian Centre for Elder Law

The Canadian Centre for Elder Law (**CCEL**) is a national, non-profit, non-partisan law reform organization committed to identifying and addressing issues that particularly affect older Canadians, promoting positive, evidenced-based legal and policy reform, and supporting education and knowledge mobilization on best practices and promising approaches.

3. Project Summary

Canadian financial service firms and their financial advisors serve millions of senior investors. Many senior Canadians suffer from dementia or other age-related conditions that affect their cognitive capacity, and many depend on family members, friends, or professional caretakers to assist them with their daily tasks and decision-making. These health and social factors can pose risks for older investors and the financial advisors who serve them:

i. **Lost Capacity:** Market conditions may necessitate that an advisor take immediate action to safeguard a client's investment capital or income, but a client may have lost capacity to provide coherent instructions due to dementia or other causes; and

ii. **Undue Influence:** A client may provide instructions to his or her advisor that the advisor suspects to be unduly influenced by a person close to the client (such as a family member who has persuaded an older parent to liquidate his or her investments and withdraw the funds). Undue influence includes elder financial exploitation, the most common form of elder abuse.

The Law Foundation of Ontario
While financially supported by The Law Foundation of Ontario Access to Justice Fund, FAIR Canada and CCEL is solely responsible for all content.

Older investors, persons with fluctuating or diminished mental capacity, and adults who are subject to undue influence or financial exploitation are collectively referred to in this paper as **vulnerable investors**. This concept of vulnerability is often a contentious one. This project uses the term "vulnerable" to refer to *social vulnerability*, and does not ascribe vulnerability to elder individuals as an inherent personal characteristic. Rather, the term reflects an understanding that differing social conditions may make a person more or less vulnerable. Individual older investors may personally not be socially vulnerable. But as a group, older individuals may be subject to external conditions—such as ageism—that negatively affects them.

Financial advisors may want to take protective action in situations where they believe a client has lost capacity or is subject to undue influence. But under Canada's existing regulatory regime, they may be unsure of their authority to do so, due to the absence of a regulator-approved protocol that defines what actions they can take and when. At the moment, a firm and its advisors fear they may violate either privacy legislation or existing regulatory requirements if they take steps to protect their client from harm. They may also be reluctant to take protective action for fear of opening themselves up to civil liability.

FAIR and the CCEL believe it is in the interests of vulnerable investors to address these regulatory gaps so that appropriate steps can be taken to help vulnerable investors. With the support of the Law Foundation of Ontario, FAIR is developing recommendations for a:

i. **Conduct Protocol:** The protocol will guide Canadian financial services firms and advisors on the protective action they may take for the benefit of vulnerable investors in situations of lost capacity or undue influence (including financial exploitation); and

ii. **Legal Safe Harbour Provision:** A model legal mechanism that would shield firms and advisors from regulatory (and potentially civil) liability where they take protective action in good faith to safeguard vulnerable investors' interests.

FAIR and CCEL's recommendations for the conduct protocol and legal safe harbor provision will be informed by their research findings on best practices in other leading jurisdictions, as well as the feedback they receive from their consultations with securities regulators, market participants, community stakeholders, and interested individuals.

4. Consultation Process and Timeline

i. Comparative Research (November 2016 to March 2017)

FAIR and CCEL has surveyed the regulatory landscapes in the United States, the United Kingdom, the European Union, Australia, New Zealand and other countries to understand how other jurisdictions are acting to protect vulnerable investors. Our key research findings are summarized in Part V of this consultation document.

ii. Stakeholder Consultations (April 19, 2017 to June 19, 2017)

We are consulting with stakeholders across Canada to obtain their views on a conduct protocol and legal safe harbour provision. We welcome all input into this project, and consultations have been scheduled in-person and by electronic means through the consultation period.

Amongst others, we are consulting with:

- Individual investors and their families / support networks.
- Provincial and territorial securities commissions;
- Federal, provincial, territorial and municipal governments;
- Public Guardians and Trustees;
- Society for Trusts and Estates Professionals
- Ontario Securities Commission Investor Advisory Panel and Investor Office;
- Ontario Securities Commission Seniors' Expert Advisory Committee;
- Investment Funds Institute of Canada Vulnerable Investors Task Force;
- Investment Industry Association of Canada;
- Investment Industry Regulatory Organization of Canada;
- Mutual Fund Dealers Association of Canada;
- Financial Consumer Agency of Canada;
- Ombudsman for Banking Services and Investments;
- National Initiative for Care of the Elderly;
- Canadian Association of Retired Persons;
- Ontario Network for the Prevention of Elder Abuse;
- Canadian Network for the Prevention of Elder Abuse;
- Gilbrea Centre on Aging;
- AGEwell;
- International Federation on Ageing;
- BC Adult Abuse and Neglect Prevention Collaborative;
- Canadian Bar Association; and
- Consumer Financial Protection Bureau (US).

iii. Final Report (June 16, 2017 to August 31, 2017)

FAIR will develop a final report that summarizes its key research findings and the feedback received from its stakeholder consultations. The report will include recommendations for the content of a conduct protocol and a legal safe harbour provision. By August 31, 2017, we will deliver the final report to the Law Foundation of Ontario and federal and provincial governments and securities regulators, to ensure it is available to inform legislative debates in the fall 2017 sessions. We will also post the report on FAIR and CCEL's websites.

