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

CANADIAN CENTRE FOR ELDER LAW

REPORT ON VULNERABLE INVESTORS: ELDER ABUSE, FINANCIAL EXPLOITATION, UNDUE INFLUENCE AND DIMINISHED MENTAL CAPACITY

Canadian Foundation for the Advancement of Investor Rights (FAIR Canada)
Canadian Centre for Elder Law

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The Law Foundation of Ontario
Advancing access to justice

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Executive Summary

Canadian investment firms and their financial services representatives[1] (hereinafter referred to as "financial services representatives" or simply "representatives") serve millions of vulnerable investors, many of whom are older Canadians. Vulnerable investors may be persons living in isolated, abusive or neglectful situations which can make them more likely to be subject to undue influence. They also may be persons with diminished mental capacity due to health issues, developmental disability, brain injury or other cognitive impairment. Such social vulnerabilities may be episodic, or long-term.[2]

Who is a Vulnerable Investor?

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 report as *vulnerable investors.* This concept of vulnerability is often a contentious one. This report uses the term "vulnerable" to refer to *social vulnerability*, and does not ascribe vulnerability to older persons as an inherent personal characteristic.[3] 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 affect them. This report specifically notes that *ageism* can make older people broadly vulnerable as a class, even while individual older adults may not be, or identify, as particularly vulnerable themselves.

This report adopts the core aspects of the Quebec definition of vulnerable investor. A vulnerable investor is a person who is in a vulnerable situation, who is of the age of majority, and lacks an ability to request or obtain assistance, either temporarily or permanently, due to one or more factors such as a physical, cognitive or psychological limitation, illness, injury or handicap.

It is important, and a goal of this report, to highlight the increased social vulnerability risks associated with aging and to raise awareness that aging life-course benchmarks may trigger a representative to start ensuring that increased appropriate protections or standards are in place. In this way, the issue of older investors will be drawn to the fore, without supporting the myth that all old people are vulnerable and in need of protection.

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[1] This includes registrant categories in the IIROC and MFDA as well as those regulated directly by securities commissions and encompasses those who have a fiduciary duty to their client (portfolio managers and advising representatives) and those that only have a suitability obligation (for example, Approved Persons and Dealing Representatives).

[2] Use of the term 'vulnerable' is not ascribed to an individual or group because of their age, mental capacity, or other characteristic; but rather to the social conditions in which they find themselves, which includes social discrimination based on wide-spread ageism.

[3] Vulnerable Adults and Mental Capacity in BC: Provincial Strategy Document, January 2009, BC Adult Abuse and Neglect Prevention Collaborative.
See: http://www.bcli.org/sites/default/files/Vanguard_(16May09).pdf

This type of definition also allows for an expansive understanding of a "vulnerable investor", who may be a younger person and subject to financial exploitation, undue influence or diminished mental capacity.

Having said that, and while recognizing that any investor may be socially vulnerable, this report focuses on issues more specific to older adults.

With the significant demographic shift occurring in Canada, issues particularly related to older investors are increasingly coming to the fore. While most older Canadians live independently and are capable of making their own financial decisions, elder financial abuse, undue influence and mental capacity challenges are serious and growing social concerns.

This report seeks to raise awareness of these concerns, and provide recommendations for how the investment industry can take positive steps to address these issues. This report includes recommendations on training, standardized conduct protocols, reporting, privacy, liability protection, and awareness raising.

Focus of Report

The report focuses on two main areas of specific challenge for vulnerable investors:

i. **Elder financial abuse and undue influence**: A person or persons may be trying to financially exploit the investor through a variety of forms of elder abuse, which can include abuse of a power of attorney or other legal authority, fraud, theft, threats, misuse of funds, coercion, abuse of trust, physical threats or by other means. Additionally, a client may exhibit behaviour or provide instructions to a financial services representative that the representative believes to be unduly influenced by a person close to the client.

ii. **Diminished capacity**: A client may lose the capacity to provide instructions to a representative, due to dementia, a psycho-social or developmental disability or health reasons such as episodic delirium or medication use. The representative, staff member or compliance officer may be concerned that trades are radically different than previously, or that the client is exhibiting erratic behaviour or is forgetful. If the client does not have a functioning enduring power of attorney on file, this situation can become very complex and delicate.

A representative or staff member who observes signs of elder financial abuse or undue influence, or diminished mental capacity, may want to assist and/or take protective action, but be unsure about whom to contact, his or her authority to act, and the legal ramifications of notifying others or not following the client's disbursement instructions.

Depending on the circumstances, these situations may warrant protective action. A representative may want to notify a person close to the client, report a suspected abuser to the authorities, or prevent the disbursement of funds from a client's account. Currently, Canada's securities regulatory regime does not equip representatives to protect vulnerable investors in these ways. There are many reasons for this, spanning from inadequate training on mental capacity and undue influence, to unclear reporting requirements and processes, to insufficient regulatory guidance and protection for representatives who want to take protective action. As a result, many representatives are unfamiliar with the warning signs of vulnerability, unsure of how to escalate issues when they do notice them, and unclear of their authority to act.

With funding from The Law Foundation of Ontario's Access to Justice Fund, the Canadian Foundation for the Advancement of Investor Rights ("FAIR Canada") and the Canadian Centre for Elder Law ("CCEL") have conducted research to understand how other jurisdictions are tackling these issues, and have consulted with stakeholders to obtain their views on how governments and regulators ought to protect vulnerable investors in Canada. This report summarizes the findings of our research and consultations, and sets out our recommendations for how to better equip representatives to protect vulnerable investors.

Recommendations

In particular, our report recommends that the six following measures be developed and implemented:

1. **Trusted Contact Person ("TCP"):** Securities regulators should implement a rule that requires firms to make reasonable efforts to obtain the name and contact information of a trusted contact person for all non-institutional clients, regardless of the client's age, at the time of opening a new account, or, in the case of existing accounts, the next earliest occasion that the firm updates a client's "Know Your Client" profile. This should be reviewed at least annually with the client. If the client does not have a trusted contact person, or does not wish to provide one, then there is no obligation that they do so.

2. **Temporary Hold on Trades and Disbursements:** Securities regulators should implement a rule that authorizes qualified individuals within a firm to place a temporary hold on trades and disbursements of funds or securities from the account of a vulnerable client, where the qualified individual reasonably believes that financial exploitation or undue influence of the vulnerable client has occurred, is occurring, or will be attempted, or where the qualified individual reasonably believes that the vulnerable client has lost the capacity to provide instructions. Provision should be made for routine payments through the accounts, in accordance with the principles used by the provincial Public Guardians and Trustees or best practice, so long as these routine payments do not significantly deplete the assets.

3. **Legal Safe Harbour:** Regulators should implement a legal safe harbour that shields firms and their representatives from regulatory liability if they act in good faith and exercise reasonable care in making a disclosure about a client to his or her designated TCP, specified government agency, securities commission or other designated reporting body. In addition, a regulatory legal safe harbor should be extended to the firm and their representatives for placing a temporary hold on disbursements or trades from the account of a vulnerable client, provided the firm and its representatives act in accordance with the regulatory requirements (which are discussed in this report) including the applicable provisions of a regulator-approved conduct protocol.

   Canadian governments at provincial and federal levels should undertake legislative law reform to provide for a legal safe harbour from civil liability where the regulatory requirements are met including reform of the *Personal Information Protection and Electronic Documents Act* (PIPEDA) legislation to accomplish this.

In the meantime, courts should give administrative deference to the securities regulatory regime when determining whether there is any civil liability (including breach of privacy laws) arising as a result of placing a temporary hold on trades, or disbursements, or disclosures to third parties as set out above, to the firm and/or its representatives in accordance with the framework and requirements set out in the report.

4. **Conduct Protocol:** Canadian securities regulators should publish a 'Conduct Protocol' that defines key terms and sets out the steps firms and representatives should take to identify and protect vulnerable clients. Establishing this Conduct Protocol will allow investment firms to design their own appropriate policies and procedures, while having the reassurance of the regulatory required Conduct Protocol as the core of their response.

5. **Education and Training**. Firms should be required to ensure that their representatives and staff have competency-based training in the areas of elder abuse, undue influence, mental capacity issues, enduring powers of attorney and ageism and have the required proficiencies. We recommend that securities regulators take the lead in establishing the content and competencies required of representatives and legal and compliance personnel at investment firms in the areas relevant to vulnerable investors who may be subject to elder abuse, financial exploitation, undue influence, mental capacity issues, and ageism and also have education on enduring powers of attorney, and substituted and supported decision-making. The securities regulators should provide a gatekeeper role of ensuring that minimum proficiency in this area is set and met.

6. **Firms Become Familiar with Outside Resources and Responders:** Firms need to learn how and when to appropriately refer a case of suspected elder financial abuse, undue influence or diminished mental capacity to local responders. As there is no single place for reporting these issues in Canada, firms will need to learn the provincial or territorial responders in each area, and make that information widely available to staff.

In addition to these specific recommendations, the report highlights some broad societal and sector-specific observations about how governments, regulators, and private organizations could better empower and support older Canadians, including the need for clarification of privacy legislation related to reporting suspected elder financial abuse undue influence or diminished mental capacity. The report further notes the overarching finding that a central barrier to reporting suspected elder financial abuse, undue influence or mental capacity issues, is the lack of a clear reporting structure or response framework in Canada.

Conclusion

Within the financial industry, this report concludes that securities regulators and firms need to also specifically consider regulatory responses for vulnerable investors who invest with firms that do not provide traditional representative-client services. Technology has impacted how financial services are delivered and the potential for further transformation and innovation needs to be considered. We make some suggestions in that regard. Lastly, this report urges the investment community to invest in initiatives that will empower older investors to plan for situations of vulnerability, including by improving understanding and use and risks of enduring powers of attorney, and adding issues related to social vulnerability and aging into the ‘Know Your Client” process.

1. INTRODUCTION

1.1. About Us

FAIR Canada

The Canadian Foundation for the Advancement of Investor Rights (FAIR Canada) 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. For more information visit www.faircanada.ca.

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. The CCEL is a division of the BC Law Institute (www.bcli.org)

1.2. Project Summary

Older Canadians and their representatives are increasingly facing two types of risks in the investment context:

Elder financial abuse and undue influence: A person or persons may be trying to financially exploit the investor through a variety of forms of elder abuse, which can include abuse of a power of attorney or other legal authority, fraud, theft, threats, misuse of funds, coercion, abuse of trust, physical threats or by other means. Additionally, a client may exhibit behaviour or provide instructions to a representative that the representative believes to be unduly influenced by a person close to the client.

Diminished capacity: A client may lose the capacity to provide instructions to a representative, due to dementia, a psycho-social or developmental disability or health reasons such as episodic delirium or medication use. The representative or staff member may be concerned that trades are radically different than previously, or that the client is acting erratic or forgetful. If the client does not have a functioning power of attorney which lasts past the point of mental incapacity on file, this situation can become very complex and delicate.[4]

[4] These powers of attorney are generally referred to as Enduring Powers of Attorney, although in Ontario they are referred to as Continuing Powers of Attorney, and in Quebec are Mandates (in case of incapacity). In the United States, they are often referred to as Durable Powers of Attorney. Broadly, this paper will use the terminology of Enduring Powers of Attorney.

As discussed in Section 4 of this report, Canada's existing regulatory regime does not adequately equip firms or representatives to support, or when required, protect vulnerable investors in situations of financial abuse or exploitation, undue influence or diminished mental capacity.

FAIR Canada and the CCEL have conducted research to understand what other jurisdictions are doing to support or protect vulnerable investors, and have consulted with a wide variety of stakeholders—including securities regulators, market participants, elder abuse experts, financial industry members and their professional associations, community groups, and interested individuals—to obtain their views on what is currently the situation, what their concerns are, what roadblocks exist, and what they think would assist vulnerable investors without overstepping into paternalism or impeding on an older adult's self-determination.

This report proceeds in several parts:

- Section 2 provides the background concepts explored in this project, including vulnerability, elder financial abuse and exploitation, undue influence, and diminished mental capacity.
- Section 3 applies these core concepts into the specific Canadian investment context.
- Section 4 summarizes the existing legal and institutional measures that a representative might rely on to take protective action, and to highlight or measure the shortcomings of those existing measures.
- Section 5 reviews the existing or emerging best practices for protecting vulnerable investors in the US, UK, Australia and New Zealand and what notable initiatives are underway in certain provinces in Canada.
- Section 6 discusses six typical case studies and summarizes what we heard from stakeholders during our consultation process.
- Section 7 sets out six recommendations for the legal measures we think regulators should develop and implement. It also explores the purpose, scope and key features of each recommendation.
- Section 8 highlights broad societal and sector-specific observations about how governments, regulators, and private organizations could better support, empower and, where appropriate, protect older Canadians.
- Section 9 provides the conclusion to the report.

1.3. *Project Methodology*

Comparative Research (November 2016 to March 2017)

FAIR Canada and CCEL surveyed the regulatory landscapes in the United States, the United Kingdom, the European Union, Australia, and New Zealand to understand how other jurisdictions are acting to protect vulnerable investors.

Consultation Paper (March to April 2017)

We developed a consultation paper[5] that set out the following: key challenges vulnerable investors and their representatives face in the investment context; the existing regulatory regime and the challenges it presents to investors who want to take protective action; existing or emerging best practices in leading jurisdictions; case studies illustrative of vulnerable investor scenarios; and consultation questions. The paper was circulated to all stakeholders prior to our consultations with them. An accompanying Power-Point Presentation[6] was created and several scenarios were developed to support discussion.

Stakeholder Consultations (April to July 2017)

We consulted with stakeholders across Canada to obtain their views on what the key issues were, the experiences of older Canadians and their supporters, the perceived roadblocks or ”red flags”, and the need for regulatory changes to enable representatives to take appropriate supportive protective action on behalf of vulnerable investors. We conducted consultations in-person and electronically, including by webinar. We invited verbal or written input from all stakeholders. The feedback we received informed our understanding of the issues and the recommendations included in this report.

Among others, we consulted with:

- Individual investors and their support networks
- Individual financial planners and representatives
- Representatives from banks, investment firms and credit unions
- Representatives of provincial and territorial securities commissions
- Representatives of federal, provincial, territorial and municipal governments
- Representatives from Canadian Public Guardians and Trustees
- Office of the Privacy Commissioner of Canada
- Members of the Society of Trusts and Estates Professionals (STEP)
- 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 (IIROC)
- IIROC’s Order Execution Only Working Group
- Mutual Fund Dealers Association of Canada
- Ombudsman for Banking Services and Investments
- National Initiative for Care of the Elderly
- Elder Abuse Ontario
- CARP

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[5] The Consultation Paper can be found on FAIR Canada’s website: http://faircanada.ca/wp-content/uploads/2008/12/170510-CONSULTATION-PAPER.pdf.

[6] This Power-Point Presentation can also be found of FAIR Canada’s website: http://faircanada.ca/wp-content/uploads/2017/10/FAIR-Canada-Consult-PPT-Vulnerable-Investors.pdf.]..

- Institute for LifeCourse and Aging, University of Toronto
- Alberta Law Reform Institute
- Canadian Network for the Prevention of Elder Abuse
- Gilbrea Centre on Aging
- Law Commission of Ontario
- AGEwell
- International Federation on Ageing
- BC Adult Abuse and Neglect Prevention Collaborative
- Members of the Canadian Bar Association
- Members of the Ontario Bar Association (Elder Law, Trusts and Estates)
- WealthSimple
- Portfolio Management Association of Canada
- United States Consumer Financial Protection Bureau
- North American Securities Administrators Association (NASAA)
- United States Securities Exchange Commission's Investor Advocate Office

We also had the benefit of sharing information regarding this project and hearing about the various related initiatives of the Financial Consumer Agency of Canada.

Final Report (July to October 2017)

This report summarizes our key research findings and the feedback received from our stakeholder consultations. It also sets out our recommendations for the specific protective measures regulators should develop and implement, as well as our broader observations about the ways in which government and regulators could better empower and protect vulnerable investors. We have delivered this report to The Law Foundation of Ontario, federal and provincial governments and securities regulators, and all the above consultative organizations or their representatives. Additionally, the report is posted on FAIR Canada's and CCEL's websites.

1.4. Project Limitations

The recommendations included in this report may have limited, or different application to, or no application to firms that do not provide traditional representative-client services, such as discount brokerages (or order execution only firms) and robo-advisors (that are on-line portfolio managers). As discussed in Section 9, we recommend that regulators should undertake separate consultations with these firms, their clients, and other stakeholders to understand what role these firms can play in protecting vulnerable investors, and how technology might be harnessed by these types of firms to protect vulnerable investors. We make suggestions, but further consultation is recommended. We additionally did not receive any input from exempt market participants[7], and, as such, our report does not specifically consider the application of our recommendations to these types of firms.

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[7] The Ontario Securities Commission defines the Exempt Market in the following way:
"The 'exempt market' describes a section of Canada's capital markets where securities can be sold without the protections associated with a prospectus. Examples of activity in the exempt market include:

The report also has not focused on the issue of undue influence or potential financial exploitation by representatives. Although these types of abuses by representatives are, of course, forbidden by the regulatory regime, such instances do occur and cause harm. However, these issues, while important, are not the focus of this report.

1.5. Definition of "Financial Services Representative" or "Representative"

A significant majority of investors use an intermediary to complete their trades in securities. Such intermediaries have various titles, and can fulfill a number of roles. Sometimes the intermediary functions largely as an order-taker and simply executes orders. In many cases the intermediary provides advice and/or recommendations. In some cases the intermediary manages the portfolio and has discretion as to what specific investments the client will hold and is not required to obtain client consent to purchase or sell a specific investment. Often the relationship between the investor and the intermediary is long-term. The investor comes to rely on the intermediary's advice in deciding how to invest his or her money. *For ease of reference, we refer here to individuals who act as intermediaries in any of these capacities as "financial service representatives" or "representatives" for short.* These individuals include all those individuals, known as "registrants" who are overseen by the Mutual Fund Dealers Association of Canada ("MFDA"), the Investment Industry Regulatory Organization of Canada ("IIROC") and those directly regulated by the various securities commissions.

Canadian and foreign companies, both public and private, selling securities to institutional investors and qualified investors, and Canadian and foreign hedge funds and pooled funds selling securities to institutional investors and qualified investors. Generally, securities offered to the public in Ontario must be offered under a prospectus, which is a document that provides detailed information about the security and the company offering it. However, there are some exceptions to this rule that allow securities to be offered without a prospectus, called prospectus exemptions. These prospectus exemptions can help a company raise money without the time and expense of preparing a prospectus. Investors who buy securities through prospectus exemptions generally do not have the benefit of ongoing information about the security that they are buying or the company selling it. As well, they often do not have the ability to easily resell the security",
online at: http://www.osc.gov.on.ca/en/exempt-market.htm#what-is-the-exempt-market.

2. BACKGROUND: UNDERSTANDING VULNERABILITY

More than 5.7 million Canadians—or 16 per cent of Canada's population—is 65 years of age or older.[8] 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.[9] 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 the investment industry.

2.1. Dementia and other forms of Diminished Capacity

Concerns about mental capacity of older adults are often a key concern, for the older adult themselves and/or for their supporters and for firms serving them. Older adults are often subjected to ageist beliefs, which include the erroneous notion that because people are older, they must have cognitive impairment, and should have someone else making their financial decisions for them. This is simply untrue. Indeed, the great majority of older Canadians will remain mentally capable in later years.

Despite this majority of older Canadians who do not and will not have some form of dementia, the issue of diminished capacity is still a significant issue in the aging Canadian population. Currently, 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.[10] By 2038, this number is expected to increase to 1.1 million people—or 2.8 percent of the population.[11] The number of Canadians affected is high, and with the current aging demographic shift, will only be higher in the next few decades.

