

# Vulnerable Investors and Legal Safe Harbour Consultation



**Foundation for the Advancement of Investor Rights**

**Canadian Centre for Elder Law**

**Spring 2017**

# The Agenda

1. Background to the project
2. Issues: Elder financial abuse and mental capacity issues
3. Status in Canada
4. Comparator Jurisdictions
5. Discussion and Consultation

# Who We Are

## ▣ Who is FAIR Canada? (FAIR)

Independent, national, charitable organization focused on strengthening investor protection in securities regulation.

## ▣ Who is the Canadian Centre for Elder Law? (CCEL)

Independent, national, charitable, non-partisan, non-political research centre on law and aging issues.

# Project Timelines: 2016-2017

- November – March – Research
- April 19– June 19 – Consultation Period
- June 19 – August 31 – Final Report
- September – Project Released

# Project Overview

- Financial services firms and financial advisors serve millions of vulnerable investors every year.
- Loss of Mental Capacity
- Undue Influence and Elder Financial Abuse

# Core Issues: Damned if you do...

- Financial sector very aware
- Elder Abuse communities want Financial firm involvement but...
- Privacy Laws – cannot report to a third party person, except police (rare)
- Regulators – follow instructions of client
- If firms do not report, could be held liable by abused adult
- If report to the wrong person – more abuse

# Project is Considering:

- **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
- **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

# Banking – now Investments

- Bank Act / PIPEDA – 2015
- Badly drafted – confusing as to what to do
- Safe Harbor – but ....

Report to gov't or part of gov't, next of kin or authorized representative

“Organization ...has reasonable grounds to believe that the individual has been, is or may be the victim of financial abuse...disclosure made solely for the purposes related to preventing or investigating the abuse”



# Reporting Elder Abuse & Neglect in Canada – Who Do You Call?

- Unlike the US – No single organization (Adult Protective Services)
- Mix of mandatory and voluntary reporting (Ontario – mandatory in LTC, BC – mandatory if you work for a health authority)
- Police, PGT (different mandates), other

# Other Barrier to Reporting



There are also many barriers to reporting abuse that victims in Canada face:

- Victims may have restricted mobility or other physical or cognitive limitations that prevent them from seeking help
- Abusers are often caregivers or in a position of power over the older person, which removes control from the victim
- Victims may be isolated from outside resources
- Other barriers may exist: language, transportation, lack of knowledge of resources available to assist

# Consultation Strategy

- Individual meetings or small groups – invite us out!
- April 28 – Toronto Financial Industry group consultation
- May 9-10 – Expert and community consultations (NICE)
- May 11 – 2 sessions in Vancouver, industry and community
- May 27 - OSC – Seniors' Expert Advisory Committee
- June Webinar – World Elder Abuse Awareness Day
- Possible consults in Quebec and Atlantic Provinces
- Additional webinars or conference calls
- Online distribution and email
- Online Survey

# “Vulnerable”

- All people are vulnerable to some degree – depends on circumstance
- Social Vulnerability – World Health Organization
- Age (because of ageism), health, finances, social isolation, aboriginal status, mental capacity, etc

# SHIFTS IN DEMOGRAPHY

Canadian seniors now outnumber children



Adults indicate < interest in Health SDM



# The Stats

- Largest demographic shift in the history of humankind
- 43.8 million in 2036 — up from 33.7 million in 2009
- Doubling of Seniors ~ 9.9 million - 10.9 million in 2036, representing a drastic spike from 4.7 million in 2009 numbers.
- 2036 see about 3.3 million people aged 80 and over, up from 1.3 million in 2009.
- There were roughly 6,000 centenarians in Canada in 2009, but that demographic is projected to triple — or possibly quadruple



# Defining Elder Abuse

- ❑ The term “elder abuse” has various definitions, depending on the context in which it is used (e.g. legal, health care, social work).
- ❑ “Elder abuse” is often defined as an action or inaction by an individual that results in harm to an older person.
- ❑ Abusers may be family members, friends, caregivers, persons in a position of trust or power, or even strangers.





# Financial Elder abuse in Canada

- 2015 National Prevalence Study estimates that about 8.2% of older adults in Canada are victims of abuse or neglect.
- Difficult to collect data
- Unaware they are being abused, particularly in cases of financial exploitation.
- No numbers for Long-Term Care or mentally incapable adults



# Prevalence Study

## Financial Elder Abuse Definition

“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”

Undue Influence can be part of this

# FINRA – 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."

# Recognizing elder abuse and neglect

## □ Elder abuse includes:

- Physical abuse
- Sexual abuse
- Emotional/psychological abuse
- Financial abuse or exploitation
- Neglect & self-neglect

(Other expanding areas: chemical, spiritual/cultural etc)

- Abuse may take shape as an isolated incident or a pattern of behaviour.
- Where there there is financial abuse – link to other forms