II. Background

More than 5.7 million Canadians—or 16 per cent of Canada's population—is 65 years or older.[1] Statistics Canada projects that the share of people aged 65 years and older will continue to increase in coming years, and will account for 20 per cent of the population by 2024.[2] Canada's burgeoning aging population has significant implications for policymakers—affecting everything from health care provision to pension disbursements to infrastructure needs. An aging population also affects participants in the investment industry.

1. Dementia

Seniors are more susceptible to diseases that affect their cognitive capacity than younger individuals. Dementia is the most significant cause of disability among Canadians older than 65—affecting 20 per cent of older adults by age 80, and more than 40 per cent by age 90. Currently, approximately 560,000 Canadians are living with dementia.[3] By 2038, this number is expected to increase to 1.1 million people—or 2.8% of the population.[4]

Dementia is characterized by the progressive deterioration of cognitive capacity. Symptoms of dementia commonly include loss of memory, judgment, and reasoning, as well as changes in mood, behaviour, and communication abilities. These symptoms may affect a person's ability to function at work, in relationships, or in daily activities.[5] One of the early "red flags" of dementia is impaired ability to understand financial issues.

Alzheimer's disease is the most common form of dementia. It is a progressive, degenerative, and fatal brain disease in which cell-to-cell connections in the brain are lost and brain cells eventually die. According to the Alzheimer Society of Canada, approximately 60 per cent of Canadians who have dementia have Alzheimer's disease.[6]

2. Elder Abuse and Neglect

The World Health Organization defines elder abuse as "a single or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust that causes harm or distress to an older person."[7] Elder abuse and neglect can be of a physical, psychological, emotional, verbal, financial, or sexual nature.

The 2015 National Survey on the Mistreatment of Older Canadians studied the prevalence of elder abuse and neglect. Led by Dr. Lynn McDonald, this large, multi-year study found that 8.2 per cent of older Canadians had been subject to elder abuse or neglect in the past year.[8]

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[1] Statistics Canada, "Canada's population estimates: age and sex, July 1, 2015."
[2] *Ibid*.
[3] Alzheimer Society of Canada, "Dementia Numbers in Canada," www.alzheimer.ca.
[4] Alzheimer Society, "Rising Tide: The Impact of Dementia on Canadian Society," (2010).
[5] Alzheimer's Association, alz.org.
[6] MedBroadcast, "Alzheimer's Disease,"
[7] World Health Organization, "Aging and life-course: Elder abuse."
[8] National Initiative for the Care of the Elderly, "National Survey on the Mistreatment of Older Canadians," (2015), www.nicenet.ca

The study did not include persons who had mental capacity issues or persons in long-term care facilities, thus, experts believe the study's 8.2 per cent estimate may underestimate the scale of the problem—particularly because elder abuse allegations are often not believed, or are underreported, poorly tracked, and little understood by third parties.

Research indicates that elder abuse is overwhelmingly perpetrated by individuals close to the older person—in two-thirds of cases, the perpetrator is a family member, caregiver, or close friend. In some cases, the abuser may be the only person with whom the older adult has contact, and may be the elder person's informal care provider.

3. Financial Exploitation

The 2015 National Mistreatment Study defines financial abuse as: "An action or lack of action with respect to material possessions, funds, assets, property, or legal documents that is unauthorized, or coerced, or a misuse of legal authority."[9] Financial exploitation is the most common form of elder abuse, and may be increasing as people live longer and suffer from more physical and cognitive disabilities. Financial exploitation occurs when a person steals or misuses another adult's financial property. Some of the ways financial elder abuse manifests include:[10]

- Monetary gifts made by an older person involuntarily or from a person who cannot understand and appreciate the value of the money;
- Misuse of credit or debit cards, or online and mobile money management by family members who were given access to the PIN to assist an older person with specific tasks;
- Inter-family loans that are not repaid;
- Misuse of a power granted under an enduring/continuing power of attorney;
- Misuse of funds in a joint account;
- Cashing in investments without permission;
- Predatory marriages; and
- Pressuring older adults to sign documents they do not understand.

Financial exploitation can be particularly devastating for seniors, who often depend on fixed incomes, and who usually do not have the means or time to offset significant losses.[11] A BC study found that older adults who lose $20,000 or more have significantly increased chance of death within 18 months. For older investors, loss of their money can be a difference between life and death.

III. The Investment Issues

1. Lost Capacity

[9] *Ibid*.
[10] "Who Can the Teller Tell: Banks, PIPEDA and Elder Financial Abuse Reporting in Canada," Laura Tamblyn Watts, p. 13.
[11] The MetLife Study of Elder Financial Abuse, MetLife and Virginia Tech, (2011)

A person must be capable of understanding relevant information and appreciating the reasonably foreseeable consequences of their decisions to manage their investments properly. Aging can diminish this capacity—particularly if a person suffers from Alzheimer's disease or other forms of dementia or cognitive impairment.

Increasingly, financial services firms and their advisors are encountering situations where their clients manifest signs of diminished capacity to understand financial decisions. A vulnerable investor is at risk of suffering financial losses in situations where market events make it necessary for his or her financial advisor to take immediate action to safeguard the client's capital or income, but the client lacks the capacity to provide coherent instructions. If there is no joint account holder; the client has not authorized someone to act on his behalf under an enduring power of attorney; and the client has not authorized the advisor to exercise discretionary authority over his accounts,[12] the advisor will be unable to take immediate action to protect the client's investments.[13] Privacy laws also prevent an advisor from raising concerns about a client's capacity with the client's family members.