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.[12] One of the early "red flags" of dementia is impaired ability to understand financial issues.[13]

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

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[8] Statistics Canada, "Canada's population estimates: age and sex, July 1, 2015."

[9] *Ibid.*

[10] Alzheimer Society of Canada, "Dementia Numbers in Canada," online at: www.alzheimer.ca.

[11] Alzheimer Society, "Rising Tide: The Impact of Dementia on Canadian Society," (2010).

[12] Alzheimer's Association, online: alz.org.

[13] See Alzheimer's Association, online: [http://www.alz.org/national/documents/tenwarnsigns.pdf.](http://www.alz.org/national/documents/tenwarnsigns.pdf)

Canadians who have dementia have Alzheimer's disease.[14] Other forms of dementia exist however, including, but not limited to: vascular dementia, Lewy-body dementia and fronto-temporal dementia.[15]

Cognitive impairment can also occur for a variety of other reasons, some of which may be marked by progressive deterioration, such as Creutzfeldt-Jakob disease or Huntington's disease. Cognitive impairment or diminished capacity may also be the result of non-progressive origins such as psycho-social or developmental disabilities, brain injury or Post-Traumatic Stress Disorder. Lastly, some forms of cognitive impairment or diminished capacity can be fluctuating or limited in duration. For instance, acute trauma such as a concussion, the effects of medication or surgery, delirium, blood sugar imbalances such as diabetes or the effects of abuse and neglect can all affect a person's mental capacity.

2.2. 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."[16] Elder abuse and neglect is usually understood to include physical, financial, psychological & emotional, verbal, chemical or sexual abuse. Recent categories also include institutional abuse, spiritual abuse and denial of human rights.

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 and more than 5 per cent specifically reported elder financial abuse.[17] The study did not include persons who had mental capacity issues or persons in long-term care facilities. Thus, experts believe the study's results may still underestimate the scale of the problem—particularly because elder abuse allegations are often not believed, underreported, poorly tracked, or little understood by third parties.

This same study concludes that elder abuse is overwhelmingly perpetrated by individuals close to the older person: in two-thirds of cases, the perpetrator is a family member, close friend, or caregiver. In some cases, the abuser may be the only person with whom the older adult has contact, and may be the older person's informal care provider. These numbers are consistent with other studies in the US, UK, Israel, Germany and by the World Health Organization.

[14] MedBroadcast, "Alzheimer's Disease."

[15] Types of dementia are usually held to include: Alzheimer's disease, Vascular dementia, Dementia with Lewy bodies (DLB), Mixed dementia, Parkinson's disease, Frontotemporal dementia, Creutzfeldt-Jakob disease, Normal pressure hydrocephalus, Huntington's disease, Wernicke-Korsakoff Syndrome. See online at: http://www.alz.org/dementia/types-of-dementia.asp.

[16] World Health Organization, "Aging and life-course: Elder abuse", online at: http://www.who.int/ageing/projects/elder_abuse/en/.

[17] National Initiative for the Care of the Elderly, "National Survey on the Mistreatment of Older Canadians," (2015), online at: www.nicenet.ca.

2.3. Elder Financial Abuse and Financial Exploitation

Elder financial abuse is one of the most common forms of elder abuse, and its prevalence is increasing in sheer numbers. The numbers are increasing because of the compounding factors of the demographic aging of the Baby Boomer generation, increased life expectancy (with an average well into the 80s for both men and women) and the inter-generational transfer of wealth. This type of financial exploitation occurs when a person steals or misuses another adult's financial property.

The 2015 National Mistreatment Study defines financial abuse more specifically 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."[18] Some of the ways elder financial abuse manifests include:[19]

- Monetary gifts made by an older person involuntarily or who cannot 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[20]; and
- Pressuring older adults to sign documents they do not understand.

Financial exploitation can be particularly devastating for older adults, who often depend on fixed incomes, and who usually do not have the means or time to offset significant losses.[21] But regardless of this particularly damaging impact, elder financial abuse is widely under-reported, often due to a combination of lack of awareness of the abuse, fear of being considered mentally incapable because the abuse happened, stigma of family violence, shame, or because the abuser may also be a caregiver or an important social connection. An example of the marked under-reporting of elder financial abuse can be found in a British Columbia Study conducted by VanCity Credit Union in 2014. This survey concluded that *41 per cent* of the older adults in the Lower Mainland and Victoria region alone experienced at least

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[18] *Ibid*.

[19] "Who Can the Teller Tell: Banks, PIPEDA and Elder Financial Abuse Reporting in Canada," (not yet published) at 13.

[20] Predatory marriages broadly are defined as one person marrying a vulnerable and/or incapable adult for the purposes of financial or other forms of exploitation. For more information on Predatory marriages, see: Kimberly Whaley *et. al*, *Capacity to Marry and the Estate Plan* (Aurora: Canada Law Book, 2010) at 70, online at:http://www.canadalawbook.ca.

[21] The MetLife Study of Elder Financial Abuse, MetLife and Virginia Tech (2011).

one situation of financial abuse. However only *6.4 per cent* of those surveyed self-reported being victimized by such exploitation to another person.[22]

Elder financial abuse is often one factor in a complex constellation of abuse or neglect. Where elder financial abuse occurs, often other forms of abuse will also be present. As such, if a representative reaches out to a family member, without understanding the broader social risks, it could put the vulnerable investor at risk of physical assault, threats, increased isolation or abuse from a beloved grandchild. It is not enough to just have a representative learn about financial abuse; rather, representatives must have a broader and deeper understanding of elder abuse in general, in order to identify ”red flags” and to avoid accidentally exacerbating a situation.

[22] The Invisible Crime: A Report on Seniors Financial Abuse, (2014). Available at: http://wpmedia.vancouversun.com/2015/11/vancity_seniors_financial_abuse_report.pdf.

3. VULNERABILITY IN THE INVESTMENT CONTEXT

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 report as *vulnerable investors.* This concept of vulnerability is often a contentious one. This report uses the term “vulnerable” to refer to *social vulnerability*, and does not ascribe vulnerability to older persons as an inherent personal characteristic.[23] 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 affect them. In this section, we discuss two common risks for older individuals in the investment context. This report specifically notes that *ageism* can make older people broadly vulnerable as a class, even while individual older adults may not be, or identify, as particularly vulnerable themselves.

3.1. Diminished or Loss of Mental Capacity

A person must be capable of understanding relevant information and appreciating the reasonably foreseeable consequences of their decisions to manage their investments properly. However, most Canadians have low financial literacy, and find the markets bewildering. Therefore, many turn to financial services representatives for help.[24] Many investors, regardless of age, rely heavily on their financial services representative who often exerts tremendous influence over the decisions that clients make.[25] Although securities regulation does not require it, the majority of Canadians believe that the firm and their financial services representative are required to provide advice based on their client’s best interests.

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[23] Vulnerable Adults and Mental Capacity in BC: Provincial Strategy Document, January 2009, BC Adult Abuse and Neglect Prevention Collaborative,
online at: http://www.bcli.org/sites/default/files/Vanguard_(16May09).pdf.

[24] CSA Consultation Paper 33-404, Proposals to Enhance the Obligations of Advisers, Dealers and Representatives towards their Clients, April 28, 2016 (2016), 39 OSCB 3947 at 3956, online at: http://www.osc.gov.on.ca/documents/en/Securities-Category3/csa_20160428_33-404_proposals-enhance-obligations-advisers-dealers-representatives.pdf; CSA Consultation Paper 33-403: The Standard of Conduct for Advisers and Dealers: Exploring the Appropriateness of Introducing a Statutory Best Interest Duty When Advice is Provided to Retail Clients, October 25, 2012, (2012) 35 OSCB 9558 at 9580, online at: http://www.osc.gov.on.ca/documents/en/Securities-Category3/csa_20121025_33-403_fiduciary-duty.pdf.

[25] Foerster et al, Retail Financial Advice: Does One Size Fit All? (2014), online at: http://www.usc.edu/schools/business/FBE/seminars/papers/F_10-3-14_LINNAINMAA.pdf. This study draws on a large data set comprised of account-level data for a large group of Canadian investors and their representatives. See also The Brondesbury Group, *Investor behaviour and beliefs: Advisor relationships and investor decision-making study* (2012) (prepared for the Investor Education Fund), at 2, online at: http://getsmarteraboutmoney.ca/en/research/Our-research/Documents/2012%20IEF%20Adviser%20relationships%20and%20investor%20decision-making%20study%20FINAL.pdf.

Recent research has been published which found that "[s]ome 7 out of 10 investors believe their representative has a legal duty to put the client's best interest ahead of his or her own. They rely on their representative to select the best investment for them and most believe the representative will recommend what is best for the client even at the expense of their own commission."[26]

The relationship between representatives and investors, regardless of age, is a spectrum ranging from unconditional confidence and trust, to dealing with the registrant as a mere order taker. Having said that, typically, advice is a recommendation upon which investors place a great deal of reliance. [27] For example, a report prepared for the Investor Advisory Panel of the Ontario Securities Commission ("OSC") in 2011 found "the majority [of investors] say they work with a financial advisor for investment [purposes]". Only a handful are not using an advisor at the present time. **Overwhelmingly, participants put unconditional confidence and trust in their advisor.** Advisors are the main source of investment information and most blindingly trust the advice they are given."[28]

Added to this is the significant asymmetry in knowledge and expertise between the representative and the client. Financial literacy is low in Canada.[29] Both the 2012 and the 2016 CSA Investor Index found that 4 out of 10 failed the general investment knowledge test included in the survey, answering fewer than four out of seven questions correctly.[30] Further, evidence suggests that "...[e]ven when people understand a financial or economic principle in theory, applying the principle to a real situation is difficult for them."[31] Low financial literacy is a stubborn problem despite the many organizations and individuals who work diligently to improve it.

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[26] *Ibid*.

[27] *Ibid*.

[28] The Brondesbury Group, Focus Groups with Retail Investors on Investor Rights and Protection (2011) (prepared for The Investor Advisory Panel of the Ontario Securities Commission), at 8, online at: http://www.osc.gov.on.ca/documents/en/Securities-Category1-Comments/com_20110427_11-765_ananda.pdf (at appendix A).

CSA Consultation Paper 33-404 (2016), 39 OSCB 3947 at 3956; CSA Consultation Paper 33-403 (2012) 35 OSCB 9558 at 9580.

[30] Innovative Research Group, Inc., *2012 CSA Investor Index: Full Report* (October 16, 2012), at 38, online at: https://www.securities-administrators.ca/uploadedFiles/General/pdfs/2012%20CSA%20Investor%20Index%20-%20Public%20Report%20FINAL_EN.pdf; Innovative Research Group, Inc. Key Highlights CSA Investor Education Study 2016 (April 2016), at 7, online at: https://www.securities-administrators.ca/uploadedFiles/General/pdfs/CSA_2016_Survey_Key_Highlights_English.PDF (note: full report not made public).

[31] The Brondesbury Group, Benchmarking Investor Knowledge (2011) prepared for the Investor Education Fund), at 16 online at: http://www.getsmarteraboutmoney.ca/en/research/Our-research/Documents/Rpt_InvKnowl_Abridged_final%202011.pdf.

In addition to low financial literacy, the increasing degree of product complexity[32] and product proliferation makes it difficult for the average Canadian to be adequately informed about the different investment product options that are available. Canada has not been immune to the proliferation of complex products including complex exchange traded funds and structured products[33]. In addition, recent changes to securities regulations have allowed a greater number of exemptions from prospectus requirements allowing ordinary retail investors to be sold exempt market products.[34] This increases the number and types of investment products that consumers may be sold and, therefore, need to understand, in order to make informed investment decisions.

Governments and employers are shifting the onus of making investment decisions for retirement savings onto individuals. The number of employees in Canada covered by a registered pension plan was 38.1% in 2014.[35] Between 1977 and 2011, the proportion of the overall employed population covered by registered pension plans declined from 52% to 37% for men, mainly due to a drop in defined benefit coverage. In the same time period, coverage for women increased from 36% to 40%.[36] The statistics show that registered pension plan coverage is declining overall, and that the shift is increasingly from defined benefit plans to defined contribution plans.[37] Therefore, not only is there a demographic shift, there will be more older Canadians who will be managing their own investments rather than receiving a pension.

Within this challenging framework, we have the additional challenge of reduced financial literacy as Canadians age. A recent academic study[38] found that individuals' financial literacy

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[32] CSA Consultation Paper 33-404 (2016), 39 OSCB 3947 at 3956.

[33] OSC Statement of Priorities for Fiscal 2011-2012 at page 4, online at: http://osc.gov.on.ca/documents/en/Publications/sop_fiscal-2011-2012.pdf.

[34] For example, see the Summary of Key Capital Raising Prospectus Exemptions in Ontario (January 28, 2016), online at: http://www.osc.gov.on.ca/documents/en/Securities-Category4/ni_20160128_45-106_key-capital-prospectus-exemptions.pdf. As noted by the GetSmarterAboutMoney website, exempt market products offer investors more "choice of investments" but with this comes "there are many risks associated with investing in the exempt market." See "The Exempt Market Explained", online at: http://www.getsmarteraboutmoney.ca/en/managing-your-money/investing/investor-protection/Pages/The-exempt-market.aspx#.V7d4VK2NCw4.

[35] Statistics Canada, *Pension plans in Canada, as of January 1, 2015* (July 21, 2016), online at: http://www.statcan.gc.ca/daily-quotidien/160721/dq160721d-eng.pdf.

[36] Marie Drolet and René Morissette, *New facts on pension coverage in Canada;* Statistics Canada (December 18, 2014) at page 1, online at: http://www.statcan.gc.ca/pub/75-006-x/2014001/article/14120-eng.pdf.

[37] Marie Drolet and René Morissette, *New facts on pension coverage in Canada;* Statistics Canada (December 18, 2014) at page 2, online at: http://www.statcan.gc.ca/pub/75-006-x/2014001/article/14120-eng.pdf.

[38] Finke, Michael S. and Howe, John S. and Huston, Sandra J., Old Age and the Decline in Financial Literacy (August 24, 2011), at 14. Forthcoming in Management Science, online at: https://ssrn.com/abstract=1948627 or http://dx.doi.org/10.2139/ssrn.1948627.

scores decline steadily each year after age 60, and that investment performance declines significantly after age 70. Interestingly, however, individuals do not necessarily lose confidence in their financial decision-making capabilities as they age, and in some cases, their confidence can even increase.[39] There is substantial evidence that age-related cognitive changes impact financial decision making. The literature finds that cognitive abilities reach optimal performance when people are in their 50s and then declines over time.[40] This cognitive decline occurs at the same time that people are likely to face more complex financial decisions involving more complex products and have succeeded in accumulating more wealth. In addition, the older consumer is less well placed to be able to address the consequences of any poor financial decision at this later stage of life.

With the normal aging process, cognitive abilities that are associated with skills, knowledge and experience gained over time remain stable while fluid abilities regarding reasoning and problem solving in novel situations tend to decline with age, starting in the thirties, in general.[41] This suggests that the issue of declining fluid abilities cannot simply be resolved by providing education and information.[42]

Individuals who suffer from Alzheimer's disease or other forms of dementia or cognitive impairment are particularly susceptible to a decline in financial reasoning skills. With the significant demographic shift, it is predictable that investment firms are experiencing an increase in cases of clients with suspected, or confirmed, diminished capacity. This age wave of the Baby Boomers will continue for several decades to come. Investment firms and regulators need to have the skills, education and protocols ready to deal with these implications.

Currently, if the client has not designated someone to act pursuant to an enduring power of attorney, and there is no joint account holder on the account, the representative is placed in a very difficult situation. The representative cannot take instructions from his or her own client, nor ask anyone besides the client for authority or input.[43] Privacy laws prevent a representative from communicating with external third parties about a client's health or capacity issues, as discussed later in this report.

3.2. Undue Influence

For older adults who need support, it often comes from family, friends, and caregivers who assist them with their daily tasks and decision-making. This reliance on others can increase the social vulnerability of older people and make them a prime target for undue influence. Undue

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[39] Ibid.

[40] The Big Window, "The Ageing Population: Ageing Mind Literature Review", 2017, at 14, online at: https://www.fca.org.uk/publication/research/ageing-mind-literature.pdf.

[41] *Ibid.* at 11.

[42] *Ibid.*, at 43.

[43] MFDA Rule 2.3.1 prohibits representatives from engaging in any discretionary trading. IIROC Rule 1300.4 prohibits representatives from engaging in discretionary trading, except where a client has provided prior written authorization for the representative to do so.

influence, by its nature, manipulates the decision-making of the target, and thus their actions and decisions are not truly their own. Decision-making and consent are subverted.

The British Columbia Law Institute (BCLI), in its October 2011 Report "Recommended Practices for Wills Practitioners Relating to Potential Undue Influence: A Guide" defines undue influence as:

> "…consist(ing) of imposing pressure that causes a person to perform some legal act… that does not reflect the true wishes or intentions of that person, but rather those of the influencer. Undue influence goes beyond mere persuasion to make a will or other disposition of property. It is the imposition of the influencer's wishes on another person, such that the other person is not acting freely in performing the act that the influencer desires. Direct or immediate benefit to the influencer is not essential. It is sufficient if the pressure imposed results in the act desired by the influencer being carried out".[44]

It can often be difficult to confidently identify undue influence. While there are straightforward examples of it, many situations are not easy to determine. The BCLI's publication "Undue Influence: Recognition / Prevention, a Reference Aid"[45], while focused on wills drafting, has been widely accepted across the country for its usefulness to professionals in identifying and responding to many forms of undue influence.

It is important to note that while undue influence in the investment context is often exerted to the financial benefit of the influencer, this is not always the case. As undue influence often exists within the more complex constellation of elder abuse and neglect dynamics, other "wins" may be at play, which may be more emotional or relational in nature. The familiar call between warring adult siblings that "mother liked you best" can play out in a number of ways, including the exertion of power and control for its own sake. Further, undue influence over a vulnerable investor may not be clear as an immediate "one-off" tactic; but may instead be part of a longer-playing scheme to wrest control of assets or to set up a client to take on guarantees to secure the influencer's own debt, or to allow other financial or social benefits.

[44] Recommended Practices for Wills Practitioners Relating to Potential Undue Influence: A Guide,(October 2011), BCLI Report No.61, at 5e online at: http://www.bcli.org/sites/default/files/undue%20influence_guide_final_cip.pdf.

[45] Undue Influence: Recognition / Prevention, a Reference Aid (October 2011), online at: http://www.bcli.org/wordpress/wp-content/uploads/2015/10/undue-influence_guide_tool.pdf.

4. CANADA'S EXISTING REGULATORY REGIME

Currently in Canada, investment firms and their representatives lack guidance on how to recognize, respond and/or report elder abuse and neglect, undue influence, or diminished mental capacity issues. This section summarizes the existing legal and institutional measures that a representative might rely on to take protective action in these cases, and highlights some of the challenges or shortcomings of each.