# Risk factors of abuse

Why older adults (especially women) may be at a high risk of abuse:

- ❑ They are unable to call for help or protest
- ❑ They are dependent on others
- ❑ They have never learned assertiveness
- ❑ Many people have access to their homes
- ❑ There is a history of abuse
- ❑ They are not believed
- ❑ The abuse has not been officially identified



# Financial abuse most commonly...

Some forms of *financial abuse*:



- Misuse of funds or property
- Theft, exploitation or scams
- Abuse of power of attorney
- Fraud or forgery of documents

# Financial abuse

## Indicators of *financial abuse*:

- ❑ Unpaid bills / No money for basics
- ❑ Absence of aids, medications, etc.
- ❑ Sudden appearance of previously uninvolved relatives
- ❑ Forged signature or Power of Attorney granted under unusual circumstances
- ❑ Adult complains of not knowing where money/assets have gone
- ❑ Abrupt changes in will/accounts
- ❑ Family member/representative refuses to spend money on the adult's behalf



# What About Mental Capacity





# Capacity and Aging

- Understand and Appreciate = consistent choice
- Anyone can lose capacity at any time due to illness or accident
- Older adults may be at greater risk due to age-associated illnesses - dementia
- Ageism or age discrimination also results in assumptions of incapacity

# Capacity Continuum

Capable

Incapable



# Powers of Attorney - 2 Domains

## □ POA – Personal Care (BC / Yukon – Representation Agreement)

Where you live

Health care decisions

How you live in the world

The “lead” attorney

## □ POA – Property \*\*\*

Money

Real Estate

Investments

“Stuff”



# Planning for Future Decisions

Capable



You  
decide

⋮

Incapable



Someone else  
decides

(Substitute  
decision-maker)

# Four Types of Power of Attorney

1. Regular
2. \*Continuing
3. \*Springing
4. Limited



# Enduring / Continuing POA

**Capable**

**Incapable**

**Active right away**

**Continues past point of  
incapability**



# Springing POA

**Capable**

**Incapable**

**NOT active  
right away**

**STARTS at point of incapability**

**Created, but dormant**



# Who Makes Your Personal Care Decisions if Incapable?

Capable	Incapable (list may vary by province – not in Alberta etc)
You Decide	<ol style="list-style-type: none"><li>1. Guardian (court)</li><li>2. <b>POA Personal Care</b></li><li>3. (Consent Capacity Board)</li><li>4. Spouse/Partner</li><li>5. Children (adult)</li><li>6. Parents</li><li>7. Siblings</li><li>8. Other relative</li></ol>



# Who Makes Your Property Decisions if Incapable?

Capable	Incapable
You Decide	<ol style="list-style-type: none"><li data-bbox="942 772 1572 833">1. Guardian (court)</li><li data-bbox="942 848 1470 909">2. POA Property</li><li data-bbox="942 1001 1744 1139">3. PGT – they don't want your business!</li></ol>

# Current Safeguards: KYC

## **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 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.

# Current Safeguards: Judgment

- **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 to even "protect them against themselves."
- MFDA Bulletin 0713, p. 7.

# Current Safeguards: Disclosure

- **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.

# Current Safeguards: Best Execution

- “Best execution” - following a client’s instructions and considering a client’s investment objectives, and considering what the advisor knows about the markets and trading patterns.
- 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. NI 23-101CP, Section 4.1 (3)

# Comparator Jurisdictions: US

- Seniors Helpline – FINRA: 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
- North American Securities Administrators' Association (NASAA) Guidelines: 2016, NASAA created model legislation—the “Act to Protect Vulnerable Adults from Financial Exploitation”

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.

# Comparator Jurisdictions: US

- 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.
- Rule 4512: firms to make reasonable efforts – name and contact person for non-institutional clients. Not retroactive. Can contact if suspected financial exploitation, abuse, health status / mental capacity, identity of substitute decision-maker
- Rule 2165: Temporary Hold on Dispersements

# Comparator Jurisdictions: UK

- 2015 –Financial Consumer Authority Consultation Paper on Vulnerable customers.
- FCA Handbook advises:

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.



# Comparator Jurisdictions: NZ

- 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
- Reforms to the Enduring Power of Attorney Act – elder abuse

# Comparator Jurisdictions: Australia

## Non-Binding Banking Guidelines:

- **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.

# Comparator Jurisdiction: Australia

- ▣ **Australian Law Reform Commission Elder Abuse Recommendations:**
- ▣ **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.

# Consultation Questions: General

1. How are firms and advisors currently responding to clients who appear to have lost capacity or be subject to undue influence?
2. Are you aware of issues pertaining to vulnerable investors that we did not address in this discussion?
3. 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?