2. Undue Influence

Seniors frequently rely on family, friends, and hired caregivers to assist them with part or all of their daily needs and decision-making. This reliance can increase social vulnerability of older people and make them a prime target for undue influence and/or financial exploitation. However, vulnerability is a function of many factors—not just age. Social vulnerability is impacted by factors such as independence, day-to-day capabilities, mental and physical health, cognitive acuity, social integration, family dynamics, relationships, finances, Aboriginal status, literacy, and one's exposure to ageism or other forms of discrimination.

It can often be difficult to confidently identify undue influence or financial exploitation. While there are straightforward examples of it—such as a son who pressures his mother to liquidate her investments to help him buy a house—many situations are not so clear-cut. For instance, is a son who encourages his father to assume more risk with his investments unduly influencing his dad? What about a daughter who uses her mom's money to pay for toys for her kids—knowing that her mother loves to spoil the grandchildren?

Currently, financial services firms and advisors lack guidance on what constitutes undue influence or financial exploitation, as well as the protective steps they may take to safeguard clients who they believe to be subject to it. While they can decline to execute opening trading instructions (i.e. directions from a client to buy securities) on the grounds that the purchase would be unsuitable for the client, they lack the legal authority to refuse instructions to liquidate holdings or transfer cash out of a client's account.[14]

[12] IIROC 1300.4.
[13] MFDA Rule 2.3.1 prohibits advisors from engaging in any discretionary trading. IIROC Rule 1300.4 prohibits advisors from engaging in discretionary trading, except where a client has provided prior written authorization for the advisor to do so.
[14] See our discussion of the "Suitability Obligation" and "Best Execution" under Part IV.

Privacy laws also generally prevent an advisor from notifying a client's family members about concerns of undue influence. Currently, an advisor is only permitted to notify a family member if he or she believes the client has been, is, or will be a victim of financial abuse, and then contacts the family member for the express purpose of addressing the abuse. This privacy law exception does not allow advisors to contact family members about concerns of undue influence that might fall short of financial exploitation.

If an advisor has grave concerns about abuse, she could contact the provincial public guardian (in Canada, there is no national government agency to which adult abuse can be reported, such as the United States' Adult Protection Services). Most of the provinces have an Office of the Public Guardian and Trustee or similarly named department (the **PGT**)) that protects certain private individuals, such as mentally incapable adults. But there are significant differences between how each provincial agency addresses elder issues, which can make it difficult for advisors to know whether to report, and how a report will be addressed.[15] Additionally, even in jurisdictions where it is mandatory or appropriate to report, the PGT may lack the resources to respond, or may intervene too late to prevent the loss of funds.

IV. Canada's Existing Protections for Vulnerable Investors

Currently in Canada financial services firms and their advisors have limited means to take protective action for vulnerable investors. This section provides an overview of the legal and institutional measures that an advisor might rely on to protect a vulnerable investor, and also highlights the limitations of these measures.

1. Suitability Obligation

Provincial securities commissions (under the auspices of the Canadian Securities Administrator (**CSA**)), the Investment Industry Regulatory Organization of Canada (**IIROC**),[16] and the Mutual Fund Dealers Association of Canada (**MFDA**)[17] are the principal bodies responsible for regulating investment firms and their advisors in Canada. The CSA,[18] IIROC,[19] and MFDA[20] each impose "suitability obligations" on financial advisors. The suitability obligation is a cornerstone of the investor-client relationship—essentially requiring investors to ensure investment decisions are suitable for their clients based on their clients' specific characteristics and objectives. The key components of the suitability obligation are:

i. **Know Your Client (KYC):** In a first meeting with a client, the advisor must conduct due diligence—obtaining information about the client's occupation, age, income, net worth, marital status, number of dependents, risk tolerance, investment objectives, investment

[15] See "Who Can the Teller Tell: Banks, PIPEDA and Elder Financial Abuse Reporting in Canada," Laura Tamblyn Watts.
[16]IIROC regulates dealer firms (i.e. firms that buy and sell securities and other investments on behalf of clients) and their advisors.
[17] MFDA regulates members of the mutual fund industry and their advisors.
[18] CSA Staff Notice 31-336 and NI 31-103, Section 13.3
[19] IIROC Notice 12-0109 and IIROC Rule 1300
[20] MFDA Bulletin 0713, MFDA Rules 2.2.1, and MFDA Notice 0069

experience, and investment horizon. The advisor must keep a record of the client's answers and must annually update the KYC profile or have the client confirm that it remains accurate.

ii. **Applying Judgment:** The advisor must understand the key characteristics and risks associated with any investment product it recommends or orders for a client, and should be able to clearly explain the reasons that a specific security is or is not suitable for a client based on the client's KYC profile. Where a client proposes a transaction that is unsuitable, the advisor has a responsibility to warn the client and even "protect them against themselves." According to past disciplinary decisions,[21] protective steps may include:

   - Providing a full, clear, written risk assessment to the client;
   - Referring the client's situation to the firm's compliance unit or a third party for an assessment;
   - Obtaining clear, unambiguous, written instructions from the client on how they wish to proceed; and
   - In extreme situations, withdrawing their services where the client's instructions are destructive to their own self-interest.

iii. **Disclosure:** The advisor must disclose all material negative factors about a product and ensure the client comprehends the information. When an advisor receives an unsuitable order from a client, the advisor must warn the client that the investment is unsuitable and discuss whether there have been any changes to the client's KYC profile. The advisor must document all disclosure.