4.1. Suitability Obligation

Provincial securities commissions (under the auspices of the Canadian Securities Administrators (**CSA**)), the Investment Industry Regulatory Organization of Canada (**IIROC**),[46] and the Mutual Fund Dealers Association of Canada (**MFDA**)[47] are the principal bodies responsible for regulating investment firms and their representatives in Canada. The CSA,[48] IIROC,[49] and MFDA[50] each impose "suitability obligations" on representatives. The suitability obligation is a cornerstone of the firm/representative-client relationship. It requires representatives to ensure investment decisions are suitable for their clients based on their clients' personal characteristics, investment objectives, time horizon, and risk tolerance. The key components of the suitability obligation are:

- **Know Your Client (KYC):** In a first meeting with a client, the representative must conduct due diligence to obtain information about the client's occupation, age, income, net worth, marital status, number of dependents, risk tolerance, investment needs and objectives, investment experience, and investment horizon. The representative must keep a record of the client's answers and in general must annually update the KYC profile or update the information if there is a material change in a client's circumstances (loss of a job, marriage, divorce, death of a spouse, birth of a child, etc).
- **Applying Judgment:** The representative must understand the structure, features and risks of each investment product she or he recommends for a client, also known as "Know Your Product" ("KYP"). The representative should be able to explain to client the investment's risks, key features, and initial and ongoing costs and fees. The representative should be able to clearly explain the reasons that a specific investment product is or is not suitable for the client based on the client's KYC profile.

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[46] IIROC regulates dealer firms (i.e. firms that buy and sell securities and other investments on behalf of clients) and their registered employees and sets and enforces market integrity rules regarding trading activity on Canada's equity marketplaces.

[47] MFDA regulates the operations, standards of practice and business conduct of its mutual fund dealer Members and their representatives.

[48] CSA Staff Notice 31-336 and NI 31-103, section 13.3.

[49] IIROC Notice 12-0109 and IIROC Rule 1300.

[50] MFDA Bulletin 0713, MFDA Rules 2.2.1, and MFDA Notice 0069.

Where a client proposes a transaction that is unsuitable based on the KYC information, the representative has a responsibility to warn the client and even "protect them against themselves." According to past disciplinary decisions,[51] 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;
- Obtaining clear, written instructions from the client on how to proceed; and
- In extreme situations, withdrawing the representative's services where the client's instructions are destructive to their own self-interest.

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

A representative could rely on the suitability obligation as reason to refuse a client's trading instructions, but the obligation does not clearly enable a representative to refuse to put through the trade, refuse a client's instructions to liquidate holdings or refuse to transfer cash out of the client's account after the representative has warned the client of the unsuitability of a transaction. [52] The representative could withdraw his or her services, but this step would be unlikely to leave a vulnerable investor better off—particularly if the person is under someone's undue influence.

The suitability obligation also does not cover situations of loss of mental capacity, where a representative might lack proper instructions to take actions that are in the client's interests, or might think it unsuitable to fulfill a client's trade or disbursement instructions. Subject to a few exceptions, representatives are not authorized to discretionarily trade securities in clients' accounts.[53]

4.2. Best Execution

Firms and representatives must make reasonable efforts to achieve "best execution" when acting for clients, meaning they must obtain the most advantageous execution terms reasonably available in the circumstances.[54] The Companion Policy provides an explanation:

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[51] MFDA Bulletin 0713, at 7.

[52] See discussion of the "Suitability Obligation" and "Best Execution" under Part 5.

[53] IIROC Rule 1300.4 and MFDA Rule 2.3.1 prohibits representatives from engaging in any discretionary trading. IIROC Rule 1300.4 prohibits representatives from engaging in discretionary trading, except where a client has provided prior written authorization for the representative to do so in certain limited circumstances. Portfolio Managers, who owe fiduciary duties to their clients, are permitted to trade on a discretionary basis.

[54] NI 23-101, Section 4.2.

"1.1.1 Definition of Best Execution – (1)…In seeking best execution, a dealer or adviser[55] may consider a number of elements, including:

a. price;
b. speed of execution;
c. certainty of execution; and
d. the overall cost of the transaction.

These four broad elements encompass more specific considerations, such as order size, reliability of quotes, liquidity, market impact (i.e. the price movement that occurs when executing an order) and opportunity cost (i.e. the missed opportunity to obtain a better price when an order is not completed at the most advantageous time). The overall cost of the transaction is meant to include, where appropriate, all costs associated with accessing an order and/or executing a trade that are passed on to a client, including fees arising from trading on a particular marketplace, jitney fees (i.e. any fees charged by one dealer to another for providing trading access) and settlement costs. The commission fees charged by a dealer would also be a cost of the transaction.

(2) The elements to be considered in determining "the most advantageous execution terms reasonably available" (i.e. best execution) and the weight given to each will vary depending on the instructions and needs of the client, the particular security, the prevailing market conditions and whether the dealer or adviser is responsible for best execution under the circumstances….

4.1 (3) What constitutes "best execution" will vary depending on the particular circumstances, and is subject to a "reasonable efforts" test that does not require achieving best execution for each and every order. To meet the "reasonable efforts" test, a dealer or adviser should be able to demonstrate that it has, and has abided by, policies and procedures that (i) require it to follow the client's instructions and the objectives set, and (ii) outline the process it has designed toward the objective of achieving best execution. The policies and procedures should describe how the dealer or adviser evaluates whether best execution was obtained and should be regularly and rigorously reviewed. The policies outlining the obligations of the dealer or adviser will be dependent on the role it is playing in an execution. For example, in making reasonable efforts to achieve best execution, the dealer should consider the client's instructions and a number of factors, including the client's investment objectives and the dealer's knowledge of markets and trading patterns. An adviser should consider a number of factors, including assessing a particular client's requirements or portfolio objectives, selecting appropriate dealers and marketplaces and monitoring the results on a

[55] "Adviser" means a portfolio manager and its advising representatives.

> regular basis. In addition, if an adviser is directly accessing a marketplace, the factors to be considered by dealers may also be applicable."[56]

"Best execution", therefore, includes following a client's instructions and considering a client's investment objectives, as well as considering what the dealer knows about the markets and trading patterns.[57]

However, the best execution obligation suffers from the same issues as the suitability obligation, in that a dealer and his or her representatives cannot rely on this rule to prevent liquidation or disbursement of funds that may not be in a client's interests. The instrument's focus is on execution of trades, not other factors which may require the trade *not* to be executed. Therefore, possible loss of mental capacity or elder abuse which may require a firm to *not* execute a trade is outside the scope of the national instrument. Additionally, mutual funds are required to execute a purchase order or redeem mutual funds on the same day as the order, or by the next business day.[58] The instrument governing mutual funds does not permit discretionary decision-making regarding executions of orders. The issue of elder abuse and loss of mental capacity simply was not contemplated by these provisions or instruments.

4.3. Power of Attorney

Legislation governing powers of attorney are provincial / territorial, and thus differ in each jurisdiction in Canada. Terminology and requirements for execution may be unique to each jurisdiction as well. Indeed in some jurisdictions, more formalized processes are required to execute a power of attorney, such as the requirement of having a lawyer draft the documents and multiple witnesses present for the execution. By sharp contrast, in other jurisdictions of Canada, an individual can create and execute a power of attorney, without the aid of a lawyer and without overly onerous witnessing provisions. It is important that investment firms have staff who are trained in understanding the unique power of attorney laws, and their recognition. Powers of attorney have two domains: that of property/finance, and that of health and personal care. This report only considers the domain of property/finance.

Fundamentally, and across all Canadian jurisdictions[59] enduring powers of attorney ("POA") for property/financial decision are legal instruments by which a capable adult authorizes a third person to manage his or her financial decisions, if the adult loses the mental capacity to do so. To be valid, a POA must be created before the person loses the mental capacity to understand and appreciate their creation, impacts and purview. They also must not be created under undue influence.

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[56] NI 23-101CP, Section 1.1.1(1), (2), and 4.1(3), a online at:http://www.osc.gov.on.ca/documents/en/Securities-Category2/csa_20160623_23-101_changes-trading-rules.pdf.

[57] NI 23-101CP, Section 4.1(3), available online at http://www.osc.gov.on.ca/documents/en/Securities-Category2/csa_20160623_23-101_changes-trading-rules.pdf.

[58] NI 81-102.

[59] Except Quebec, where the civil law of "mandates" governs, and is somewhat different in scope and process.

A representative who believes his or her client experiences diminished capacity could query whether the client has previously created an enduring POA. If so, the representative might ask to have a copy kept on file. It may seem that having an enduring POA on file makes the matter straightforward: if the representative cannot get clear instructions or consent from the client, then turn to the POA. However, it may not be, in fact, straightforward at all.

In cases where the enduring POA is active, the document is verified, the power of attorney holder ("attorney") is easily found, willing and able to assume the financial tasks, and where there is agreement that the client does not have mental capacity issues - then indeed the representative can turn to the attorney as a substitute decision-maker on the file.

However, it is rarely so simple. This ability to take instructions from an attorney will depend on such variables as: the terms drafted in the document; what, if anything, is required to "spring" it into effect; any limitations that may be in place in the document; the ability of the representative to rely on the document as the most current version and its legal validity or scope; the practical challenge of locating a named attorney who may have moved or died; the willingness or capacity of the attorney to assume the role; and in cases where two or more attorneys must work jointly and make co-decisions, their ability to agree on decisions required or on how to manage the financial affairs. All this is further exacerbated by the reality that approximately 2/3 of all elder financial abuse is perpetrated by family member and friends, including persons named as attorneys.

Lastly, where the diminished capacity of a client is only *suspected*, and not proven by a capacity assessment process unique to the province or territory, the foundational principle is that mental capacity is always presumed. If capacity is presumed, with no specific capacity assessment to the contrary, then broadly, the firm or its representatives cannot breach client privacy and reach out to an attorney, unless there are specific instructions in the POA otherwise or if the legislation in the particular province permits this disclosure.

Yet, despite these challenges where an enduring POA has been created, it is even more time-consuming and costly to have a substitute decision-maker be appointed through a formal guardianship process. This process can be privately done through a court appointment, where a capable adult is willing to act as a substitute decision-maker, and often also willing to take on the process and cost of getting the court appointment. In some Canadian jurisdictions, the costs for appointment are still presumed to come out of the allegedly incapable adult's estate; however, recently Ontario courts have warned against this. In a notable decision of *Salter v Salter Estate*[60], Mr. Justice Brown held that "Parties cannot treat the assets of an estate as a kind of ATM bank machine from which withdrawals automatically flow to fund their litigation… The 'loser pays' principle brings needed discipline to civil litigation by requiring parties to assess their personal exposure to costs before launching down the road of a lawsuit or a motion." This finding was later upheld in the case of *Fiacco v. Lombardi*[61], and the principle

[60] *Salter v. Salter Estate*, 2009 CanLII 28403 (ONSC).

[61] *Fiacco v. Lombardi*, 2009 CanLII 46170 (ONSC).

has now been entrenched that it can no longer be presumed that costs of an appointment will be born by the allegedly incapable adult's estate.

In other cases the provincial / territorial offices of Public Guardian and Trustee[62] may become involved and help to establish a statutory guardianship, or where there is no one else willing or able to act on behalf of the incapable adult, the offices of the PGT may retain authority as guardian.

It is far beyond the scope of this report to make recommendations for changes to provincial or territorial laws and systems for substitute decision-making. However, the review of the challenges faced by investment firms and their representatives above, including the challenges in using powers of attorney, highlights the need for reform of the regulation and privacy provisions which prevent appropriate good faith efforts to reach out to a third party to support vulnerable clients or take appropriate protective action.

IIROC and the MFDA both have rules prohibiting engaging in personal dealings with clients. These rules include a prohibition on a representative "…acting as a a power of attorney, trustee, or executor, or to otherwise having full or partial control over the financial affairs of a client, unless: (i) the client is related[63] to the registered representative or investment representative, and (ii) the arrangement is disclosed to and approved by the firm.[64] The IIROC rule does not apply to discretionary and managed accounts.[65] This does eliminate a potentially important "check and balance" from a client perspective, and warrants observation and monitoring.

4.4. Reporting to the Public Guardian and Trustee

Representatives often assume that they can report their concerns about vulnerable investors to their provincial Public Guardian and Trustee (PGT).[66] However, the various provincial PGTs differ considerably in their authority and capacity to respond to claims. For some PGTs such investigations are out of their mandate. In others, even if the matter falls within their mandate, it may be difficult for PGTs to conduct prompt investigations or get positive and timely interventions due to resourcing issues.

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[62] Public Curator in Quebec.

[63] As defined by the Income Tax Act definition of "related person."

[64] IIROC Notice 17-0079, April 6, 2017, online at: https://www.osc.gov.on.ca/documents/en/Marketplaces/iiroc_20170406_iiroc-notice-17-0079.pdf; and MFDA Rule 2.3, Bulletin #0712-P, January 19, 2017, online at: http://mfda.ca/bulletin/0712-p/.

[65] IIROC Rule 43.2(5)(ii; online at: http://docs.iiroc.ca/DisplayDocument.aspx?DocumentID=9A27597DCC6147ABA40DA451AB582F8A&Language=en.

[66] Nova Scotia is the only province in which a representative would have a mandatory duty to report suspected abuse, due to its broad mandatory reporting of elder abuse regime.

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.[67] In others, such as British Columbia, the PGT has the further power and indeed the obligation to investigate reports of abuse[68]. However, some PGTs also lack the authority and/or the resources to respond to claims. In many cases, PGTs may not be able to act quickly enough to protect a vulnerable investor from financial loss.

4.5. Reporting to the Police

Across Canada, a representative who believes that a client is being abused or financially exploited can 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.[69] In 2013, the federal 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.[70]

In practice though, representatives are unlikely to report to police in all but the most extreme cases. The police and court systems are also not 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 play little role in preventing or resolving elder abuse. Investigating financial elder abuse cases are often very labour intensive, and require specialized training which is rare across the country.[71] Underreporting of elder abuse in turn affects the amount of resources that police devote to these crimes.

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[67] For instance, BC and Ontario have fairly well resourced PGTs compared nationally. However, BC has a much broader mandate in relation to abuse and neglect, and has stronger linkages with responding agencies. 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. This is unique in Canada. Other Public Guardian and Trustee legislation allows for the PGT to freeze accounts, but only Saskatchewan currently allows the financial institution to take this step by itself. After freezing the accounts, the institution is to make a report to the Saskatchewan PGT. However, in practice, Saskatchewan's PGT has very limited resources and it is unclear how often this power is actually used.

[68] BC's PGT has the ability to freeze assets for up to 120 days (30 days plus 3 renewals) and the ability to halt sales of real estate. Unlike Saskatchewan, however, in BC it is not the financial institution itself which has the power to freeze assets.

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

[70] *Ibid*, s 718.

[71] For instance, the Toronto Police Services offers a 5-day Elder Abuse course, 3 times a year; however, there is only 1 vulnerable persons police coordinator for the entire Toronto Police Services region. Even if training is in place, ongoing supports for these areas are thin on the ground. Fraud investigations by police services across the country are often specific units and not well integrated with elder abuse cases. Police are often unwilling or unable to devote resources to elder financial abuse cases, and in matters of complex securities losses, often do not feel that they have the capacity or expertise to move forward with prosecution (Consultations with Cst. Patricia Fleischmann and Cst. Jason Peddle, Toronto Police Services,

While beyond the scope of this report, we are mindful that some jurisdictions, such as New York state or California in the United States, have made a priority of combatting crimes against the elderly and have dedicated multi-disciplinary teams including police resources and dedicated prosecutors, to address such crimes. Further, jurisdictions such as these track all crimes that involve a senior.[72] The success of such structures could be a useful area of study for consideration and future adoption in Canada.

4.6. Federal Privacy Legislation - PIPEDA

Canada's privacy legislation, the *Personal Information Protection and Electronic Documents Act* (PIPEDA), prohibits organizations from disclosing individuals' personal information without their consent, subject to certain exceptions. The government amended these exceptions in 2015 to address concerns by Canadian banks that PIPEDA prevented reporting of elder financial abuse.

Now, PIPEDA authorizes organizations that collect, use or disclose personal information in the course of their commercial activities to disclose an individual's personal information to a "government institution," or the individual's "next of kin" or "authorized representative," without the affected individual's consent, provided that: the disclosing organization has reasonable grounds to believe the individual has been, is, or may be the victim of financial abuse; the disclosure is made solely for purposes of preventing or investigating the abuse; and it is reasonable to expect disclosure to the individual would compromise the prevention or investigation of the abuse.[73]

Unfortunately, these amendments are not particularly helpful, as PIPEDA does not define the terms "governmental organization," "next-of-kin," "authorized representative," or "financial abuse". Hansard and the federal *Interpretation Act*[74] are also silent, providing no guidance in terms of definitions.[75]

April and May 2017. Consultations with the National Initiative for Care of the Elderly Network police representatives June 2017. Consultations with the Vancouver and New Westminster Police Services, May 2017).

[72] For example, see online at: https://www.nycourts.gov/courts/nyc/housing/pdfs/gal%20pdfs/ELDER_ABUSE_WORKSHOP_INFORMATION.pdf and http://nasaa.cdn.s3.amazonaws.com/wp-content/uploads/2016/03/Elder-Abuse-Panel-Handout.pdf The North American Securities Administrators Association also tries to track the amount of elder fraud: see NASAA's August 2017 Pulse Survey: Seniors & Financial Exploitation, available online at http://nasaa.cdn.s3.amazonaws.com/wp-content/uploads/2017/08/NASAA-August-2017-Pulse-Survey-Senior-Financial-Abuse.pdf. U.S. members of NASAA also track and report on the number of enforcement cases involving seniors; see NASAA 2017 Enforcement Report at p 6; available online at http://nasaa.cdn.s3.amazonaws.com/wp-content/uploads/2017/09/2017-Enforcement-Report-Based-on-2016-Data.pdf. The report notes that it brought enforcement actions involving 1000 senior victims.

[73] Ibid, s 7(3)(d.3).

[74] *Interpretation Act* (R.S.C. , 1985, c. I-21).

[75] These terms are also not defined in the Interpretation Act, and have not been the subject of litigation. Alberta and British Columbia's *Personal Information Protection Acts,* and Quebec's *Act Respecting The Protection Of Personal Information In The Private Sector*, have been deemed "substantially similar"

Importantly, this relatively new PIPEDA disclosure exception also does not allow for unauthorized reporting if a firm has concerns about the person's mental capacity. While the firm or representative could always try to obtain the affected person's direct consent to disclose mental capacity concerns to a third party, this can be highly problematic in many cases, and downright futile in others.

Under the exceptions relating to suspected financial abuse, an investment firm could notify the police. It seems likely, but not absolutely clear, that this exception may also obliquely refer to a public guardian and trustee if it had clear grounds for believing a client was being financially abused, and believed disclosure to the client would compromise the prevention of it. It is further unclear who a "legally-authorized representative" includes, but it is likely that it might cover a person appointed pursuant to a POA.[76] It is much less certain if the investment firm could reach out to a client's immediate family members, particularly as there is no guidance on this, and a "family member" may have no authority to act regardless. Indeed, there are no default lists for substitute decision-making in property/finance issues, unlike the domain of health and personal care issues (for most provinces). Notifying a family member does not give rise to the presumption that they could be a substitute decision-maker for property/finance pursuant to some default statutory authority. It simply does not exist in law.

Even with the admittedly unclear and unhelpful PIPEDA exceptions in place, representatives would still be in breach of PIPEDA obligations if they notified (without the client's permission) any of these organizations or individuals if they had concerns that a client had diminished mental capacity, or was subject to undue influence that fell short of the undefined "financial abuse".

In short, the PIPEDA exceptions are unclear, undefined and do not easily relate to the provincial and territorial systems which govern decision-making and systems for reporting elder abuse. They are of little practical assistance in the areas which they seek to cover, and are silent in the areas relating to mental capacity. While it is beyond the scope of this report to recommend specific amendments to PIPEDA, it is clear that further changes to PIPEDA are needed.

It is recommended that revising and reworking of this PIPEDA section should be part of any "next steps" process in this legislative area.

legislation, but they do not contain similar provisions allowing for disclosure in cases of suspected abuse, and do not use these terms.