# Consultation Questions: Conduct Protocol

1. Which regulatory body should implement it?
2. Should it be mandatory or permissive?
3. What should it include?  
Definitions (i.e. “lost capacity”; “undue influence”)
  - ▣ Preventative practices:
    - ▣ Firm policies
    - ▣ Staff training
    - ▣ Advising older clients to enter enduring POAs while they have capacity
    - ▣ Obtaining Trusted Contact Person information for all client accounts

# Consultation Questions: Conduct Protocol

## 3. Protective steps:

- Reporting (when; to whom; under what authority)
- Temporary hold on disbursements
  - Who has authority to authorize?
  - Length of hold?
  - What happens after a hold is placed?

## 4. Recordkeeping and disclosure requirements?

# Consultation Questions: Legal Safe Harbour

Legal Safe Harbour Provision:

- Which regulatory body?
- Implemented under what legal instrument?
- Who would it shield?
- When would it apply?
- Would it afford protection against regulatory and civil liability?

# Case Study #1: The New Best Friend

Mrs. Bernstein is an 86-year old woman, living in a suburban neighbourhood. Recent widow. Increasingly confused. Arthritis and a recent fall. New younger friend Brenda. Starts helping with tasks and chores.

Investment reports have too small print. Brenda takes Mrs. Bernstein to a lawyer and has a new POA drawn up allowing 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 insists she has a valid Power of Attorney which is active right away, and that she is acting on Mrs. Bernstein's instructions. Mr. Singh is worried that Mrs. Bernstein might be financially abused, but does not know what to do.



# Case Study #2: Unsuccessful Son in the Basement

Mr. Song Li is 78 and his wife, Mrs. Patricia Li is 79 – rural community. 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. Lives in basement. History of substance abuse.

Young Li - starts a new business - seed money. He takes his mother to her new investment advisor Ms. Clarke, and does most of the talking. Tells advisor his mother wants to significantly invest 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 very 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: Snake Oil Salesman

Mr. Alexei Davidoff is an enterprising financial planner who has developed a niche practice within 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 both in English and in his native Russian. Mr. Petrov lives frugally but has a modest nest-egg which he lives off, combined with his equally modest pension. Mr. Davidoff tells Mr. Petrov that he can get him much better returns and starts putting the funds in high risk, inappropriate investments, that have high commissions. Mr. Petrov's son Ivan reads his father's mail and sees what is going on and knows that not only is his father losing money in commissions, but also that the investments were utterly inappropriate given his father-in-law's age and circumstances. The father-in-law however, 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 getting 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 male voice on the phone confirms this when she asks him. 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 into 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

M. 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 usual contact with his advisor, Ms. Manon Dompierre. He has taken off for an extended walking trek in Malaysia are without phone or email coverage and hits his head. He's in a coma.

A sudden change in the market makes the sale of a particular investment very urgent, or the loss to M. Beaulieu is both likely and severe. Ms. Dompierre has no one to seek instructions from, and there is no Power of Attorney on file

# Case Study #6: The Toothy Charmer Son

Mrs. Maria Farris is a very proud 68-year old woman who uses two canes to help get around. She opened an account with online access to her investments as she figured it would save her having to attend meetings in person. Her investment dealer, Mr. Chung, met Maria's son Vincenzo on several occasions as he would drive her downtown to the firm's offices. Mr. Chung was always impressed by his sharp professionalism, his charm and his care for his mother. Mr. Chung started to notice some out of character and worrying trades happening. When he called Mrs. Farris, she seemed very confused and foggy. Mr. Chung is worried about privacy, but even more worried about Mrs. Farris' mental capacity. Mr. Chung decides to reach out and call her son Vincenzo about his worries about his mother's capacity and about the trades. 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 her accounts. Mr. Chung is bewildered.

# Case Study Consult Questions

1. Do any of these case studies sounds familiar to you? Have you had versions of this happen in your experiences? What happened?
2. Absent an exception, notification of concerns about a client to a third party without consent is a violation of privacy law, and financial firms can get into trouble for breaching privacy. What happens at your firm or in your industry in these kinds of cases?
3. If any of these cases came to your firm or industry, what would the internal process be to resolve the issue. If there is escalation, what are the steps? Who gets to make the final decision?

# Case Study Consult Questions

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 the risk that the firm is actually just alerting the abuser, and is making the situation much worse. There may be increased abuse to the vulnerable adult, or the abuser may close up shop and take all the funds. Given these risks, should there be a third party notification protocol? What do you think are good ideas for how to notify and to whom?

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

# Case Study Consult Questions

6. Do you think having a legal “Safe Harbour” is a good idea for firms? Why or why not? What provisions or rules would the safe harbour be applicable to and why?

7. Do you think having a “Trusted Contact” on file, and regularly reviewed with the client is a good idea? Why or why not? Is there anyone who should be excluded from being a Trusted Contact? Should joint account holders be permitted to be a Trusted Contact, for example?



# Case Study Consult Questions

8. 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 and why?

9. 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

# Contact Us

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