An advisor could rely on the suitability obligation as reason to refuse a client's opening trading instructions, but the obligation does not clearly enable an advisor to refuse a client's instructions to liquidate holdings or transfer cash out of the client's account after the advisor has warned the client of the unsuitability of a transaction. The advisor could withdraw his or her services—but this step would not leave the vulnerable investor better off, particularly if the person is subject to undue influence.

The suitability obligation also does not cover situations of lost capacity, where an advisor might want to take immediate protective action in volatile market conditions. Subject to a few exceptions, advisors are not generally authorized to discretionarily trade securities in clients' accounts.[22]

2. Best Execution

Firms and advisers must make reasonable efforts to achieve "best execution" when acting for clients—meaning they must obtain the most advantageous execution terms reasonably

[21] MFDA Bulletin 0713, p. 7.
[22] IIROC Rule 1300.4 and MFDA Rule 2.3.1 prohibits advisors from engaging in any discretionary trading. IIROC Rule 1300.4 prohibits advisors from engaging in discretionary trading, except where a client has provided prior written authorization for the advisor to do so.

available in the circumstances.[23] "Best execution" includes following a client's instructions and considering a client's investment objectives, as well as considering what the advisor knows about the markets and trading patterns.[24] While advisors are therefore required to follow clients' instructions, they are also required to consider clients' objectives and market conditions when making trades. The best execution obligation suffers from the same issues as the suitability obligation, in that advisors cannot rely on it to prevent liquidation or disbursement of funds that may not be in their clients' interests.

Additionally, mutual funds are required to execute a purchase order or redeem mutual funds on the same day of the order, or by the next business day.[25] The rules do not permit discretionary decision-making regarding executions of orders.

3. Regulatory Guidance

IIROC has issued "Guidance on compliance and supervisory issues when dealing with senior clients"[26] that sets out some industry best practices. These best practices include: having an emergency or "trusted contact person" on file with the firm; having firm training and education for representatives on issues such as diminished capacity and financial exploitation; and having policies and procedures that are designed to detect and address potential financial exploitation and diminished capacity situations, including the use of temporary holds.[27]

4. Power of Attorney

An enduring power of attorney (**POA**) for property is a legal instrument by which a person authorizes a third person to manage his or her income and assets if the person loses the capacity to make or communicate decisions. To be valid, a POA must be created before the person loses capacity.

An advisor who believes his or her client experiences diminished capacity could query whether the client has previously created an enduring / continuing POA. If so, the advisor could thereafter take instructions from the named attorney.

i. IIROC Powers of Attorney and Executors

In addition, IIROC's recent Notice 17-0079[28] allows registered representatives and investment representatives to be executors or have a power of attorney over a client, be a trustee or executor, or have control over the financial affairs of a client,

[23] NI 23-101, Section 4.2.
[24] NI 23-101CP, Section 4.1(3)
[25] NI 81-102.
[26] IIROC Notice 16-0114, Guidance on compliance and supervisory issues when dealing with senior clients, May 31, 2016.
[27] See also: Canada's Investment Industry: Protecting Senior Investors - Compliance, Supervisory and Other Practices When Serving Senior Investors, March 18, 2014.
[28] IIROC Notice 17-0079, April 6, 2017.

in situations where the client is a related person to the registered or investment representative:

Control or authority

(i) Acting as a Power of Attorney, trustee, executor, or otherwise having full or partial control or authority over the financial affairs of a client, unless:

(a) The client is a Related Person as defined by the Income Tax Act (Canada) and the existence of such control is addressed in accordance with the Dealer Member's policies and procedures; and

(b) In the case of Registered Representatives and Investment Representatives, the arrangement in sub-clause 43.2(5)(i)(a) is disclosed to and approved in writing by the Dealer Member, prior to the transaction.

(ii) In the case of discretionary and managed accounts, clause43.2(5)(i) does not apply to the extent that the control or authority exercised is consistent with the Corporation's applicable requirements for such accounts.

5. Reporting to the Public Guardian and Trustee

Advisors can report concerns about a vulnerable investor to their provincial PGT.[29] This is not always a straightforward solution, though, as the provincial PGTs differ considerably in their authority and capacity to respond to claims. In some provinces, the PGT has the power to intervene in circumstances of financial abuse by a POA holder, guardian, trustee, or other substitute decision-maker.[30] In others, the PGT has the power to investigate abuse. PGTs also often lack the resources to respond to claims, and may act too slowly to protect a vulnerable investor from loss.

6. Reporting to the Police

An advisor who believes that a client is being abused or financially exploited could notify the police. The *Criminal Code* does not specifically criminalize "elder abuse" or "financial exploitation," but it does prohibit various forms of abusive and exploitative conduct, including theft by a person holding a power of attorney, theft, breach of trust, forgery, extortion, fraud, failure to provide the necessaries of life, and criminal negligence.[31] In 2013, the government also introduced a provision that permits courts to consider aggravating factors in sentencing, such as whether the offender was motivated by the victim's age or disability, or whether the offender abused a position of trust or authority in relation to the victim.[32]

[29] Nova Scotia is the only province in which an advisor would have a mandatory duty to report suspected abuse.

[30] In Saskatchewan, for instance, financial institutions are authorized under the *Public Guardian and Trustee Act* to freeze the funds of a vulnerable adult's account for up to 5 business days.

[31] *Criminal Code*, ss. 331, 322, 336, 366, 346, 386-388, 215, 219.

[32] *Ibid*, s. 718.