[76] Presumably in BC and the Yukon it would also include a Representative, pursuant to a Representation Agreement. In Quebec, it likely includes a person appointed by Mandate, but it is unclear if it would include an attorney pursuant to the much less formalized Quebec Power of Attorney process.

4.7. Regulatory Guidance

In May 2016, IIROC issued its "Guidance on Compliance and Supervisory Issues When Dealing with Senior Clients",[77] which sets out some industry best practices for protecting vulnerable older investors. 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, including the use of temporary holds.[78]

These recommendations are sound, and indeed parallel many of the recommendations in this report. However, in light of the various legal barriers that make supportive and protective action difficult, it is strongly suggested that securities regulators implement specific legal measures and a tailored Conduct Protocol authorizing supportive and protective action. While this Guidance has been published, the take up of its recommendations has been spotty at best, as far as we are aware. Clarifying regulatory expectations beyond the published Guidance will bring greater clarity to firms, representatives and to investors.

4.8. Initiatives by Provinces Regarding Aging

Quebec

In May 2017, the province implemented *An Act to combat maltreatment of seniors and other persons of full age in vulnerable situations*. The legislation requires every health and social services institution "to adopt and implement a policy to combat maltreatment of such persons, facilitating the reporting of cases of maltreatment and promoting the establishment of an intervention process with respect to maltreatment of seniors."[79] The legislation authorizes the government to designate, by regulation, any "body, resource or category of bodies" to adopt a policy to combat maltreatment of persons in vulnerable situations."[80]

The Quebec's securities commission, the Autorité des marchés financiers (AMF), has been involved in the issues related to elder abuse, undue influence and mental capacity issues. Quebec is taking significant steps to protect seniors in both is past policies and social

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[77] IIROC Notice 16-0114, May 31, 2016, "Guidance on compliance and supervisory issues when dealing with senior clients", online at: http://docs.iiroc.ca/DisplayDocument.aspx?DocumentID=87C0E6D580544E889B569A079B8C35AA&Language=en.

[78] See also the Investment Industry Association of Canada's Guidance, "Canada's Investment Industry: Protecting Senior Investors - Compliance, Supervisory and Other Practices When Serving Senior Investors", March 18, 2014, online at: http://iiac.ca/wp-content/uploads/Canadas-Investment-Industry-Protecting-Senior-Investors_March-18-2014.pdf

[79] *Act to combat maltreatment*, s 1.

[80] *Act to combat maltreatment*, s 13.

investments, and in the creation of an integrated provincial strategy for response and "*bientraitance*" (good treatment) of older people.

In June 2017, the Quebec government released a five-year action plan to address elder mistreatment, which aims to promote personal and public understanding of elder mistreatment, and to coordinate organizational efforts to address it.[81]

On September 14, 2017 the AMF hosted a broad-based community and industry roundtable on these topics as a step in moving towards integrated implementation of the provincial framework within the investment industry. This is but one example of the AMF's leadership on this issue in integrating the securities regulator into the broader provincial elder abuse prevention and response strategy.

British Columbia

In British Columbia, the PGT works closely with health authorities and community organizations in order to protect older British Columbians. The PGT in British Columbia has the power to intervene in circumstances of financial abuse by a POA holder, guardian, trustee, or other substitute decision-maker and has the further power and indeed the obligation to investigate reports of abuse.

Ontario

The Ontario Securities Commission ("OSC") has created a unique Seniors Expert Advisory Committee and is moving towards the creation of an OSC Seniors Strategy. The recently created Investor Office of the OSC has created a specific focus on issues related to aging and vulnerable investors. The OSC also has an active and engaged Investor Advisory Panel (IAP) which has consistently made recommendations on the issues related to the older investors, and vulnerable investors.

The Ontario government last week released "Aging with Confidence: Ontario's Action Plan for Seniors[82] ("Action Plan for Seniors"). The Finance Minister announced that over $155 million over three years will be spent on a seniors' strategy[83]. The Action Plan for Seniors includes: enhancing education about powers of attorney, strengthening elder abuse prevention, and a consumer protection pilot program to protect seniors through education and awareness and intervention programs for seniors who have fallen victim to consumer scams.[84]

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[81] See online at: https://cnpea.ca/images/plan-action-maltraitance-2017-2022.pdf.

[82] Footnote 82: "Aging with Confidence: Ontario's Action Plan for Seniors" (November 2017), online at: https://files.ontario.ca/ontarios_seniors_strategy_2017.pdf {Ontario Action Plan].

[83] Footnote 83: Robert Benzie, "Sousa to unveil tax cuts for small businesses in budget update" Toronto Star (November 14, 2017), online at: https://www.thestar.com/news/queenspark/2017/11/14/sousa-to-unveil-tax-cuts-for-small-businesses-in-budget-update.html.

[84] Footnote 84: Ontario Action Plan at 17.

New Brunswick

New Brunswick has done considerable work regarding issues surrounding aging including an expert forum. The Financial and Consumer Services Commission held a number of seniors engagement sessions with its citizens across the province and released a Final Report.[85] The Final Report includes findings of discussions regarding the freezing of accounts (and the use of technology to detect abnormal activity and the lack of any safe harbour), diminished mental capacity and the use of contact persons on accounts, and confusion around the process and reporting of financial abuse. This report was followed by a summary report "FCNB Forum on Senior Financial Abuse: Improving Detection, Prevention and Response to Senior Financial Abuse in New Brunswick"[86]. The summary report records the ideas that were generated through the process which make it clear that a multi-disciplinary, collaborative approach to dealing with the issue of elder financial abuse is needed.[87] FCNB has announced at the time of writing that it will be "…launching consultations across the province to find solutions to help prevent and respond to the financial abuse of New Brunswick's growing population of seniors. FCNB will be inviting New Brunswickers to provide input on a paper that examines the challenges and opportunities to safeguard seniors from financial abuse."[88] In addition, the Government of New Brunswick in September of this year approved the recommendations contained in a strategy developed earlier this year by the Council on Aging and will establish an aging secretariat and a roundtable on aging to oversee the 77 recommendations[89].

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[85] Online at: http://0104.nccdn.net/1_5/29b/21a/222/Senior-Engagement-Session-Report-Final-EN.pdf.

[86] Online at: http://0104.nccdn.net/1_5/247/360/266/FCNB-Senior-Forum-Report--2016-08-31-EN-FINAL-Website-version.pdf.

[87] Online at: http://0104.nccdn.net/1_5/247/360/266/FCNB-Senior-Forum-Report--2016-08-31-EN-FINAL-Website-version.pdf at pp 9-11.

[88] Online at: http://fcnb.ca/senior-financial-abuse-paper.html/?utm_source=FCNB&utm_medium=SliderEN.

[89] Online at: http://www2.gnb.ca/content/gnb/en/news/news_release.2017.09.1189.html. The Council on Ageing Report, online at: http://www2.gnb.ca/content/dam/gnb/Departments/sd-ds/pdf/Seniors/AnAgingStrategyForNB.pdf.

5. BEST PRACTICES IN LEADING JURISDICTIONS OUTSIDE CANADA

In this section, we canvass existing or emerging laws or practices for protecting vulnerable investors in the U.S., U.K., Australia, and New Zealand.[90]

5.1. United States

The U.S. is a world leader in supporting and protecting its older Americans from financial elder abuse and exploitation. In recent years, it has introduced three key national instruments aimed at protecting vulnerable investors: FINRA Rules 4512 and 2165 (the "FINRA Rules")[91], the Seniors Safe Act of 2016 (which is not yet passed into law), and the "NASAA Model Act" (defined below) (collectively, the "U.S. Rules"). The U.S. government and industry groups have also created a number of organizations and initiatives aimed at assisting seniors, which include significant education and training components as well as rules and guidance. We discuss the key features of these instruments and initiatives below.

FINRA Rules

The Financial Industry Regulatory Authority, Inc. (**FINRA**) is a self-regulatory organization that regulates brokerage firms and exchange markets. The Securities and Exchange Commission (**SEC**) is the government agency responsible for the overall regulation of the securities industry, including FINRA. In February 2017, the SEC approved amendments to the recordkeeping requirements in FINRA Rule 4512 (Trusted Contact Person), and the adoption of FINRA Rule 2165 (Temporary Hold on Disbursements). The complete text of the FINRA Rules is included at Appendix "A" to this report. The FINRA Rules comes into effect on February 5, 2018.

FINRA Rule 4512: Trusted Contact Person

FINRA Rule 4512 requires firms to make reasonable efforts[92] to obtain the name and contact information of an adult trusted contact person (TCP) for all non-institutional clients. Except for existing clients,[93] representatives must request the TCP contact information at the time of opening a client's account. The firm is also to make reasonable efforts to obtain, or if previously obtained, update where appropriate, the name of and contact information for a

[90] We have not included the European Union in this summary, as the European Securities and Market Authority (the EU authority that protects investors in the EU financial markets) does not have authority to harmonize EU member states' securities legislation, and has indicated that it has not yet taken protective action for vulnerable investors.

[91] See online at: http://www.finra.org/industry/notices/17-11.

[92] FINRA has said this requirement will ordinarily be satisfied by a member simply asking the client for the TCP information.

[93] 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).

trusted contact person.[94] Representatives are not prohibited from opening an account where a client refuses or fails to provide this information.

The firm must disclose in writing to the customer that the firm is authorized to contact the TCP and disclose information about the customer's account to address possible financial exploitation, to confirm the specifics of the customer's current contact information, health status, or the identity of any legal guardian, executor, trustee or holder of a power of attorney.[95] FINRA Regulatory Notice 17-11 provides that asking a customer to provide the name and contact information for a TCP would constitute reasonable efforts to obtain the information and would satisfy the rule.[96]

According to the Regulatory Notice, the TCP is "…intended to be a resource for the [firm] in administering the customer's account, protecting assets and responding to possible financial exploitation. A [firm] may use its discretion in relying on any information provided by the [TCP]. A [firm] may elect to notify an individual that he or she was named as a [TCP]; however, the rule does not require such notification."[97]

FINRA Rule 2165: Temporary Hold on Disbursements

FINRA Rule 2165 permits qualified persons who reasonably believe that financial exploitation has occurred, is occurring, has been attempted, or will be attempted, to place temporary holds on disbursements of funds or securities from the accounts of specified adult clients. If a firm places a hold, it must immediately initiate an internal review of the financial exploitation and fulfill various notice obligations. The temporary hold expires within 15 business days unless extended by a qualified person for an additional 15 business days (if the internal review supports an extension), or if a court orders an extension.

FINRA Rule 2165 permits members to exercise their discretion in withholding disbursements where financial exploitation may be occurring. It does not require them to act, and it does not require them to report suspected financial exploitation to Adult Protective Services (APS)[98]. Most states have laws which require some form of mandatory reporting[99]. The Supplementary Materials to FINRA Rule 2165 include a safe harbour provision that shields firms from liability under three FINRA provisions[100] if they do place temporary holds on disbursements, provided

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[94] FINRA Rule 4512.06(c).

[95] FINRA Rule 4512.06.

[96] FINRA Regulatory Notice 17-11, March 2017, "Financial Exploitation of Seniors" at 2.

[97] *Ibid.*

[98] See online at: http://www.napsa-now.org.

[99] For details on the Canadian system on elder abuse reporting see: https://www.bcli.org/sites/default/files/Practical_Guide_English_Rev_JULY_2011.pdf.

[100] The immunity is from: FINRA Rules 2010 (Standards of Commercial Honour and Principles of Trade), 2150 (Improper Use of Customers' Securities or Funds; Prohibition Against Guarantees and Sharing in Accounts) and 11870 (Customer Account Transfer Contracts). These rules generally prohibit the withholding of funds.

holds are placed in accordance with the requirements of FINRA Rule 2165.[101] Therefore, it is a limited safe harbor from specific FINRA rules and does not prevent civil or administrative actions.[102]

Seniors Safe Act of 2016

In 2016**,** the House of Representatives passed the *Seniors Safe Act of 2016* (the Seniors Safe Act), which is currently before the Senate.[103] The act extends legal immunity, including from civil or administrative proceedings, from disclosing the possible exploitation to "covered financial institutions" and their employees who disclose possible financial exploitation of senior citizens, and to "covered agencies," provided the financial institution and disclosing employees meet certain conditions.

For a disclosing employee to be shielded, he or she must have received training, have been serving in specified functions within the organization, and made the disclosure with reasonable care. For a financial institution to be shielded, it must have provided training to the disclosing employee that: explained how to identify and report suspected exploitation of a senior citizen; discussed the need to protect the privacy and respect the integrity of clients; and ensured the training was appropriate to the job responsibilities of the individual attending the training.

NASAA Initiatives

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.

NASAA Model Act

In 2016, NASAA approved model legislation, the *Act to Protect Vulnerable Adults from Financial Exploitation* (NASAA Model Act). The text of NASAA Model Act is included at Appendix "B" to this report. The NASAA Model Act may be adopted as legislation by NASAA's U.S. members during state legislative sessions or implemented by regulation. As of March 2017, four states—Alabama, Indiana, Vermont and Louisiana—had enacted regulations or passed legislation that contains provisions similar to the NASAA Model Act. Three states—Washington, Missouri and Delaware—had laws in place before NASAA's approval of its act.

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[101] FINRA Rule 2165(b)(B)(i) and (ii).

[102] https://www.martindale.com/banking-financial-services/article_Sutherland-Asbill-Brennan-LLP_2239652.htm.

[103] *Seniors Safe Act,2016*, H.R. 4538, available online at https://www.congress.gov/bill/114th-congress/house-bill/4538/text.

The NASAA Model Act requires qualified individuals[104] to notify Adult Protective Services and the securities commissioner if they believe financial exploitation of an eligible adult[105] may have occurred, may have been attempted, or is being attempted.[106] And it permits (but does not require) qualified individuals to notify any third party previously designated by the client if the person believes financial exploitation may have occurred, may have been attempted, or is being attempted.

The NASAA Model Act permits a firm to delay disbursements from the account of an eligible adult if it reasonably believes, after initiating an internal review of the requested disbursement and the suspected financial exploitation, that the requested disbursement may result in financial exploitation.[107] If a firm chooses to act, it must fulfill various internal review and notification/reporting requirements (including notifying parties authorized to transact on the account, Adult Protective Services ("APS") and the commissioner of securities and providing a report of the results of its internal investigation to APS and the commissioner of securities within seven business days after the requested disbursement), and lift the suspensions within a certain period of time unless a court extends the freeze.

The NASAA Model Act also includes a safe harbor provision that provides firms and representatives with immunity "from any administrative or civil liability that might otherwise arise from such delay in a disbursement," provided the firm and advisor act in good faith, exercise reasonable care, and comply with the act's requirements relating to delayed disbursements.[108]

NASAA's Guide

In 2014, NASAA published a Guide for Developing Practices and Procedures for Protecting Seniors and Vulnerable Investors from Financial Exploitation (NASAA Guide).[109] The NASAA Guide exists to assist broker-dealers and representatives with detecting, reporting, and mitigating seniors' financial exploitation, and is intended to complement the NASAA Model Act. It sets out that firms should:

- **Identify vulnerable individuals:** by establishing policies that will assist the firm in identifying which of its clients are covered under applicable state laws or regulations designed to fight financial exploitation; develop and review training programs designed to educate employees to recognize signs of diminished capacity and financial exploitation; develop special tips and strategies on how to communicate

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[104] A qualified individual means any agent, investment adviser representative or person who serves in a supervisory, compliance or legal capacity for a broker-dealer or investment adviser.

[105] Eligible adult means a person sixty-five years of age or older; a person subject to a state's adult protective services laws.

[106] NASAA Model Act, s 3.

[107] NASAA Model Act, s 7.

[108] NASAA Model Act, s 8.

[109] See online at: 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.

with persons experiencing diminished capacity (such policies and procedures could include enhancing oversight for accounts where an advisor has concerns about client vulnerability; documenting contact with seniors who are having problems with recall or comprehension; and developing escalation procedures); training front-line employees on how to ask appropriate questions regarding potential cognitive decline, while still maintaining a client's sense of autonomy and dignity; and providing information on resources such as Adult Protective Services ("APS"); and providing employees with informational materials detailing the signs of diminished capacity and financial exploitation so as to improve detection of financial exploitation.

- **Report to government:** by mandating reporting even if a firm operates in jurisdictions where there is no legal obligation to report; developing policies that detail the criteria that trigger a reporting requirement; developing clear, detailed escalation procedures, establishing direct lines of communication to ensure proper reporting; ensuring the firms' policies and procedures are to promote internal communication and coordination regarding the reporting of financial exploitation; and mandating the use of internal reporting forms to ensure that each report contains pre-determined categories of information while each firm is to develop its own forms with specific, and critically important information.

- **Notify third parties of potential issues:** by building strong relationships with clients and initiating discussions about potential future issues and the importance of future planning; assisting clients with creating financial directives and powers of attorney and trusted contacts; ensuring clients are familiar with the use and limitations of these documents or approaches; and ensuring that policies and procedures related to third-party notification are designed to promote compliance with federal and state laws.

- **Manage delayed disbursements:** by developing policies for freezing disbursements, with a view to ensuring they are minimally disruptive to the client and compliant with law; developing procedures for ensuring notification requirements are met; designating a person within the firm who is responsible for notifications; and monitoring the timing of delayed disbursements to ensure that funds are not withheld longer than is permissible.

- **Cooperate with regulators:** by implementing policies to provide guidance on responding to inquiries from APS agencies, securities regulators or law enforcement.

The NASAA Guide appears to have had mixed success. In 2016, NASAA published results from a multistate review of how broker-dealers were dealing with issues related to older investors. Based on 62 exams, NASAA found that virtually all firms had a formal process for internally reporting concerns regarding diminished capacity and/or elder financial abuse, and approximately one-third of firms had dedicated teams responsible for seniors-related issues. But, among other issues, only 30 per cent of firms had created seniors-specific polices and procedures; more than half lacked a policy defining senior customers; approximately 20 per cent of firms had no supervisory procedures regarding key seniors' issues; 19 per cent of firms did not have a decision-maker responsible for reporting concerns to agencies/authorities outside the firm; and less than half of them had developed a form for clients to indicate a TCP. Finally reporting to authorities was poor: reporting to APS occurred in 62 per cent of cases that were internally escalated, only 4 per cent of cases were reported to law enforcement, and less than 1 per cent of cases were reported to state securities regulators.

ServeOurSeniors.org

In 2015, NASAA launched a seniors-focused and user-friendly website, ServeOurSeniors.org, which includes resources for older investors, caregivers, the securities industry, and policymakers. The website helps users easily locate contact information for their jurisdiction's securities regulator, adult protective services agency, and other governmental seniors-related service providers.

Consumer Financial Protection Bureau Advisory

In 2016, the Consumer Financial Protection Bureau (CFPB) published an Advisory for Financial Institutions on Preventing and Responding to Elder Financial Exploitation[110], which identifies key ways financial institutions can address elder financial exploitation. The CFPB Advisory is similar to the NASAA Guide in many ways. It encourages financial institutions to:

- **Develop protocols:** to train staff on reporting procedures, complying with regulatory requirements, obtaining consent for information-sharing with trusted third parties, and collaborating with key stakeholders.

- **Provide training:** to ensure staff understands what constitutes elder financial exploitation, can recognize the warning signs, and knows how to respond.

- **Use technology:** to analyze account activities that may be associated with elder financial exploitation. It recommends that financial institutions use fraud detection systems and predictive analytics to detect abnormal client behaviour.

- **Develop reporting procedures:** to ensure staff are familiar with a report's components (i.e. the information that must be included in a report to support allegations and assist responders) and their reporting obligations under state and federal law (including to whom and when reports must be made, and the actions that responders can and cannot take); and the privacy implications of reporting, including knowledge of the 2013 Interagency Guidance (discussed below).