In practice, though, advisors are unlikely to report to police in all but the most extreme cases. The justice system is also not very well equipped to handle elder abuse claims (particularly where a victim is unwilling to report on the abuser or extricate himself from the relationship of undue influence), and plays little role in preventing or resolving elder abuse. Underreporting of elder abuse in turn affects the amount of resources that police devote to these crimes.

7. Privacy Exceptions

Canada's privacy legislation, the *Personal Information Protection and Electronic Documents Act* (**PIPEDA**), prohibits organizations from disclosing individuals' personal information without consent, subject to a few exceptions. In response to concerns by Canadian banks that PIPEDA's disclosure exceptions prevented them from reporting elder financial abuse, the government amended these exceptions in 2015. Now, organizations may disclose personal information to the government or an individual's next-of-kin or authorized representative, if the organization has reasonable grounds to believe the "individual has been, is, or may be the victim of financial abuse," and the disclosure is made solely for purposes of preventing or investigating the abuse.[33]

In addition, organizations can disclose personal information to another organization without the individual's consent, if the disclosure is made for the purpose of:

- Investigating a breach of an agreement or a contravention of law where it is reasonable to expect that disclosure with the knowledge or consent of the individual would compromise the investigation;[34] or
- Detecting or suppressing fraud and it is reasonable to expect that the disclosure with the knowledge or consent of the individual would compromise the ability to prevent, detect or suppress the fraud.[35]

Unfortunately, these amendments are not particularly helpful, as they have not clarified what constitutes financial abuse, or to which government organizations financial abuse should be reported. An organization would be permitted to notify a client's next-of-kin or authorized representative about undue influence if the notification was for the purpose of preventing or investigating the abuse. But under these exceptions, an advisor could not notify a client's family members solely for the purpose of raising concerns about the client's cognitive capacity or vulnerability to undue influence. For example, an advisor could alert a client's family members if she was confident she had received a forged letter with account instructions to liquidate a client's accounts, but might be prohibited from notifying family members if a client's caretaker is imprudently counseling a client to get out of the markets for the client's own well-being.

V. Best Practices in Comparator Jurisdictions

[33] Ibid, s. 7(3)(d.3)
[34] PIPEDA, s. 7(3)(d.1)
[35] Ibid, s. 7(3)(d.2).

The following section provides an overview of the initiatives being taken in other leading jurisdictions to protect vulnerable investors.

1. United States

i. Seniors Helpline

In 2015, the Financial Industry Regulatory Authority, Inc. (**FINRA**) launched the Securities Helpline for Seniors (**HELPS**), a resource for senior investors who have securities-related questions and concerns. HELPS staff provide personalized assistance to seniors, and refer elder abuse concerns to Adult Protective Services. FINRA also analyzes HELPS call data to identify trends that inform its regulatory efforts. Its experience with the helpline highlighted the need for protective measures to address elder abuse and financial exploitation.

ii. NASAA Model Act and State Legislation

The North American Securities Administrators Association (**NASAA**) is an international association devoted to investor protection. Its members include American, Canadian, and Mexican state and provincial securities administrators. In 2016, NASAA created model legislation—the "Act to Protect Vulnerable Adults from Financial Exploitation"—which requires financial advisors to report suspected financial exploitation; authorizes them to disclose suspected abuse to designated third parties; and enables them to delay disbursements for up to 15 business days if financial exploitation is suspected. The act also provides immunity from administrative or civil liability for advisors who take protective action. A small number of states—including Delaware, Montana, Washington, and Indiana—have enacted statutes based on NASAA's model legislation.[36]

Additionally, more than 20 states require advisors to file reports with a state agency or law enforcement entity if they believe a senior is financially exploited. Some states' laws also provide for mandatory training or procedures for filing these reports.

iii. FINRA Rule 4512 and 2165

In February 2017, the Securities Exchange Commission approved amendments to the recordkeeping requirements in FINRA Rule 4512, and the adoption of FINRA Rule 2165. These changes take effect February 5, 2018.

iv. Rule 4512: Trusted Contact Person

Rule 4512 requires firms to make reasonable efforts to obtain the name and contact information of an adult "trusted contact person" for all non-institutional clients. Except for

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[36] See DEL. CODE ANN. tit. 31, § 3910 (2015); MO. REV. STAT. §§ 409.600-.630 (2015); WASH. REV. CODE §§ 74.34.215, 220 (2015); and IND. CODE ANN. § 23-19-4.1 (2016).

existing clients,[37] advisors must request the trusted contact information at the time of opening a client's account, and must advise the client that it can contact the trusted contact person and disclose information about the client if, among other things, the firm has concerns about possible financial exploitation or needs to confirm the client's health status[38] or the identity of a POA holder, guardian, executor, or trustee. A firm can exercise discretion in relying on any information provided by the trusted contact person.

Rule 4512 only requires firms to make "reasonable efforts" to obtain trusted contact information from a client.[39] They are not prohibited from opening an account where a client refuses or fails to provide this information.

v. Rule 2165: Temporary Hold on Disbursements

Rule 2165 permits "qualified persons" who reasonably believe that "financial exploitation" is occurring[40] to place temporary holds on disbursements of funds or securities from the "accounts" of "specified adult" clients:

- **Qualified persons**: Firm employees who serve in a supervisory, compliance, or legal role and who are reasonably related to the account of the specified adult.
- **Financial exploitation:**
  - (A) the wrongful or unauthorized taking, withholding, appropriation, or use of a specified adult's funds or securities; or (b) any act or omission by a person, including through the use of a power or attorney, guardianship, or any other authority, regarding a specified adult, to: (i) obtain control, through deception, intimidation or undue influence, over the specified adult's money, assets or property; or (ii) convert the specified adult's money, assets or property."
- **Account:** Any firm account for which a specified adult can transact business.
- **Specified adult:** A person who is 65 and older, or a person 18 and older that the firm reasonably believes has a mental or physical impairment that renders the individual unable to protect his or her own interests.