- **Protect Senior clients:** by using procedures to assist elderly clients, including by obtaining advance consent to sharing account information with a designated trusted third party, and providing age-friendly services (like helping clients to create POAs and ensuring prompt procedures for recognizing POAs).

[110] Online at: http://files.consumerfinance.gov/f/201603_cfpb_advisory-for-financial-institutions-on-preventing-and-responding-to-elder-financial-exploitation.pdf.

- **Collaborate with stakeholders:** by working with APS and law enforcement authorities; collaborating with elder agencies to offer educational programs and informational materials; [111] and supporting local multidisciplinary networks and initiatives.

U.S. Privacy law

The *Gramm-Leach-Bliley Act* (GLBA) includes federal privacy legislation that generally prohibits financial organizations from disclosing an individual's personal information unless it has first provided the individual with notice of the disclosure and a reasonable opportunity to opt out of it.

In 2013, eight federal financial regulators[112] issued Interagency Guidance to "financial institutions"[113] to clarify the applicability of the privacy provisions of the GLBA to financial institutions that want to report elder "financial exploitation."[114] The guidance clarifies that reporting possible elder financial exploitation "does not, in general, violate the privacy provisions of the GLBA or its implementing regulations." The GLBA also includes specific exceptions that permit financial institutions to share personal information with government agencies for the purpose of reporting suspected elder financial abuse without the consumer's authorization and that would not violate GLBA.[115] As discussed above, Canada's privacy legislation has different provisions and does not have comparable provisions.

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[111] The CFPB's website includes educational resources for consumers, including resources for Older Adults and their Families, and Information for Economically Vulnerable Consumers: online at: https://www.consumerfinance.gov/empowerment/.

[112] The Federal Reserve, the Commodity Futures Trading Commission, the CFPB, the Federal Deposit Insurance Corporation, the Federal Trade Commission, the National Credit Union Administration, the Office of the Comptroller of the Currency, and the Securities and Exchange Commission.

[113] Unlike PIPEDA, the GLBA defines "financial institutions," as all businesses, regardless of size, that are "significantly engaged" in providing financial products or services: online at: https://www.ftc.gov/tips-advice/business-center/guidance/financial-institutions-customer-information-complying#who.

[114] The Interagency Guidance defines exploitation by reference to *The Older Americans Act*, as amended by the *Elder Justice Act* of 2009, which defines exploitation as "the fraudulent or otherwise illegal, unauthorized, or improper act or process of an individual, including a caregiver or fiduciary, that uses the resources of an elder for monetary or personal benefit, profit, or gain, or that results in depriving an elder of rightful access to, or use of, benefits, resources, belongings, or assets."

[115] See 2013 Interagency Guidance on Privacy Laws and Reporting Financial Abuse of Older Adults, at page 3, in particular the three exceptions are:

(1) A financial institution may disclose nonpublic personal information to comply with federal, state, or local laws, rules and other applicable legal requirements, such as state laws that require reporting by financial institutions of suspected abuse (15 U.S.C. 6802(e)(8) and implementing regulations at ___.15(a)(7)(i)).

(2) A financial institution may disclose nonpublic personal information to respond to a properly authorized civil, criminal, or regulatory investigation, or subpoena or summons by federal, state, or local authorities or to respond to judicial process or government regulatory authorities having

Financial Crimes Enforcement Network

The U.S. Treasury Department's Financial Crimes Enforcement Network (**FinCEN**) exists to safeguard the financial system from criminal activity, and to promote national security through the collection, analysis, and dissemination of financial intelligence. FinCEN receives Suspicious Activity Reports (**SAR**) from financial institutions about transactions that are known or suspected to be unlawful.

In 2011, FinCEN published an Advisory to Financial Institutions on Filing Suspicious Activity Reports Regarding Elder Financial Exploitation,[116] which lists common "red flags" of elder financial exploitation. Its advisory asks financial institutions to indicate in their reports that the suspicious activity that they are reporting relates to "elder financial exploitation." FinCEN uses these reports to identify common types of fraud and potential trends affecting seniors.

FinCEN (and the CFPB) have also created a free, instructor-led curriculum called Money Smart for Older Adults, which firms are invited to use to teach older adults about elder financial exploitation and why they may be at risk. The resource is also intended as a tool for bank-community partnerships, where bank staff delivers this information in collaboration with seniors' agencies or adult protective services. The curriculum covers topics such as common types of elder financial exploitation, identity theft, and planning for unexpected life events.

Securities Helpline for Seniors

In 2015, the FINRA launched the Securities Helpline for Seniors (HELPS), a resource for older investors who have securities-related questions and concerns. HELPS staff provide personalized assistance to seniors, and refer elder financial abuse concerns to APS. 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 financial

jurisdiction for examination, compliance, or other purposes as authorized by law (15 U.S.C. 6802(e)(8) and implementing regulations at ___.15(a)(7)(ii)-(iii)).

(3) A financial institution may disclose nonpublic personal information to protect against or prevent actual or potential fraud, unauthorized transactions, claims, or other liability (15 U.S.C. 6802(e)(3)(B) and implementing regulations at ___.15(a)(2)(ii)). For example, this exception generally would allow a financial institution to disclose to appropriate authorities nonpublic personal information in order to: (i) report incidents that result in taking an older adult's funds without actual consent, or (ii) report incidents of obtaining an older adult's consent to sign over assets through misrepresentation of the intent of the transaction.

*Note that the CFPB's, FTC's, CFTC's, and SEC's implementing regulations are contained in 12 CFR part 1016, 16 CFR part 313, 17 CFR part 160, and 17 CFR part 248, respectively. For ease of reference, the Guidance uses the shared numerical suffix of each of these agencies' regulations, online at: http://files.consumerfinance.gov/f/201309_cfpb_elder-abuse-guidance.pdf.

[116] Online at: https://www.fincen.gov/resources/advisories/fincen-advisory-fin-2011-a003.

abuse and financial exploitation. It should also be noted that firms and representatives use HELPS as a resource to assist senior clients.[117]

5.2. United Kingdom

Financial Conduct Authority Initiatives

The Financial Conduct Authority (**FCA**) Handbook requires firms to implement policies and procedures "to identify particularly vulnerable customers and to deal with such customers appropriately." [118] 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:

- 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.

The FCA has done work on the issue of consumer access[119] and consumer vulnerability[120]. In a February 2015 Occasional Paper on Consumer Vulnerability published by the FCA, the authors discuss how firm policies designed to prevent financial abuse and fraud can inhibit the ability of staff to use discretion, particularly in relation to third party access (powers of attorney or third-party mandates (temporary delegation of authority to someone else when in hospital, for example). It noted that clearer procedures are needed so that the ability to help consumers in vulnerable circumstances can align with the goal to safeguard consumers from financial abuse. In some instances, the paper notes that procedures put in place to protect customers from abuse can get in the way of enabling legitimate access by third parties (such as those holding a power of attorney). The report notes:

> "While protection from abuse is critical, it can sometimes create a tension with allowing legitimate access by third parties. The FCA's research found that many people were frustrated with a safeguarding approach that prevented them from accessing and using services. This was particularly likely to occur for people in caring roles, and those with long-term illnesses. A failure to recognise deputyship, power of attorney or third party mandates was often the root of the problem.

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[117] Online at: http://nasaa.cdn.s3.amazonaws.com/wp-content/uploads/2017/06/BD-Study-of-Senior-Practices-and-Procedures_06152017.pdf, at 20.

[118] Online at: https://www.fca.org.uk/about/handbook.

[119] Sharon Collard, Martin Coppack, Jonquil Lowe, & Simon Sarkar, Occasional Paper #17 "Access to Financial Services in the U.K." (FCA) May 2016, online at: https://www.fca.org.uk/publication/occasional-papers/occasional-paper-17.pdf.

[120] Martin Coppack, Yasmin Raza, Simon Sarkar, Kate Scribbins, "Occasional Paper #8 "Consumer Vulnerability" (FCA), February 2015, online at: https://www.fca.org.uk/publication/occasional-papers/occasional-paper-8.pdf.

> Some forms of accompaniment (by a relative or friend), or third party action such as authorisation to act if a person is temporarily incapacitated, are completely legitimate, and may be essential. It can make a stressful situation even worse if an over-zealous approach forms a barrier to this sort of access. Evidence gathered for this paper indicates that training around fraud and abuse could be balanced by ensuring good awareness about power of attorney and third party mandates."[121]

The report highlights the need for firms to be proactive in identifying customers who may be at risk of financial exploitation and abuse as a "vital part of a vulnerability strategy". Firms have various tactics that they can use to do this such as identifying unusual spending patterns on those consumers who have been "flagged" as potentially vulnerable, unusual account activity or picking up on clues during phone calls.[122]

The report identifies the problem that is present in Canada – that firms cannot disclose information about a customer's account to a third party (such as a relative or caregiver) without authorization or an arrangement such as a power of attorney or third-party mandate. The report also notes that the FCA's analysis of what firms were doing around consumer vulnerability showed that some firms were doing much more than others, that there was some good practices but little in the way of an overall strategy.[123]

The paper sets out a number of good outcomes that vulnerable consumers should receive when they approach financial service providers, such as: (i) knowing that appropriate action will be taken if suspicious activity is spotted that may signal abuse or fraud; (ii) that if a person is a carer for an older or vulnerable consumer, the firm will listen and make a note of his or her concerns even though it may not be able to divulge any information to the carer; and (iii) if the person is recently bereaved, a power of attorney or has a third party mandate, receiving consistent advice and treatment.

In February 2016, the FCA began consultations on improving the financial industry's responsiveness to the needs of older consumers. It issued a discussion paper in February 2016[124]and given the views gathered from stakeholders, it decided to undertake work in six key areas:

- How can firms help consumers to better engage with products and services in retail banking?
- How can the FCA build on existing industry initiatives to facilitate mortgage lending to older consumers?

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[121] *Ibid*, at 60.

[122] *Ibid*. at 60.

[123] *Ibid.* at 77-78.

[124] DP16/1, A Collection of perspectives, "Ageing Population and Financial Services", February 2016, FCA, online at: https://www.fca.org.uk/publication/discussion/dp16-01.pdf.

- Can older people and their families access regulated advice for long-term care?
- How can we work with our stakeholders to support those that require third-party access? and
- Is there more than can be done to help consumers navigate markets where upper age limits exist?
- What happens as the mind ages, and what does this mean in terms of products, services and distribution?

The FCA would like to see products and services adapted to meet the individual's needs - as their needs change significantly as they age. The FCA sees its work as collaborative with those done by independent bodies such as other firms, authorities, and professional and trade bodies.

In September 2017 the FCA published its Occasional Paper 31: "Ageing Population and Financial Services".[125] The paper explores how the ageing population would impact the financial services industry, with more of a focus on banking services than investment firms and their services. It sets out ideas for firms to consider in ways that fit their business models, such as looking at product and service design, customer support and reviewing and adapting strategies. Of relevance to the issues relevant in our report, it highlights the following ideas (and is not proposing rules or guidance at this time):

- As older consumers are likely to be expected to interact with more complex products or products new to them, firms should consider what is needed to guide and support consumers, including what type of communications and support will make it less complex and more familiar to consumers – aiding their processing and decision-making and decision (or processing aids);[126]
- The FCA would like to see products and services which as many consumers as possible can use;
- The FCA would like to see mechanisms for effective third-party access improved;
- They would like firms and industry groups to consider making it easier for older people to set up and use third party access arrangements safely and examine existing gaps to explore how to reduce consumer harm;
- They suggest government consider the benefits of creating a digital power of attorney system and centralized database;

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[125] Occasional Paper 31, "Ageing Population and Financial Services", September 2017, FCA,

[126] *Ibid.*, at 45.

- The paper notes that UK Finance is considering an industry wide framework for a third-party mandate, what it may look like and under what circumstances it could be applied;

- To balance protection and access, it suggests firms develop straightforward options to encourage legitimate delegated access for carers, whilst maintaining robust safeguards to reduce the risk of abuse. For example, they could offer older people and accept limited levels of delegation. Firms should work with trade bodies to develop best practice solutions; and

- Promote the benefits of planning ahead for these issues.

The FCA expects all firms to design appropriate training, processes, systems and controls to prevent fraud scams or financial abuse, including abuse perpetrated by family members or caregivers. Identifying customers who may be at risk of financial exploitation and abuse is a key part of a vulnerability strategy.[127]

The FCA views the issues as complex and ones that will require action from multiple parties to address. It acknowledges that it is at the early stage of addressing the issue of vulnerable consumers and the ageing population. The FCA states it will do periodic, strategic reviews over time and anticipates further review in three to five years of how the financial services industry is adapting to meet the needs of older consumers. The FCA endeavors to pay close attention to issues that affect older consumers and will consider intervening if harm has crystallized or is increasing.[128]

The FCA also commissioned research to support firms in understanding the needs, circumstances, experiences and preferences of older consumers: "The Ageing Mind" - a literature review of scientific research exploring the impact and effects of cognitive ageing; and "Coping Mechanisms and Third Party Access" – qualitative research exploring the challenges faced by older consumers and their caregivers in accessing and dealing with retail banking products, and the associated problems that arise when a third party has access to the older person's accounts and helps deal with those accounts.

Mental Capacity Act 2005

The UK's Mental Capacity Act 2005 (MCA) helps people with dementia, their carers, and professionals to make decisions relating to an affected individual's property, financial affairs, health, and social care. The MCA sets out a two-stage test for determining mental capacity, which we discuss in Section 8 of this report.[129] The test requires the following steps:

- First, one must ask whether the individual has an impairment of, or a disturbance in the functioning of, their mind or brain, whether as a result of a condition, illness, or external factors such as alcohol or drug use?

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[127] *Ibid.* at p 78.

[128] *Ibid.* at p 12.

[129] *Mental Capacity Act* (2005), online at: http://www.legislation.gov.uk/ukpga/2005/9/contents.

- Second, one must consider whether the impairment or disturbance makes the person incapable of making a specific decision when they need to.

The MCA recognizes that individuals can lack the capacity to make some decisions but have capacity to make others. The MCA says a person is considered unable to make a decision if they cannot:

- Understand the information relevant to a decision;
- Retain that information;
- Use or weigh that information in a decision-making process; or
- Communicate a decision.

If either of the two tests above is not satisfied then the MCA deems a person to be incapable of making a specific decision. If the person has created a lasting power of attorney, the appointed decision-maker can then make decisions on the person's behalf. Alternatively, a court-appointed deputy may assume responsibility for decision-making. Safeguarding practitioners have reported overwhelming support for the MCA and its framework for assessing capacity.[130]

5.3. Australia

ALRC National Strategy

The Australian Law Reform Commission (ALRC) recently completed an Inquiry on Protecting the Rights of Older Australians from Abuse. Its resulting report calls for a multipronged national strategy to address elder abuse through legal reform, policy change, education and other initiatives. The ALRC published an extensive and thorough report entitled Elder Abuse—A National Legal Response.[131]

With respect to banks, the report recommends that 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. It also recommends that the code 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.[132]

The Australian Bankers Association (ABA) supports financial abuse reporting guidelines[133]; 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

[130] *Ibid*.

[131] (ALRC Report 131), June 14, 2017. See: https://www.alrc.gov.au/publications/elder-abuse-report

[132] Proposals 7-1 and 7-2.

[133] See also, online at: https://www.bankers.asn.au/media/media-releases/media-release-2013/Financial-abuse-prevention.

reporting on the grounds that it could disrupt banks' relationships with their clients and make them vulnerable to civil lawsuits for failing to detect or report financial abuse.

ABA Banking Guidelines

Currently, the 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.

5.4. New Zealand

Banking Guidelines

The New Zealand Bankers Association has developed voluntary guidelines to assist banks in meeting the needs of vulnerable clients. The guidelines recommend that banks train staff on recognizing financial abuse and develop procedures to address it[134].

Enduring Power of Attorney

In 2008, New Zealand amended the *Protection of Personal and Property Rights Act, 1988* (3PR Act)[135] to address concerns about elder financial abuse through the misuse of enduring powers of attorney. The amendments:

- Require the person giving the POA (the donor) and the person receiving the authority (the attorney) to seek independent legal advice when establishing an enduring POA;
- Strengthen witnessing requirements;
- Introduce a statutory presumption of competence;
- Provide clear direction for the suspension and revocation of enduring POAs;
- 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 enduring POA; act in donors' interests; and encourage donors' capability;
- Require enduring POA holders to maintain records;
- Facilitate access to courts for people concerned about an attorney'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 enduring POA. A court can make "property orders," which appoint a person to administer the vulnerable person's property.

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[134] See also online at: https://greypower.co.nz/taking-steps-prevent-financial-elder-abuse/.

[135] Online at: http://www.legislation.govt.nz/act/public/1988/0004/latest/whole.html.

6. OUR CONSULTATIONS: WHAT WE HEARD

Case Study Examples

As part of the consultation process, a series of case studies were used to stimulate discussion and determine if the issues identified were the correct ones to consider. Consultations were conducted individually and in groups with key stakeholders. Canadian stakeholders included older adults, older adult advocates, key agencies in elder abuse and mental capacity issues, lawyers, financial professionals, public guardians and trustees, police, community based organizations, medical and social work professionals, caregivers, and regulators. Key external expert stakeholders were consulted from the US, UK and Australia. Stakeholders had the opportunity to meet in person individually or as part of a number of group presentations, by webinar, phone or electronically. Participants were enthusiastically engaged, and were very aligned in their recommendations, across sectors and across the country. Here is a sample of what we heard. The case studies used are included below.

"I think this is a great project; you have identified a huge gap which is complex and is in the midst of a huge social problem. I've had every single one of those hypothetical case studies walk in my door. Industry has to play a better role, but unless we can get that legal safe harbour we're just stuck." Financial industry representative, Ontario.

"God, I have every one of these cases. Yes I truly do. And more and more of them." Financial industry representative, Ontario.

"These case studies are really good – I work with an ethnic community and its true – some people really work themselves into certain groups or communities and can do terrible damage to investments." Financial industry representative, British Columbia.

"Everybody at this table who has had these cases raise your hand! See – everyone's hand is raised. Everyone. Things like this happen all the time." Community member said to a group of police, financial industry representatives, advocates and lawyers.

6.1 *Case Studies Provided to Facilitate Discussions*

#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 Brendastarts helping with tasks and chores. The investment reports have too small a print for her. 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.

#2 The Unsuccessful Son in the Basement

Mr. Song Li is 78 and his wife, Mrs. Patricia Li is 79 and they live in a 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. He lives in basement and has a history of substance abuse. Young Li starts a new business and needs seed money. He takes his mother to her new investment advisor, Ms. Clarke, and does most of the talking. He tells the 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.

#3 The Snake Oil Salesman

Mr. Alexei Davidoff is an enterprising financial planner who has developed a niche practice within newcomer communities. He starts making 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’s age and circumstances. The father however, does not listen to his son and fully trusts the advice provided.

#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.

#5 The Off-Grid World Traveler

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 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.

#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, charm and 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.

6.2 Questions Posed in Relation to Case Studies

A standardized list of questions were asked at each stakeholder consultation after presentation of the case studies. The questions were as follows:

- Do any of these case studies sounds familiar to you? Have you had versions of this happen in your experiences? What happened?
- 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?
- If any of these cases came to your firm or industry, what would the internal process be to resolve the issue(s)? If there is escalation, what are the steps? Who gets to make the final decision?
- 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?
- 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?
- 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?

- 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?

- What role, if any, 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?

- 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? Why or why not?