If a firm places a hold, it must immediately initiate an internal review of the financial exploitation, and no later than two business days after doing so, must notify all parties authorized to transact business on the account (and the trusted contact person, if available) of the hold and reason for it. If the firm reasonably believes that the trusted contact person is involved in the financial exploitation, it must not contact the person.

[37] For accounts already in existence at the time Rule 4512 takes effect, firms are permitted to obtain the trusted contact information in the course of their routine and customary business, or as otherwise required by applicable laws (such as requirements to periodically update client records).
[38] FINRA has said a member could reach out to a trusted contact if it suspected that the customer is suffering from Alzheimer's disease, dementia, or other forms of diminished capacity.
[39] FINRA has said this requirement that will ordinarily be satisfied by simply asking the client for this information.
[40] The hold can be placed if the qualified person believes financial exploitation has occurred, is occurring, has been attempted, or will be attempted.

The temporary hold expires not later than 15 business days after the date the hold is placed, unless it is extended by a court order. The qualified person can also extend the temporary hold for an additional 15 business days if the firm's internal review supports the belief that the specified adult is being financially exploited.

A hold placed pursuant to this Rule would not necessarily result in a complete freeze on all of a client's account activities—i.e. preventing normal disbursements (for rent or utilities) in addition to the potentially exploitative disbursement. The Rule states: "(1) A member may place a temporary hold on a disbursement of funds or securities from the Account of a Specified Adult…" This language suggests that the hold can be targeted at a specific suspect disbursement. In a SEC Notice Proposal,[41] FINRA noted that it was keen to ensure that "customers' ordinary disbursements are not disrupted" by the application of the Rule.

Notably, Rule 2165 permits—but does not require—firms to withhold disbursements where financial exploitation may be occurring. The Supplementary Materials to Rule 2165 includes a safe harbour provision that protects firms for taking protective action, but also insulates them from liability if they fail to place a hold where there were concerns about financial exploitation. While a firm is not required to withhold disbursements, if it chooses to do so, it must then notify the other persons authorized to conduct business on the account and the trusted contact person.[42] The Rule does not require the firm to report to Adult Protective Services.

Firms must keep records of the requests for disbursement and the hold; the findings that led to the temporary hold being placed; notifications to relevant parties; and the findings of its internal review. They must also develop supervisory procedures and training policies to achieve compliance with Rule 2165, including procedures for the identification, escalation, and reporting of financial exploitation.

2. United Kingdom

In 2015, the Financial Conduct Authority (**FCA**) released a Consultation Paper on Investor Vulnerability[43] that discusses the FCA's intention to work with the financial industry to improve awareness of vulnerability issues, and support firms in developing their own vulnerability strategies.

The FCA Handbook[44] also contains a rule requiring firms to "establish and implement clear and effective policies and procedures to identify particularly vulnerable customers and to deal with such customers appropriately." The Handbook defines a "vulnerable consumer" as someone who, due to their personal circumstances, is susceptible to detriment, particularly when a firm is not acting with appropriate levels of care. The FCA advises firms to:

[41] Dated November 1, 2016.
[42] Rule 2165(b)(B)(i) and (ii).
[43] Occasional Paper No. 8: Consumer Vulnerability.
[44] https://www.fca.org.uk/about/handbook

- Develop policies on consumer vulnerability and ensure staff are aware of them;
- Audit their current and ongoing practices;
- Ensure flexible application of the terms and conditions of products and services;
- Ensure best practices in the handling, recording, and disclosure of information;
- Implement processes for referring clients to specialist teams.

3. European Union

The European Securities and Market Authority (**ESMA**)—the EU authority that protects investors in the EU financial markets—does not have authority to harmonize EU member states' securities legislation. EU member states are individually responsible for implementing protective measures for vulnerable investors under national laws.

4. Australia

i. Banking Guidelines

Currently, the Australian Bankers Association (**ABA**) has two non-binding guidelines in place for banks to address financial abuse:

- **Protecting vulnerable customers from potential financial abuse:** This framework explains what financial abuse can look like, how it can affect clients, and how bank staff can respond to it.
- **Responding to requests from a power of attorney or court-appointed administrator:** This guideline explains how POA arrangements work, how clients use them, and how banks should respond to these arrangements.

ii. ALRC National Strategy

The Australian Law Reform Commission (**ALRC**) recently completed an Inquiry on Protecting the Rights of Older Australians from Abuse. Its resulting Elder Abuse Report[45] calls for a multipronged national strategy to address elder abuse through legal reform, policy change, education and other initiatives. With respect to banks, the report recommends:

- **Proposal 7-1:** The *Code of Banking Practice* should require banks to take reasonable steps to prevent the financial abuse of older customers, including training staff, using software to identify suspicious transactions, and reporting suspected abuse to the authorities.
- **Proposal 7-2:** The *Code of Banking Practice* should increase the witnessing requirements for arrangements allowing people to authorize third parties to access their bank accounts. Clients should also have to sign a declaration stating that they understand the scope of the authority and the additional risk of financial abuse.

[45] Released December 2016.

The ABA supports financial abuse reporting guidelines; the existence of a designated government body to which reports should be made; and statutory immunity for banks that do report suspected financial abuse. But it opposes mandatory reporting, arguing it would risk disrupting banks' relationship with their clients and expose them to civil lawsuits for failing to detect or report financial abuse.

5. New Zealand

i. Banking Guidelines

The New Zealand Bankers Association has developed voluntary guidelines to assist banks in meeting the needs of vulnerable clients. The guidelines recommend banks train staff on recognizing financial abuse and develop procedures to address it.

ii. Enduring Power of Attorney

In 2008, New Zealand amended the *Protection of Personal and Property Rights Act, 1988* (**3PR Act**), to address concerns about elder financial abuse through the misuse of enduring powers of attorney (**EPA**). The amendments:

- Require the person giving the Power of Attorney (the **donor**) and the person receiving the authority (the **attorney**) to seek independent legal advice when establishing an EPA;
- Strengthen witnessing requirements;
- Introduce a statutory presumption of competence;
- Provide clear direction for the suspension and revocation of EPAs;
- Define the meaning of "mentally incapable;"
- Require certification of a donor's mental incapability before an attorney can act;
- Impose duties on attorneys to: consult with donors and anyone else named in the EPA; act in donors' interests; and encourage donors' capability;
- Require EPA holders to maintain records;
- Facilitate access to courts for people concerned about an EPA holder's actions.

The 3PR Act also allows family courts to make orders for people who have lost their mental capacity but who have not made an EPA. A court can make "property orders," which appoint a person to administer the vulnerable person's property.

VI. Case Studies

Case Study #1: The New Best Friend

Mrs. Bernstein is an 86-year old woman, living in a suburban neighbourhood. Her husband recently died and she's struggled to adapt. She has a daughter living 200 km away, but has few other close family or friends left. Lately, Mrs. Bernstein has been forgetting things, and has been having a more difficult time getting around physically, due to arthritis and a recent fall. A new, younger friend, Brenda, who she recently met at the community centre, starts helping Mrs.

Bernstein out with chores and tasks. As Mrs. Bernstein struggles to read fine print, it has become almost impossible to read her investment reports. Brenda takes Mrs. Bernstein to a lawyer and has a new Power of Attorney drawn up that enables Brenda to make decisions right away, and continuing into incapacity. Brenda instructs Mr. Sanjay Singh, Mrs. Bernstein's investment advisor, to start selling off significant investments and cashing them out. Mr. Singh wants to confirm the instructions with Mrs. Bernstein, but she doesn't answer her phone or other correspondence. Brenda notes that she has a valid Power of Attorney, which is effective immediately, and that she is acting on Mrs. Bernstein's instructions. Mr. Singh is worried that Mrs. Bernstein is being financially exploited, but does not know what to do.

Case Study #2: The Unsuccessful Son in the Basement

Mr. Song Li is 78 and his wife, Mrs. Patricia Li, is 79. The couple lives in a rural community far from the nearest branch offices of their financial institution. Mr. Li is the caregiver for his wife, who has mild-to-moderate dementia. Their son, Young Li, aged 47, has remained dependent on them for years and works odd jobs. He moved back into their basement 10 years ago, following his divorce, and has never left. While he has a history of substance abuse, his parents think he is doing better these days. Young Li decides he wants to start a new business, and requires some seed money. He takes his mother to her new investment advisor, Ms. Clarke, and does most of the talking. He informs Ms. Clarke that his mother wants to invest significantly in his company. Ms. Clarke talks to Mrs. Li, who presents well and agrees with everything her son is saying, and keeps repeating: "Young is such a good boy. Of course I believe in him." Ms. Clarke is worried. She does not know Mrs. Li well, and there is nothing of note on her file to prevent the transaction. She advises Mrs. Li that start-up businesses have a high failure rate and are therefore high risk, but Ms. Li insists she wants to make the investment.

Case Study #3: The Snake-Oil Salesman

Mr. Alexei Davidoff is an enterprising financial planner who has developed a niche practice in newcomer communities. He starts doing investments for Mr. Yuri Petrov, aged 88. Mr. Petrov immigrated to Canada from Russia 20 years ago, and has literacy challenges in English. Mr. Petrov lives frugally but has a modest nest-egg that he lives off, combined with an equally modest pension. Mr. Davidoff tells Mr. Petrov that he can get much better returns for him, and starts putting the funds in high risk, inappropriate investments, which have high commissions. Mr. Petrov's son, Ivan, reads his father's mail and sees what is happening. He knows that his father is overpaying on commissions, and that the investments are inappropriate, given his father's age and circumstances. His father does not listen to his son and fully trusts the advice provided.

Case Study #4: The Free-Prize, Send-Money Scammer

Ms. Anu Fateh is an 81-year-old woman who lives alone and is becoming increasingly confused. She answers the phone and, to her delight, is informed that she has won a lottery from her country of origin. She believes that her sister, Ahlya, must have bought her the ticket, and the person on the phone confirms this information when she asks about it. Anu starts sending money from her bank accounts by wire to the account number given. As the voices on the

phone become increasingly threatening, Anu goes to see her investment advisor and withdraws $30,000 in cash. She then wires that as well. Three days later, she comes in again and wants to withdraw another $50,000 in cash. Ms. Fateh has a daughter in Boston and a son living about 30 minutes away, who sometimes comes into the financial institution to help his mother and is somewhat known to the staff.