6.3 Observations We Made

The Lack of Central Agency to Report to

Participants related very well to the case studies and noted that these felt like very familiar examples to them. We highlighted that Case Study #5 was somewhat different, as it raised the question of having a trusted contact person, in the absence of having a concern around abuse or neglect, undue influence or mental capacity. These case studies led to participants sharing their experiences or sharing issues which had arisen in their practices and also provided an accessible launch point to discuss the substantive issues around legal safe harbour, conduct protocols, the role of education, who to report to, etc.

At each and every consultation, roundtable or interview, the over-arching issue of "who to report to" and "what would they do" arose. While it was clearly stated in our consultation that it was well beyond the mandate of this project to consider the need, if any, for a national adult protective services system in Canada, it remained a central focus. In one mixed stakeholder roundtable of experts, a participant asked the others "who thinks we need some real kind of actual APS in Canada? Who thinks not having this is a huge barrier?" and in response, all participants raised their hands. One participant noted:

> *"The biggest problem is that we really need an agency – an adult protective agency – who has a 1-800 number, who is staffed with people can help, and who everyone knows is the organization to call. It's not good enough anymore to just say we don't have one in Canada. We need one. And things are only going to get worse." Elder abuse advocate, Ontario.*

What Firms are Doing Now

One of the first areas of discussion we explored with financial industry representatives (of all types) was "what are you doing now" and "what systems do you have in place" or "what would happen in these cases if they came to you". Financial industry representatives were again remarkably consistent: there are few clear systems to follow, few experts within the organization, few clear procedures, and when in doubt, it is sent to the legal department, which has mixed outcomes. In one case, a large financial firm representative said that they embedded, in their terms and conditions, the ability to not follow client instructions if they were worried. However, she did feel that not every client was aware that this was in the terms and conditions. Only two firms we interviewed felt that they had adequate processes and expertise in place to handle the issues raised in the case studies, and one of those was a credit union. One of the key findings was very few firms have processes or competency-based education in place, generally. In terms of issue escalation, there was a strong consensus that a regulator established and required Conduct Protocol would be of significant guidance and welcome.

Legal Safe Harbour

> *"Damned if you do and damned if you don't is the real problem. Professionals are worried that if they report they breach privacy and regulatory requirements. They are worried about getting sued or in trouble with the regulators. But my experience is that where there is a moral imperative felt by an advisor or representative that someone is up to no good, then they will try to report this to someone. But there is often no one to report to. Which is why the US safe harbour provisions don't have a useful version for Canada – if we want to try to freeze accounts there has to be someone to report to!" Lawyer and STEP member, Ontario.*

> *"Everyone here agrees – lawyers, regulators, elder abuse advocates, health care professionals – whatever. We all agree. Yes – legal safe harbour. Yes - both civil and regulatory. Yes – it's needed. It's just not fair to the securities sector, who is trying to do the right thing with elder abuse and dementia and these issues, that even if they act the right way, they have to violate something. This needs to be fixed. We need the regulators involved." Industry representative, Ontario*.

> *"I think a legal safe harbour, a conduct protocol and having a trusted contact person on file would be positive measures. From what I see firms are afraid of legal liability as well so if there was a reasonable defense that would give them a sense of comfort, that's fine. For the good actors in the industry it would limit information for the protection of their clients, I don't see how it would be abused or harmful for investors. I can see how it would helpful for investors." Financial consumer advocate, Ontario.*

With consultations held with people from Western Canada and the Atlantic provinces, through in-person meetings and via webinars or direct 1:1 interviews, the responses to "should there be a legal safe harbour" were almost astonishingly consistent. In every case, there was consensus that a legal safe harbour was required for firms and representatives. In all but one meeting, it was agreed that legal safe harbour should cover off both civil and regulatory (one informant was uncertain if civil liability should be covered.) The "Catch-22" of feeling morally and professionally obligated to do something while being concerned about breaching privacy or regulatory provisions was pervasive throughout all of our consultations with stakeholders.

Education and Training

> *"Don't send a message [that] the purpose of the education is to impose an obligation to take action in every single case - but rather [its purpose is] to facilitate the ability to take action. They need to have competency-based training, the whole context, not just one small thing like POAs." Industry expert & lawyer, Ontario*.

> *"I had to tell an [investment advisor] we could be calling the alleged abuser. And a person might or might not know that. So contact [with a third party] for the sake of protecting*

the person, has to be done carefully. The idea of setting up with the person at the beginning [KYC] is a good start but people need to be actually educated. Consumers and industry need education about the growing complexity of elder abuse, undue influence and mental capacity issues and with our shrinking safety net, as people get older younger generations cannot afford a home so this is the tip of the iceberg. It is going to get worse. We all need to be ready." A Public Guardian and Trustee staff member.

"What is normal now today is not normal 10 years ago. What is needed today? The new normal [of aging] as part of the KYC process. If you are asking a 70 year old person some information about their health versus asking them when they are 60 [whether] their circumstances are different. It is about awareness and education, and getting them to understand and letting them know that the information is collected to protect them." Regulator key informant.

There was absolute consensus in all stakeholder meetings that mandatory education and training was required for firms and representatives in the area of elder abuse (broadly – and not just financial exploitation), undue influence and mental capacity challenges. We found this surprising, as often education and training can be seen as costly. However, it was also accepted that the defense of a legal safe harbour must be tied to education and training of staff, as found in the U.S. model. Clearly, there is a very high degree of consensus on this requirement for staff training and education - and not just amongst community members, seniors, and advocates, but also within the securities industry itself.

The desire to have specific competencies established by regulators was very clear. The actual delivery of the education, be it in-house, by a third-party trainer, by professional associations or otherwise was held to not be as important as ensuring that the core competencies needed for staff education and training were identified and met.

Conduct Protocol

"Yes, and I think industry should have to do some things to qualify – like education. And to follow what the regulators say. This is really important in our very regulated industry. Industry says it's okay to do it, this is how you do it, and we'll do it. But we have to be educated and protected." Financial advisor, Ontario.

"Guidance isn't enough. Regulators need to create some kind of Conduct Protocol and then mandate education for the firms to make sure that staff can follow it. A Conduct Protocol is perfect for these kinds of situations." Consumer advocate, Ontario.

"This is the more fulsome version of KYC (Know Your Client). We need to incorporate these questions as part of an expanded process. Everyone needs to start asking about planning, mental capacity and so on earlier. It's really about knowing your client, in a better way". Regulator key informant.

"Even if the regulator just keeps track of the data that's good. How many reports of elder abuse? How many reports of dementia or undue influence? We need to start collecting baseline data." Academic, Ontario.

"I had the occasion in my father's circumstance, to help my uncle navigate my father's financial circumstances. No one would take the POA, which was done by the lawyer, and it took ages to verify the documents. It took weeks, and there was money being lost.

> *Millions of dollars had been lost, and having the sector cooperate was highly challenging because there was all this unnecessary suspicion. They didn't know what they were doing. Don't the financial people have a system of investigation or whatever that they have to follow on this?" Older adult from a rural community, Ontario.*

Having a defined and specific Conduct Protocol prescribed by the securities regulators was also met with absolute agreement in all stakeholder consultations. Overall, it was found that firms and representatives know that these issues are problems, agree that matters must be made better, that legal safe harbour is absolutely required by the firms, and a mandated Conduct Protocol would be welcomed. There was a strong sense that the securities sector is already highly regulated, and representatives owe obligations to their clients, so regulation in this field was neither surprising nor unwelcome.

> As one participant said:
>
> *"Look – we are already so regulated, it's kind of just one more thing – and that's okay. This is really concerning stuff. I want the regulators to just lay what steps we should follow and we'll do it. It's less risky than trying to figure it all out ourselves and doing it wrong." Financial industry representative, Ontario.*

Trusted Contact Person ("TCP")

> *"A trusted contact might be beneficial at any age. In terms of POA, what we are seeing in our jurisdiction is that there is an abuse of POA and also people not understanding who might be the best person to be appointed POA. We focus a lot on education, educating lawyers so you relay this information to their clients." Government representative, Atlantic province.*
>
> *"It certainly is very helpful in contacting a trusted person, for cases like when client is presenting with dementia or cognitive capacity challenges. I think that's really important. Obviously if that contact person is a suspect then the financial advisor should not call them though. I guess it's education and judgment." Community member, British Columbia.*
>
> *"Two things to be mindful of: when do you ask [for a trusted contact person] …definitely not exclusive to when individual becomes older in age…and how you do it so as not to worry them. We need to be clear how this 'asking' should [be] structured and be required to note to file. The client needs to be able to say no – no I don't want a person contacted. Or maybe I don't have one. It should be part of the KYC process…a check in with client, a build out of this process. It would be important to define the scope of disclosure to this client, because people are very sensitive to discussing finances with others and should know what would be shared or not." Industry representative, British Columbia.*

Overwhelmingly, having a TCP was considered a positive step, as long as only *reasonable efforts* to get one listed are required of the representative, and that the client can refuse to provide one if they choose. It was agreed that the TCP should be reviewed annually between the representative and the client, and that there should be some guidance and consideration given as to what makes a "good" TCP.

The area of the most discussion in all the consultations was the degree of information which can be disclosed to the TCP. Some participants felt that it should only be a very light touch enquiry – as if to help locate someone who would not respond to calls or letters. Others had differing opinions and leaned much more towards the open discussion end of the scale. Overall agreement was found that the firm or representative should use their training and professional judgment in determining what information should be disclosed, depending on the circumstances – and to release what was necessary in those circumstances.

One expert elder law and securities lawyer summed it up best when he said:

> *"Look - if it's gone this far as to reach out to a third party Trusted Contact which the client has themself appointed, then this is not time to mince words. To get here you have to have tried to work with the client several times, probably escalated it up within your internal chain of command, probably gone back down to the advisor [or representative] and so on. If it's that bad, let's trust the person that the client said could be trusted and let them know that there is a problem, if it's health, dementia, can't get a hold of them – whatever it is – like the US system allows". STEP member / lawyer, Ontario.*

7. RECOMMENDATIONS

In this section, the six supportive and protective recommendations are explored, which Canadian securities regulators should develop and implement. Also discussed is the purpose, scope, and key features of each measure, with reference to other jurisdiction's precedents where applicable.

1. Obtain a Trusted Contact Person "TCP"

Recommendation: Canadian securities regulators should implement a rule that requires firms and their representatives to make reasonable efforts to obtain the name and contact information of a TCP for all non-institutional clients, at the time of opening a new account, or, in the case of existing accounts, the next earliest occasion that the advisor updates a client's KYC profile, regardless of the age of the client. This should be reviewed at least annually with the client. If the client does not have a TCP, or does not wish to provide one, then there is no obligation that they do so.

Discussion: There was consensus among stakeholders that representatives would benefit from having the ability to contact a TCP to obtain essential information about the client, or to alert the TCP about concerning conduct by the client or persons close to the client.

The rule should not exhaustively delineate the circumstances in which a representative can contact the TCP. Rather, it should enable representatives to exercise their discretion about contacting a TCP if financial exploitation, financial abuse or undue influence is suspected or issues of lack of mental capacity arise. This would permit the representative to request information from the TCP about a client's changed contact information or health status; obtain the contact information for a POA holder, guardian, or trustee; or flag concerns about diminished capacity, undue influence, or financial exploitation.

It is recognized that this rule would empower representatives to depart from standard practices regarding client confidentiality, and that it risks giving rise to situations where clients could feel their privacy has been violated or might alert a TCP who turns out to be aware of, or involved in, the financial exploitation, abuse or undue influence. While these concerns are clearly important, the report finds that the benefits of the rule outweigh its risks, if properly mitigated.

The risk associated with the use of a TCP can be mitigated in three key ways.

First, representatives would only be required to make reasonable efforts to obtain the name of a TCP; they would not be prevented from acting for clients who fail or, refuse to provide a TCP, or indeed have no one in their lives who could play that role appropriately. Representatives should be encouraged to explain to clients how a TCP might be used as a resource to support, or if necessary to protect the investor. Reference to hypothetical situations where the TCP might be contacted could be effectively used to discuss possible future needs or situations which could arise. In addition, the client should be advised to take care in determining who to make a TCP, since that person may be provided with sensitive information about the client in the future and that it must be someone that the client trusts with such information. The client could then make an informed decision about whether to, or who to, name a TCP.

Second, for clients that do identify a TCP, the representative should be required to provide written disclosure to the client that confirms the name and contact information of the TCP; outlines the broad circumstances in which the TCP may be contacted; and notifies the client of the option to change or remove the name of the TCP from the file at any time.

Third, representatives should be required to undergo specific training on how to identify vulnerable investors, and potential abusers and should be provided with guidance on contacting TCPs judiciously so that the risks of contacting someone involved in perpetrating the elder abuse are reduced and so that information that is private to the client is not shared without a reasonable basis. We recommend that regulators publish supplementary guidance and/or a conduct protocol that explains the circumstances in which an advisor might contact the TCP, and the thresholds that a client should meet before doing so. As part of this, it must be made explicit that disclosure to a TCP may not be made if the firm or representative suspect that the TCP may be aware or involved in financial exploitation of the client.

Key Features: We recommend that the TCP rule include the following characteristics. Some of these characteristics should either be stated explicitly in the text of the rule, while others may be in the regulatory guidance and/or conduct protocol that accompanies it:

- **Reasonable efforts:** The rule should require the representative to make "reasonable efforts" to obtain the name and contact information of a TCP from a client. FINRA has said that an advisor will generally fulfill this requirement under Rule 4512 by simply asking the client for this information at the time the account is opened.[136] As stated above, we recommend that a request for this information occur at the time the account is opened and that the role of the TCP should also be explained so that the client is fully informed and understands the implications of designating a TCP. Like FINRA, we do not think representatives should be prohibited from acting for clients who fail or refuse to name a TCP. For accounts that already exist when the rule takes effect, representatives should be required to request a client's TCP information at the next earliest occasion that the advisor updates a client's KYC profile (and at least annually). The name of the TCP should be reviewed and updated on an annual basis. In cases where the client has refused or been hesitant to provide a TCP in the past, the representative should take special care annually to explain the advantages and concerns of having a TCP, checking in to ensure that situations have not changed for the client.

- **Applicable clients:** Representatives should use reasonable efforts to obtain a TCP for every non-institutional client, regardless of the client's age. While the recommendation for the TCP rule is animated by a concern for vulnerable older investors, we do not think the TCP rule should be limited exclusively to older clients for two reasons:

[136] Supplementary Materials to FINRA Rule 4512 specify that "a member shall make reasonable efforts to obtain, or if previously obtained, to update where appropriate the name and contact information for a TCP."

a) Many, if not most, representative-client relationships are formed well before a client turns 65. Since it is most efficient for the firm/representative to obtain the TCP information at the time the account is opened, this information will frequently be obtained in cases where the client is not yet a senior.

b) Once a representative has the TCP information on file, it would be reasonable to expand its use beyond senior clients, particularly since we are recommending that the TCP be contacted in circumstances that are not necessarily related to client age, such as undue influence or mental incapacity. This recommendation is consistent with FINRA Rule 4512, which places no age constraints on the TCP requirement. Admittedly, it is different from the NASAA Model Act, which only permits disclosure to third parties designated by "eligible adults" (who are defined as persons 65 years or older).[137] The NASAA Model Act is solely concerned with financial exploitation of older adults whereas our recommendations include also addressing loss of mental capacity.

- **TCP Qualifications:** There should be minimal constraints on who can serve as a TCP, although representatives should encourage clients to name someone who is likely to remain close to the client throughout the person's life(such as a family member or longstanding friend) and will be aware of the client's abilities and general health and contact location. The only requirements to serve as TCP should be that someone is 18 years or older and themselves mentally capable and not in conflict with the client. It is recommended that where possible, the TCP chosen should live in the same province, or at least the same country, as the client.

- **Disclosure:** When requesting that a client name a TCP, the representative should be required to explain the purpose of the rule, the broad circumstances in which the representative might contact the TCP, and the limitations of the disclosure the representative would communicate to a TCP. If the client identifies a TCP, the representative should also be required to provide written disclosure to the client that confirms the name and contact information of the client's TCP; outlines the types of circumstances in which the TCP may be contacted; notifies the client that their provision of the TCP information constitutes consent for the contact the with the TCP; and informs the client of their right to change or remove the TCP from the file at any time.

- **Contacting the TCP:** Representatives should be accorded broad discretion to use the TCP as a resource to help them act in the client's supported or protective interests, whether that be to locate a client's whereabouts, to confirm their health status, to identify the name of a POA holder or guardian, or to alert the TCP to concerns about a client's diminished capacity, undue influence, or financial

[137] The NASAA Model Act only contemplates notifying third parties about financial exploitation, so its TCP requirement is tailored to a risk that is acute to seniors. By comparison, FINRA Rule 4152 contemplates contacting the TCP in a range of circumstances.

exploitation. It would unduly limit the effectiveness of the rule if regulators too narrowly prescribed the circumstances in which an advisor could contact the TCP.[138] However, securities regulators should ensure representatives receive proper guidance and training on how to identify vulnerable investors and when to contact TCPs and circumstances when not to contact a TCP (if suspected of being aware of or involved in undue influence or financial exploitation). As discussed above, it is recommended that supplementary guidance and/or a Conduct Protocol explain the thresholds that a firm and its representative should meet for contacting a TCP and disclosing client information. For example:

- Before contacting a TCP, representatives should be required to use "best efforts" to first obtain the necessary information from the client directly. (This might entail first trying to reach the client directly several times, using the different modes of communication on file.)

- Alternatively, where a representative wants to contact a TCP to flag health, security, or safety concerns, the representative should be required to have "reasonable grounds" for believing that the client is suffering from diminished capacity, undue influence, financial exploitation, or other impairments.

- Representatives who do contact TCPs might be held to a "minimum disclosure revealed" standard, which requires them to disclose the minimum information reasonably necessary to obtain the requested information from the TCP or to communicate their reasonable grounds for concern so as to protect privacy of the client to the extent possible in the circumstances. However, this should not become a roadblock to properly dealing with a given situation.

- **Recordkeeping:** Firms and their representatives should be required to maintain records of their reasons for contacting a TCP, as well as records of their communications with TCPs.

- **Client notification:** Firms should not be required to notify the client if he or she has contacted or obtained information from the TCP. In our view, such a requirement would be unduly onerous for firms and would serve little purpose.

[138] We note that this recommendation differs from the approach taken in the NASAA Model Act, which only permits TCPs to be contacted about possible financial exploitation. Our recommendation more closely tracks FINRA Rule 4512, which allows the TCP to be contacted to "address possible financial exploitation, to confirm the specifics of the customer's current contact information, health status, or the identity of any legal guardian, executor, trustee or holder of a power of attorney, or as otherwise permitted by Rule 2165." However, we recommend that the Canadian rule be even less restrictive than FINRA Rule 4512. Rather than delineating the circumstances in which the TCP can be used, the representative should be permitted to contact the TCP when he or she considers it to be in the best interests of the client.

- **TCP notification:** Like FINRA, we do not think firms should be required to notify TCPs when they have been named as TCP, but they should be free to notify TCPs if the client has agreed to so notify.

- **Permissive:** The TCP is a resource for representatives to use to serve their clients' best interests, but representatives should not be obligated to contact a TCP. This approach would be consistent with the NASAA Model Act, which permits representatives to notify third parties that have been previously designated by the client of possible financial exploitation, but does not require it. In addition, it should be explicitly provided that disclosure may not be made to a TCP that is suspected of financial exploitation or other abuse of the client. A legal safe harbour provision (discussed below) should be implemented to shield firms and representatives from liability from such disclosure if they do contact TCPs in good faith and in accordance with the provisions of the regulatory conduct protocol.

- **Implementing instrument:** The TCP rule should be a legal requirement, rather than a recommended best practice. A voluntary provision risks being of little effect. The 2016 NASAA Broker-Dealer Study of Seniors Practices and Procedures found that virtually no broker-dealers were requesting identification of a TCP when NASAA had simply recommended that firms obtain this information from clients.[139] In addition, although IIROC has encouraged its dealer members to obtain from clients the identity of a trusted contact person, the consultations revealed that few firms are doing so.

2. Provide Ability to Place a Temporary Hold on Trades and Disbursements

Recommendation: Regulators should implement a rule that authorizes qualified individuals within firms to place temporary holds on trades of securities and disbursements from the accounts of a vulnerable client, where a qualified individual reasonably believes that financial exploitation or undue influence of the vulnerable client has occurred, is occurring, or will be attempted, or where the qualified individual reasonably believes that the vulnerable client has lost the capacity to provide instructions. Provision should be made for routine payments through the accounts, in accordance with the principles used by the provincial public guardians and trustees ("PGT"s) or best practice, so long as these routine payments do not significantly deplete the assets.

Discussion: There was consensus among stakeholders that firms should be empowered to temporarily freeze trades and disbursements in situations of actual or reasonably suspected elder financial abuse, undue influence and/or loss of mental capacity. There was also consensus that the firm must conduct an internal investigation of the situation and, as necessary, escalate it externally.

Enabling firms to suspend trades and disbursements on a temporary basis is, in and of itself, not sufficient to protect a client who is being financially exploited or put at risk. Rather, firms

[139] NASAA Broker-Dealer Section Study of Senior Practices and Procedures 2016-2017, at 20.

and their representatives should be encouraged to view temporary freezes as merely one step of a series of steps included in a support and protective action conduct protocol. Firms and their representatives would not necessarily play a role in the further support and protective action, but identification of the issues, discussions with the client, and/or notification of persons close to the client or authorities may trigger subsequent action.

To this end, it is important that firms and their representatives understand how this rule fits into a broader framework for support and protective action. It is therefore strongly recommended that this rule be accompanied by regulatory required conduct protocol that defines and explains financial exploitation, undue influence, and diminished capacity; discusses what provincial, federal or non-governmental resources exist to respond to these issues; discusses the potential legal and social repercussions of taking protective action; and outlines the immediate and long-term steps firms can and should take in these situations.

Key Features

- **Vulnerable client:** As discussed previously, it is recommended that the term "vulnerable client" not be *defined* by age as it is in some comparator jurisdictions, but that older age be understood as a strongly co-related due to ageism and social vulnerability. Rather, we prefer to follow the core aspects of Quebec's definition of vulnerable client. A vulnerable person is defined as a "person in a vulnerable situation", who is of the age of majority, and lacks an ability to request or obtain assistance, either temporarily or permanently, due to one or more factors such as a physical, cognitive or psychological limitation, illness, injury or handicap.
  Unlike the US NASAA Rule, which often has a bright age line of 65 or similar as a defining factor, we suggest an approach where benchmarks of life are utilized (like planning for retirement, retirement, qualifying for Canada public pensions or other benefits etc). This may in practice amount to much the same outcome, but is important normatively. It is a goal of this report, to highlight the increased social vulnerability risks associated with aging and to raise awareness that aging life-course benchmarks may trigger a representative to start ensuring that increased appropriate protections or standards are in place.

  In this way, the issue of older investors will be drawn to the fore, without supporting the myth that all old people are vulnerable and in need of protection.

  This type of definition also allows for an expansive understanding of a "vulnerable investor", who may be a younger person and subject to financial exploitation, undue influence or diminished mental capacity. This approach is also in accord with other international regulators, many of whom have chosen to not place age parameters around vulnerability.

- **Qualified individual:** The rule should clarify who has responsibility and authority to place holds. We recommend that responsibility for a hold should rest with the firm itself as an entity, and not its individual representatives or administrative staff. As best practice, firms should locate this authority with internal "qualified individuals" (rather than all representatives equally), to ensure freezes are only placed after having been duly considered by highly trained individuals who have developed expertise in these areas. Indeed we recommend adapting to the Canadian context the NASAA Model Act's definition of "qualified individual," which defines the term as: "any agent, investment adviser representative or person who serves in a supervisory, compliance, or legal capacity for a broker-dealer or investment adviser." FINRA Rule 2165 takes a somewhat different approach: it allows a firm to identify in its written supervisory procedures "the title of each person authorized to place, terminate or extend a temporary hold on behalf of the member." Instead of the more open FINRA version, we recommend the more prescriptive NASAA approach so that, in Canada, properly trained individuals who are performing functions commensurate with these types of issues are the ones with the authority.

- **Financial exploitation:** The rule should include a broad definition of "financial exploitation," such as the one used in FINRA Rule 2165, which defines "financial exploitation" as: (A) the wrongful or unauthorized taking, withholding, appropriation, or use of a specified adult's funds or securities; or (B) any act or omission taken by a person, including through the use of a power of 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.

- **Mental Capacity:** Unlike the US model, it is recommended here that the freezing powers (also known as a "hold")[140] on accounts also be extended to include mental capacity issues.[141] We recommend that where there exists a *reasonable belief* by the firm or representative that a client's mental capacity has diminished to the point where they can no longer provide instructions, or where a client wishes to engage in trades or strategies that are significantly or strangely outside his or her KYC parameters, and it is suspected that this is due to issues related to cognitive decline, then freezing powers may be used carefully and judiciously. At all times a client's autonomy, self-determination and right to live at risk (including the risk of making poor financial decisions if they are mentally capable of understanding and appreciating the consequences of their decision) must be respected. Simply put, just because an older adult or a vulnerable investor makes a poor financial decision, or decides to invest unwisely in a way they have not previously done, or decides to unwisely invest in a family endeavour, this should not automatically trigger the thinking that this client may have mental capacity issues.

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[140] In this report, the terms "freeze" and "hold" on the accounts are used inter-changeably.

[141] During consultations with US experts, including drafters of FINRA rules, the issue of mental capacity was not included in the FINRA model as response for mental capacity was thought to fall clearly under the purview of the National Adult Protective Services ("APS") regime, who are mandatory responders throughout the US. Third parties in the US can call APS into cases without breaching privacy requirements, and without attracting civil or regulatory liability. As such, concerns about mental capacity issues in this context may be adequately addressed by this APS system.

Evidenced-based “red flags” need to be present, reasonable and good faith enquiries should be made by the investment firm, and a general erring on the side of client autonomy is very important.

Clear and robust documentation of instances of diminished client mental capacity, and documentation of client-directed trades that may be simply “unwise”, should be required. In addition, contacting a TCP that may be on file may be encouraged, depending on the unique circumstances of the case.

- **Client discussions:** Prior to placing a hold, a representative should be encouraged to discuss with the client his or her concerns about the proposed trade, disbursement or other file activity, unless he or she believes in good faith that this discussion would cause the client further harm. The firm should consider contacting the TCP at this point. A firm and its representative should be judicious in considering what weight to attach to his or her conversations with the client and/or TCP, and to decide whether to continue with the freeze on the funds.

- **Temporary holds:** Firms should exercise their informed and specifically educated discretion in determining which activities need to be subject to a freeze. They should permit necessary “cost of living” type non-damaging asset disbursements similar to those permitted in FINRA Rule 2165 which specifies that only temporary holds be placed on suspicious disbursements, but not on non-suspicious disbursements. There must also be a “reasonable” belief in diminished capacity or financial abuse. Unlike FINRA, however, it is recommended that firms should be permitted to freeze securities transactions not just on disbursements but on *all activities in the investment accounts which also includes trades or selling of shares*. Otherwise, trades or liquidation of securities in the accounts could have materially negative consequences for the client, from which he or she may not financially recover.

- **Internal investigative review:** Before placing a hold, the firm should initiate an internal review of the requested disbursement and/or financial exploitation, in order to have a reasonable belief that there is suspected financial exploitation, undue influence or diminished mental capacity. Upon delaying a disbursement, the firm should continue its internal review.

- **Notification: Of suspected abuse** – Firms, through their representatives, or those who are in a supervisory, compliance or legal capacity, should promptly notify their securities regulator (including the MFDA or IIROC) if they reasonably belief that financial exploitation is occurring. As soon as the firm places a hold on the account, it should be required to notify the client (and other persons authorized to transact business on the account) of the hold and the reason for placing it. The standard should be immediate notification, or no later than two business days from the date that the firm places the hold. In the US, the FINRA Rule 2165 requires the firm to additionally notify a TCP. Further consideration by regulators should be given as to whether to require notification to the TCP as well or allow firms to have discretion as to whether to do so. Importantly, it should be set out that disclosure may not be made to a TCP or other persons authorized to transact business on the account if the representative or other qualified individual suspects the third party of financial exploitation, or undue influence.

- **Notification of Delaying a Disbursement or Trade** - In addition, the firm should be required to promptly notify the securities commission and, IIROC or the MFDA (as applicable), of the hold. This will allow the regulator to assess the situation and determine whether additional resources should be brought to bear. In addition, notification should promptly occur to other relevant organizations such as provincial offices of the guardian and trustee and police.

- **Expiry:** The rule should specify the period within which a hold will expire, unless extended by the firm, a securities regulator, or other authority such as the police, the PGT or a court. FINRA Rule 2165 provides that a hold expires within 15 business days from the date that the hold is placed, unless previously terminated or extended by a state regulator or agency or a court. It also permits the hold to be extended by the firm for an additional 10 business days if the firm's internal review bears out the conclusion that financial exploitation is or may be occurring. The NASAA Model Act provides for 15 days unless Adult Protective Services or the commissioner of securities requests that it be extended, in which case it shall expire no more than 25 days after the first delayed disbursement occurred unless sooner terminated by Adult Protective Services of the securities commissioner or a court. In Canada we have been advised that the 15 day time period is not sufficient as this does not provide a long enough time period to obtain a court order to extend the time further and in most jurisdictions, the PGT does not have the purview to become involved. It is recommended, therefore, that the initial freeze period be 25 days unless the securities commission or PGT or a court sooner terminates the hold. This will hopefully permit enough time to continue the internal review and allow any interested party, the firm, PGT, or securities commission to seek the assistance of a court in order to further extend the time or seek other protective relief.

- **External processes:** Firms should be required to develop policies and procedures consistent with the regulatory required conduct protocol for the steps they will take if their internal review bears out a finding of financial exploitation, undue influence or diminished mental capacity of a client. Such policies and procedures should include steps for reporting to police, securities commissioner, and/or provincial/ territorial PGT, as appropriate, and meeting with the client, and/or notifying the TCP and those authorized to transact on the account (if a hold is placed). It is recommended that firms be required to notify the relevant securities commission of suspected financial exploitation regardless of whether a temporary hold is placed or not. In addition, notification should be made to the appropriate provincial agencies.

- **Recordkeeping:** A firm should be required to keep records of all pertinent information relating to the hold, including the circumstances surrounding the request for disbursement, any prior conversations with the client or TCP, the date and details of the hold, notifications to external parties, the findings of the internal review, and any internal and external escalation processes, and the outcome of the temporary holds they place.

- **Permissive:** Firms should not be required to place a hold on trades and disbursements, or other account activity. This recommendation is consistent with FINRA Rule 2165 and the NASAA Model Rule. We believe that, on balance, clients are better protected if there is discretion regarding freezing of an account.

3. Implement a Legal Safe Harbour

Recommendation: Regulators should implement a legal safe harbour that shields firms and their representatives from regulatory liability if they act in good faith and exercise reasonable care in making a disclosure about a client to his or her designated TCP or specified government agency or securities commission or other designated reporting body. In addition, a regulatory legal safe harbor should be extended to the firm and their representatives for placing a temporary hold on disbursements or trades from the account of a vulnerable client, provided the firm and its representatives act in accordance with the regulatory requirements (which are discussed in this report) including the applicable provisions of a regulator-approved conduct protocol.

Canadian governments at provincial and federal levels should undertake legislative law reform to provide for a legal safe harbour from civil liability where the regulatory requirements are met including reform of the PIPEDA legislation. While beyond the scope of this project, it is also strongly recommended that the PIPEDA sections dealing with 'financial abuse' intervention undergo separate law reform to provide clarity of language and terminology, and to ensure that the responders indicated in the PIPEDA section match up with provincial responses and legal terminology.

In the meantime, courts should give administrative deference to the securities regulatory regime when determining whether there is any civil liability (including breach of privacy laws) resulting from placing a temporary hold on trades or disbursements or disclosures to third parties as set out above, to the firm and/or its representatives in accordance with the framework and requirements set out in the report.

Firms and their representatives should be protected from claims of breach of privacy or other breaches of obligations that might otherwise arise from a disclosure to the TCP or a securities regulator or other authority (government agency or police) if they act in good faith and exercise reasonable care in making such disclosure or in respect of notifications as a result of holds on disbursements or trades.

In order to obtain the benefits of a safe habour, the firm and its representatives must have acted with reasonable care and in accordance with:

a) the regulatory requirements established by the securities commissions;

b) the applicable provisions of an accepted conduct protocol by the securities commissions; and

c) investment firms must have undertaken appropriate education and training of all staff, representatives and qualified individuals on elder abuse, financial exploitation of vulnerable investors, undue influence and diminished mental capacity issues.

Discussion: Stakeholders agreed that the lack of clarity about the legal ramifications of taking protective action is a profound and significant deterrent to firms taking supportive and protective steps to help vulnerable investors. Stakeholders unanimously (save for one stakeholder who thought the safe harbor should only be regulatory) agreed that a legal safe harbour provision, which shields firms and representatives from both regulatory and civil liability for acting in good faith to protect a vulnerable investor, is absolutely critical.

The U.S. Rules all include legal safe harbour provisions, although they vary in scope and terms. Canadian securities regulators are encouraged to take a purposive approach to a legal safe harbour: if the goal is to encourage firms and representatives to take good faith supportive and protective action, the shield should provide immunity from both regulatory and civil lawsuits, and it should protect firms both for placing freezes on funds, as well as for reporting concerns about elder abuse, financial exploitation, undue influence, and diminished capacity to TCPs and specified government agencies, police and securities regulatory authorities.

The rules recommended in this report may empower investment firms and representatives to override the autonomy and privacy of their clients, which is a profound and serious step. As such, it is imperative that the investment firms and representatives take supportive and protective action judiciously and with all reasonable care. As stressed elsewhere in this report, there was consensus amongst all stakeholders, both industry and community based, that the combination of a) mandatory education and training on the issues with the content of such education and competency based training being set by the regulators, b) clear requirements, and c) an accepted regulatory required conduct protocol are the best ways to ensure representatives do not unjustifiably curtail their clients' freedom and autonomy.

The availability of the legal safe harbour "defence" should be conditional on firms and representatives fulfilling their education and training obligations, and acting in accordance with the regulatory requirements, including the conduct protocol, as this creates an incentive for them to comply. It is noted that this "conditional" approach is consistent with the legal safe harbours contained in the U.S. Rules.

Key Features of a Legal Safe Harbour:

- **Scope of protected action:** The legal safe harbour provision should shield investment firms and their representatives from liability for providing necessary disclosure about a client to the person's designated TCP (so long as disclosure was reasonable and in good faith) or specified government agencies, or for placing a temporary hold on trades and disbursements from the account of a vulnerable client. A provision that covered all three of these activities would most closely track the NASAA Model Act, which grants immunity for reporting to "Adult Protective Services and the commissioner of securities;"[142] notifying any "third party previously

[142] NASAA Model Act, s 4.

designated by the eligible adult;"[143] or delaying disbursements as authorized by the act.[144] By comparison, FINRA Rule 2165's safe harbour only shields firms and representatives for temporary holds on disbursements. FINRA expressly rejected calls from commentators to extend the scope of protected action to apply to notifications regarding financial exploitation or diminished capacity.[145] The Seniors Safe Act only shields firms and representatives for "disclosing the possible exploitation of a senior citizen to a covered agency."

- **Specified government agencies:** It is recommended that defining the government agencies to which disclosure and/or reports is required to be made, in a manner similar to the "covered agency" approach used in the Seniors Safe Act. That act lists specific US agencies to which reports are made, including financial regulatory agencies, federal financial institutions regulatory agencies, the SEC, law enforcement agencies, local or state adult protective services agencies, and state attorney generals. In Canada, that list could include the following: securities regulatory agencies (including the MFDA, IIROC, La Chambre de la sécuritié financière, designated responders to elder abuse and neglect, undue influence and/or mental capacity issues (different in each province / territory), Canadian Anti-Fraud Agency, the police, Financial Consumer Agency of Canada (in limited circumstances where the funds may be routed through a banking account), and Public Guardians and Trustees.

- **Mandatory Reporting:** that mandatory reporting to securities regulatory authorities should be made in all instances as they can be a hub or triage focal point to ensure that appropriate resources are marshaled to protect victims of financial elder abuse or to help address cognitive decline. As time is of the essence when financial exploitation occurs, the ability of a securities regulator to assess and determine whether additional resources should be utilized is necessary if vulnerable investors are to be meaningfully protected. Such reporting will also balance the authority to combat financial exploitation with the rights of the investors to their property. Finally, such reporting will allow for data to be collected on the instance and prevalence of these issues. Such reporting is required in the NASAA Model Act and was not mandated by FINRA, but is required by many state laws.

- **Scope of immunity:** If the purpose of a legal safe harbour is to encourage firms and representatives to take supportive and protective action by removing the fear of liability, the provision should shield firms and representatives from both civil and regulatory liability, as described above. This is similar to the NASAA Model Act. By comparison, FINRA Rule 2165 only provides immunity from three regulatory

[143] NASAA Model Act, s 6.

[144] NASAA Model Act, s 8.

[145] FINRA noted that states "may separately provide immunity to members under state law." It also acknowledged that a shield for taking protective action in cases of diminished capacity was a matter that required further consideration.

provisions: FINRA Rules 2010 (Standards of Commercial Honour and Principles of Trade), 2150 (Improper Use of Customers' Securities or Funds; Prohibition Against Guarantees and Sharing in Accounts) and 11870 (Customer Account Transfer Contracts). FINRA explicitly rejected calls to extend the scope of the immunity to civil actions, which is consistent with the more litigious character of the US.

- **Conditions for reliance on a legal safe harbour:** For a firm or advisor to enjoy the protection of the legal safe harbour, they should be required to have acted in accordance with:

a) the regulatory requirements established by the securities commissions;

b)the applicable provisions of a conduct protocol required by securities commissions; and

c) investment firms must have undertaken competency-based education and training of all staff, representatives and qualified individuals on elder financial abuse, financial exploitation of vulnerable investors, undue influence and diminished mental capacity issues. Securities regulators should determine the content of the education and training so as to ensure high standards and consistency. Delivery of the training could be provided by authorized external third parties.

While FINRA Rule 2165 and the Seniors Safe Act do not use the language of a "conduct protocol", their safe harbour provisions are also contingent on firms and representatives satisfying various training, supervision and record retention requirements. The NASAA Model Act, by comparison, only requires individuals to act in "good faith and exercise reasonable care," and, in the case of delayed disbursements, in accordance with the authorizing provision. Stakeholders agreed that mandatory training and education were essential to addressing the issue of financial exploitation, undue influence and mental incapacity, as was a conduct protocol and welcomed these proposals.

- **Consistency across Canada:** securities regulators across the country should ideally come to unified standards and a single conduct protocol.

4. Implement a Conduct Protocol

Recommendation: Canadian securities regulators should create a 'Conduct Protocol' that defines key terms and sets out the steps that firms and representatives should take to identify and protect vulnerable clients.

Discussion: In the consultation document, stakeholders were presented with a series of case studies describing hypothetical situations of elder abuse, financial exploitation, undue influence, and diminished mental capacity, as well as one hypothetical of a "hard to reach" client on an off-grid vacation with no enduring POA.