Case Study #5: The Off-Grid World Traveller

Mr. Jean-Guy Beaulieu is a 72-year old adventurer who retired very well after a profitable career. Jean-Guy watches his investments closely and is in regular contact with his advisor, Mr. Manon Dompierre. During an extended walking trek in Malaysia, he injures himself and falls into a coma. A sudden change in the market makes the sale of a particular investment urgent. Mr. Dompierre know that a failure to act will likely result in severe losses, but is unable to seek instructions from anyone, as there is no Power of Attorney on file.

Case Study #6: The Toothy Charmer Son

Mrs. Maria Farris is a proud 68-year old woman who uses two canes to get around. She lives in a small town that she moved to after divorcing her abusive husband eight years ago. She opened an account with online access to her investments, as she figured it would save her from having to attend meetings in person. Her investment dealer, Mr. Chung, has met Maria's son, Vincenzo, on several occasions, when he has driven his mother to the firm's offices. Mr. Chung was always impressed by his sharp professionalism, charm and care for his mother. Mr. Chung started to notice some out-of-character and worrying trades on Mrs. Farris' account. When he calls Mrs. Farris, she seems confused. Mr. Chung is worried about privacy, but also worried about Mrs. Farris' mental capacity. Mr. Chung decides to call Vincenzo, to voice his worries about his mother's capacity and trading activities. The next day, Mrs. Farris comes into the office limping and bruised. She tells Mr. Chung to stay out of things and says she wants to cash out of her accounts. Mr. Chung is bewildered.

VII. Consultation Questions

Case Study Discussion Consultation Questions:

1. Do any of these case studies sounds familiar to you? Have you experienced similar kinds of events? What happened?

2. Subject to narrow exceptions, it is a violation of privacy law to notify a third party about a client without the client's consent. Financial firms can get into trouble for breaching privacy laws. What happens at your firm or in your industry in these kinds of cases? Does your firm occasionally opt to violate the securities requirement (such as not proceeding to implement client's instructions to proceed with a trade) rather than violate a privacy law?
3. If any of these cases came to your attention, what is the internal process for resolving the issue? If the situation is escalated, what are the steps? Who makes the final

decision?

4. If a firm reports suspected abuse or mental capacity issues to a third party—such as a family member or friend—there is always a risk that the firm is alerting the abuser, and thereby making the situation worse. The abuser might inflict more harm on the vulnerable adult, or liquidate funds and go elsewhere. Given these risks, should there be a third-party notification protocol? What are your ideas for how and who to notify?

5. Do you think your firm or industry provides adequate education on recognizing elder abuse, mental capacity issues and social vulnerability? If not, what should education and training cover?

6. Do you think it is advisable to have a "Trusted Contact Person" on file? Should it be regularly reviewed with the client? Why or why not? Is there any person who should be excluded from being a Trusted Contact? For example, should joint account holders be permitted to be a Trusted Contact?

7. What role do you think a Trusted Contact should or would have in relation to a Power of Attorney? What if there is both a Trusted Contact and a Power of Attorney for an incapable adult? Who gets to decide what and why?

8. Should the Trusted Contact be notified that they have been added to the account as a Trusted Contact person at the time they are added by the client?

General Consultation Questions

We are interested in obtaining your perspective on the key issues relating to vulnerable investors. In particular, we want to understand:

9. How are firms and advisors currently responding to clients who appear to have lost capacity or be subject to undue influence?

10. Are you aware of issues pertaining to vulnerable investors that we did not address in this discussion?

11. Are there regulatory provisions not highlighted in our discussion that firms or advisors could rely on to justify taking protective action or that impede such steps being taken?

12. Conduct Protocol:

    i. Which regulatory body should implement it?
    ii. Should it be mandatory or permissive?
    iii. What should it include?
        1. Definitions (i.e. "lost capacity"; "undue influence")
        2. Preventative practices:
            a. Firm policies
            b. Staff training

    c. Advising older clients to enter enduring POAs while they have capacity
    d. Obtaining Trusted Contact Person information for all client accounts
3. Protective steps:
    a. Reporting (when; to whom; under what authority)
    b. Temporary hold on disbursements
        i. Who has authority to authorize?
        ii. Length of hold?
        iii. What happens after a hold is placed?
4. Recordkeeping and disclosure requirements?

13. Do you think a legal "safe harbour" that insulates firms from liability is a good idea? Why or why not? To which provisions or rules should the safe harbour apply and why? Who would it shield and when would it apply? Would it afford protection against regulatory and civil liability?

14. What issues does the ability of registered representative or investment representatives in the IIROC channel to hold a Power of Attorney, Trustee or Executor position vis-a-vis a related client raise, if any? How does this ability fit into protecting clients who may have loss of capacity issues or be subject to financial elder abuse?

15. How is technology used to protect vulnerable investors (i) in the traditional advice channel, (ii) the discount brokerage channel and (iii) the robo-advice channel? What role could it play in the future? For example, banks can monitor accounts for suspicious transactions. We foresee greater use of technology and less face-to-face contact by financial advisors and their clients, even in the traditional advice channel.

The issues addressed in our Consultation Document are important and we value stakeholders' input on these questions. We invite all interested parties to provide written submissions to us, and to voice their feedback at our in-person or webinar consultations.

Please submit your comments in writing on or before **June 19, 2017**. You may provide written comments in electronic form or hard copy. If sending your comments by email, please send them to info@faircanada.ca, or if by mail, to the following address:

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