Overwhelmingly, financial industry stakeholders said they were familiar with these situations; the majority of them expressed that they had personally experienced these types of scenarios in their work. However, most investment industry stakeholders acknowledged their firms did not have procedures for identifying and responding to elder abuse, financial exploitation, undue influence, or loss of mental capacity and instead tended to approach these situations on an ad hoc basis.[146] In particular, investment industry stakeholders noted there was a lack of clarity around when and to whom to report concerns about elder abuse or financial exploitation.

A securities regulatory conduct protocol would help to ensure vulnerable investors were consistently identified, and supportive and protective action taken where appropriate.

Key features of a conduct protocol are discussed below, and draw from the NASAA Guide for Broker-Dealers and Investment Representatives, the CFPB Advisory for Financial Institutions, the U.S. Rules, and other leading industry precedents.

Investment firms and representatives which follow the conduct protocol and invest in staff skill-building and education will be well equipped to exercise informed discretion in contacting TCPs, placing temporary holds on accounts, and reporting to authorities.

Finally, we note that the conduct protocol is meant to be a regulatory document for the entire industry. Part of the conduct protocol's requirements would be that industry firms develop their own internal firm-specific policies and procedures to address the required components.

Key Features:

- **Key terms:** The protocol should define key terms, including but not limited to: "elder abuse"; "elder financial abuse"; "vulnerable investor"; "undue influence"; "financial exploitation," and "diminished mental capacity". Where appropriate, it should outline the steps for determining whether a client falls within the meaning of a defined term.

- **Vulnerable client:** It is recommended that the term "vulnerable client" not be defined by age. Rather, it should follow Quebec's lead in combating maltreatment of older adults and persons with diminished capacity as a "person in a vulnerable situation" and includes the concept that their ability to request or obtain assistance is temporarily or permanently limited because of factors such as a physical, cognitive or psychological limitation, illness, injury or handicap. It should also highlight that older adults are often made socially vulnerable due to ageism, or other factors. In this way, the issue of older investors will be drawn to the fore, without supporting the myth that all old people are vulnerable and in need of protection. This type of definition also allows for an expansive understanding of a "vulnerable investor", who may be a younger person and subject to financial exploitation, undue influence or diminished mental capacity.

  This approach is also in accord with other international regulators, many of whom have chosen to not place age parameters around vulnerability. The UK FCA Handbook, for example, defines a "vulnerable consumer" as someone who, due to

[146] Notably, while not directly engaged in the securities sector, VanCity Credit Union has a robust and impressive system in place including internal experts, "red flags", policies and procedures and has undertaken their own unique research in the area.

their personal circumstances, is susceptible to detriment, particularly when a firm is not acting with appropriate levels of care.

This is a departure from the US model, which, in part, is age-based, such as FINRA's definition of a "specified adult" which is defined as a: (i) a natural person age 65 and older; or (ii) a natural person age 18 and older who the member reasonably believes has a mental or physical impairment that renders the individual unable to protect his or her own interests." NASAA's Model Act is limited to those persons 65 years or older or a person subject to the applicable state Adult Protective Services statute. The US has many state-specific statues as well as a federal Older Americans Act which enshrines age 65 in legislation. It would be a departure, and perhaps a more difficult law reform synergy for the US FINRA model not to reflect governing state and federal legislation. Canada does not have this challenge.

- **Undue influence:** It is recommended that the definition be generally adopted from the authoritative BC Law Institute Report on Undue Influence, to the following definition: "…imposing pressure that causes a person to perform some legal act that does not reflect the true wishes or intentions of that person, but rather those of the influencer. Undue influence goes beyond mere persuasion. It is the imposition of the influencer's wishes on another person, such that the other person is not acting freely in performing the act that the influencer desires. Direct or immediate benefit to the influencer is not essential. It is sufficient if the pressure imposed results in the act desired by the influencer being carried out".[147]

- **Financial exploitation:** It is recommended to adopt a broad definition of financial exploitation, such as the one used in FINRA Rule 2165, which defines "financial exploitation" as: (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 of 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.

- **Mental Capacity or Diminished Mental Capacity:** as different legislation across the country uses somewhat different language to describe mental capacity and the ability to make one's own decisions, it is recommended that mental capacity be simply defined as the ability to understand and appreciate the decision and implication of the decision at hand. Capacity must be clearly defined as decisional by asking, is the adult "capable of what"?

Specifically, a capable adult must be able to:

- Understand the information relevant to the decision;

[147] Recommended Practices for Wills Practitioners Relating to Potential Undue Influence: A Guide, (October 2011), BCLI Report No.61, at 5,online at: http://www.bcli.org/sites/default/files/undue%20influence_guide_final_cip.pdf.

- Retain that information;
- Use or weigh that information in a decision-making process; and
- Communicate a decision.

Where there is impairment of these factors, the adult may be said to have some diminished capacity or some loss of mental capacity. Using phrases such as “lost capacity” or “incompetent” should be avoided, both for being outdated terminology, but also for the predominately incorrect inference that capacity is like an “on / off” binary switch.[148] Capacity is a continuum and should be referred to in conditional terms.

- **Warning signs:** The conduct protocol should outline some of the common markers of undue influence, financial exploitation, and diminished capacity.

- **TCP communications:** The conduct protocol could include a non-exhaustive list of scenarios in which a representative might use a TCP as a resource to support and protect the client and their assets. For example, if a representative observes markedly different behaviours, including the desire to send large amounts of money to previously unknown parties in another country by wire-transfer, and cannot be supported against this abuse in any other direct way, then the representative may contact the TCP to flag the risks and encourage the TCP to assist the client, if possible. Or if a representative observed signs that a caretaker was exerting significant undue influence over a client’s financial decisions, and that the client also looked frightened of the caretaker, then the representative might contact the TCP to flag his or her concerns, amongst other possible steps taken.

- **Temporary holds:** The conduct protocol should include that firms should develop policies and procedures for placing temporary holds on the investment accounts, other than modest routine monies flowing through to support common living expenses etc. This should include procedures for the internal review process, notifications, and reporting externally.
- **Reporting to government and/or social service response agencies:** The protocol should identify situations where reporting to government or other social service response agencies is *required* and where it is *encouraged*. This might include cases of financial exploitation that are clearly illegal, or situations where a provincial public guardian should be notified. The protocol should reiterate the need to also separately notify the securities regulatory authorities.
- **Internal Reviews**: The conduct protocol should provide information on expectations as to what firms should be doing with respect to their internal reviews when financial exploitation, undue influence or loss of mental capacity is suspected.

[148] The often-cited example for when capacity can be understood as binary is when the adult is in a coma. Other than that, a person retains some mental capacities. The question is, at the specific time, is the adult able to understand and appreciate the decision and its consequences?

5. Need for Mandatory Education and Training.

Recommendation: Firms should be required to ensure that their representatives and staff have competency-based training in the areas of elder abuse, undue influence, mental capacity issues, enduring powers of attorney and ageism and have the required proficiencies. We recommend that securities regulators take the lead in establishing the content and competencies required of representatives and legal and compliance personnel at investment firms in the areas relevant to vulnerable investors who may be subject to elder abuse, undue influence, mental capacity issues, powers of attorney and ageism. The securities regulators should provide a gatekeeper role of ensuring that minimum proficiency in this area is set and met.

Discussion:

- **Training:** Firms should be required to train staff on recognizing and responding appropriately to vulnerable or potentially vulnerable clients. Securities regulators should establish core competencies and create training standards and materials. Securities regulators should be central to the creation, and have oversight over, the delivery of the core education and skills-based training. Training standards should be similar to those specified in the *Seniors Safe Act*, which provides that an investment firm's training must include:
  a) instruction on how individuals can identify and report suspected elder abuse and exploitation;
  b) discuss the need to protect the privacy and respect the integrity and self-determination of each client;
  c) be appropriate to the job responsibilities of the individual attending the training; and
  d) be provided as soon as reasonably practicable, but competencies should be completed not later than one year from when the employee begins employment.

- **Client discussions:** Representatives who notice signs of elder abuse, financial exploitation, undue influence or diminished mental capacity should be encouraged to have conversations with their clients about the preventative measures that might be taken to mitigate the risks. Having such conversations requires specific competencies, and education and training is required to engage appropriately.

  In a situation of early suspected diminishing capacity, a representative might encourage the client to consider if they have an up-to-date and appropriate enduring POA and remind them that having prepared a will does not assist or apply to cases of incapacity. In addition, basic information about the provincial system of substitute decision-making could be provided.

  Should the client wish to be referred to internal resources such as brochures or other knowledge mobilization tools, the investment firm and representative should have appropriate materials available, or be able to direct them to such resources externally.

While a representative always has a duty to meet their client alone, in a situation of suspected undue influence, a representative might want to spend extra time and have a conversation with the client on his or her own, to discuss the nature of the relationship with the suspected influencer and the risks of undue influence, if appropriate and safe. Representatives should be encouraged to keep fulsome notes of their conversations on file and have some standardized guidance around questioning, so that they can track changes over time. This type of process would be consistent with the representative fulfilling its KYC obligations.

- **Recordkeeping Requirements and Training:** Representatives should be encouraged to maintain diligent records of clients who exhibit signs of diminishing capacity or autonomy. Firms should also be required to maintain records of their internal review and reporting processes in situations of financial exploitation. Training should be provided on how to record these concerns appropriately.

6. Firms Need to Become Familiar with Outside Resources and Responders:

Recommendations: Firms will need to be provided with the education and training to learn how and when to appropriately refer a case of suspected elder financial abuse, undue influence or diminished mental capacity to local responders. As there is no single place for reporting these issues in Canada, firms will need to learn the provincial or territorial responders in each area, and make that information widely available to staff.[149]

[149] Please see the Legal Safe Harbour recommendation #3 for a discussion of recommending mandatory reporting to securities regulatory authorities, above at 69.

8. FINAL OBSERVATIONS

This project was established to consider recommendations on specific measures that regulators could implement to protect vulnerable investors in the financial industry. We recognize the limits of this mandate. However, we would be remiss to not highlight the broader observations that came out of our research and consultations. In this section, we make some society-wide and financial sector-specific recommendations for reforms and initiatives that would significantly enhance the protection of older adults in this country.

8.1 *Is it Time for Some Form of Canadian Adult Protective Agency?*

Stakeholders consistently, and without exception, identified the lack of an adult protective agency as the key factor handicapping Canada's efforts to protect vulnerable investors specifically, and vulnerable adults generally. The absence of an agency like the American APS, coupled with the lack of clarity around reporting obligations, has implications for the supportive and protective measures recommended in this report. Without a dedicated agency to receive reports about issues facing vulnerable adults, many of whom would be seniors, representatives may see little utility in placing holds on disbursements or taking other protective action. While the police and public guardians may be able to address certain forms of financial exploitation or elder abuse, they often lack the expertise, resources, and/or mandate to respond to complex sociological phenomena like diminished capacity and undue influence.

Elder abuse, undue influence and diminished mental capacity are broad social issues which affect many individuals across many sectors. If Canada's goal is to ensure vulnerable adults are adequately supported - or if needed, protected - then Canadians of various walks of life (including older adults, their family members, caretakers, and service-providers) may need a specific, funded, public agency or resource that they can turn to.

There have been concerns voiced for decades now that an Adult Protective Services organization would trample the rights of older adults or adults with disabilities. However, the modernization of laws to require the most effective and least intrusive interventions, the increased understanding of the importance for autonomy and self-determination, the establishment and ratification of the UN Convention on the Rights of Persons with Disabilities and the pressing unmet societal needs may make the time right to map out what a Canadian Adult Protective Agency might look like or how it might function.

In this regard, the U.S. has launched numerous initiatives Canada could consider emulating, including mostly broadly, the National APS system. But more narrowly, and targeted to the investment sector, it might also be beneficial to consider Canadian versions of the *HELPS hotline*, *ServeOurseniors.org*, and *FinCEN/CFPB's Money Smart for Older Adults Resource Guide*.

Canada would not necessarily have to start from scratch creating similar resources here. The Canadian Anti-Fraud Centre, for example, already collects information on matters such as mass marketing fraud, internet fraud, or identification theft. The Centre could be built out to respond to financial exploitation reports. In Ontario, 211 is a 24-7 helpline that connects Ontarians to the community or social services they require. A national or provincial hotline could be developed in the same vein as 211, which would triage senior-specific calls to the appropriate protective agency, health provider, enforcement agency, public guardian, or securities commission. In the meantime, we recommend firms and representatives become mandatory reporters to securities regulatory authorities, on the terms discussed earlier in the report. In addition, securities commissioners, IIROC and the MFDA might want to establish a call line (to which they all subscribe) to field calls from representatives and clients about vulnerable investor concerns.

8.2. *Comprehensive Seniors Strategy*

An aging population creates challenges that affect all sectors of society. These challenges are not specific to any one industry, and should not be addressed by regulators in silos. Rather, as an Alzheimer Society's report recognized: "Inadequate or patchy inter-sector work makes it harder to robustly protect people's rights."[150] A CFPB report similar observes: "Experts and professionals in the field agree that increased multidisciplinary community collaboration and interagency cooperation is vital to addressing the problem of elder abuse, especially financial exploitation."[151]

The U.S., and more recently, the U.K., Australia, New Brunswick and Quebec are developing comprehensive aging strategies that look at how aging affects all areas of society, and bring together governmental and non-governmental actors across many sectors.

Of note, the Ontario Securities Commission has created a unique Seniors Expert Advisory Committee and is moving towards the creation of an OSC Seniors Strategy. These efforts are both commendable.

Our stakeholders uniformly agreed on the need for Canada's federal, provincial and municipal governments to develop a national comprehensive aging strategy that emulates the approaches of these other jurisdictions. We agree with that critically important recommendation.

8.3. *Education and Competency-based Training on Key Issues*

We recognize that it can be difficult to determine whether a person is suffering from elder abuse, undue influence, or diminished mental capacity. Often a determination usually comes down to a professional exercise in judgment, hopefully backed by evidence-based tools, and where error is a possibility.

As we have noted throughout this report, education and training are critical in equipping firms and their representatives to make those informed professional judgment calls. Government and an array of customer-oriented organizations (both within and outside of the financial industry) have a responsibility to ensure front-line staff receives the training they require to

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[150] Alzheimer's Society, "Short Changed: protecting people with dementia from financial abuse", 2011, at 47, online at https://www.alzheimers.org.uk/download/downloads/id/1296/short_changed_-_protecting_people_with_dementia_from_financial_abuse.pdf.

[151] CFPB, "Report and Recommendations: Fighting Elder Financial Exploitation through Community Networks", Office for Older Americans, at 13, online at: http://files.consumerfinance.gov/f/documents/082016_cfpb_Networks_Study_Report.pdf.

properly identify vulnerability. To quote the OSC's Investor Advisory Panel: "Any protocol developed must be supported by adequate training by client-facing staff at investment firms. Staff must also be trained in dealing with specific scenarios that could arise." These observations hold true not simply for organizations in the financial industry, but for most Canadian organizations.

8.4 Privacy legislation

In Section 5 of this report, we discussed how Canada's privacy legislation fails to encourage elder abuse reporting, notwithstanding the recent amendments made to PIPEDA for this purpose. Currently, there is an unfortunate lack of clarity around who is covered by PIPEDA's reporting exceptions, and what constitutes financial exploitation. Barring additional amendments to PIPEDA to address these shortcomings, we recommend that the Office of the Privacy Commissioner issue guidance clarifying the scope and use of the existing PIPEDA exceptions, similar to the U.S. Interagency Guidance issued in 2013.

8.5 Non-advisory Delivery Channels

Many of the recommendations discussed in this report assume clients are being served under a full-service advisory model, where representatives meet with clients in person to provide their services. We recognize, though, that many investors already invest in—or are increasingly turning to—lower-cost, self-directed investment channels, such as discount brokerages or order execution only brokers (OEO) and robo-advisors.

Discount brokerages like Virtual Brokers, Questrade, or TD Direct Investing, allow clients to trade on their own accounts and are not permitted to provide recommendations to clients based on what is "suitable". Typically, therefore, transactions occur online with little or no interaction with a live representative (some executions may still occur by phone but this has declined greatly (currently about 5%)). These brokerages may offer some services (such as some physical branches with staff who are available to provide limited assistance), but do not and are not permitted to provide specific recommendations to clients.

Many discount brokerages are affiliated with large financial institutions and have in-person contact with the client through their bank affiliate. Accordingly, it is possible to become aware of cognitive decline or suspect financial abuse through bank staffs' dealings with the older client. In such situations, account agreements which allow for staff of different affiliates to speak to each other in order to "manage risks" could be utilized to alert the discount brokerage of suspected undue influence or elder financial abuse. A "red flag" could be placed on the discount brokerage account of the client and procedures escalated to work with the affiliate bank to protect the client's assets.

Robo-advisors like Nest Wealth and Wealthsimple are portfolio managers that charge clients fees in exchange for an algorithm-guided investment portfolio. A client is placed in an appropriate portfolio based on their filling out a KYC questionnaire on-line. With some robo-advisors, a phone call to the client is still required to complete the process. With others, exemptive relief has been obtained to skip this step except in specific circumstances.[152] Clients are able to call, text or email these firms, but do not meet directly with advisers nor do clients initiate trades as the accounts are discretionarily managed – that is, the client doesn't initiate trades, rather the firm does based on the algorithm. If an individual wishes to withdraw a significant amount of funds, the robo-advisor will ask the client to explain why but will not interfere with the withdrawal.

Discount brokerages, and robo-advisors, therefore, have limited contact with clients; and place few, if any, limits on disbursements.

In the robo-advice and discount brokerage channels, there is simply vastly less personal interaction with the client and therefore less ability for representatives to suspect issues like diminished capacity, undue influence, or financial exploitation. On the other hand, given that clients do not initiate trades at robo-advisors, there is less risk form making risky trades due to loss of mental capacity or undue influence.

Technology is likely the best way to monitor financially exploitative conduct in this context or to provide a means to prevent the draining of an investment account.

Supervised machine learning could be used to detect unusual trading activity or other abnormal account activity. It has come to our attention that inactivity on a discount brokerage account may get flagged as an inactive account. Through the use of technology as to a person's normal trading patterns, a lack of trading would not be flagged as unusual since a buy and hold investor would do just that. Little trading would be that client's "normal" level of trading patterns. Through use of supervised machine learning, only abnormal activity would be red flagged.

There was some support among some stakeholders for using technology for this purpose, if all firms were required to invest in a similar manner such there is a level playing field. Mandatory requirements would likely be necessary as stakeholders acknowledged that their firms would be unlikely to invest in the technology required to monitor for potential financial exploitation unless they were mandated to do so.

Given technological capabilities it is possible the following could be utilized:

- Discount brokerages - unusual trades (wildly different transactions that are well outside the normal type of trade by the investor) could be red flagged in the same manner as a credit card purchase outside the norm for a customer is flagged and halted.
- Anti-fraud measures currently being utilized to comply with anti-money laundering requirements could be adapted to help prevent financial exploitation.
- If there is unusual trading activity on an account and it is suspected that someone other than the client or someone authorized to trade on behalf

[152] Such as if the client is over 71, the time horizon of the client is less than 3 years or the client has a negative net worth or household income of less than $25,000.

of the client, has taken over the account, then holds on funds or other steps consistent with AML could be utilized.

It is recommended that further consultation be undertaken with these channels and further consideration given as to how to best address vulnerability, including elder financial abuse and loss of mental capacity.

8.6. *Best Interest Standard*

In recent years, securities regulators have been considering whether to introduce a "best interest" standard for representatives. As the CSA noted in a recent staff notice, the CSA is interested in "strengthen(ing) the standard of conduct and mak(ing) the client-registrant relationship more centered on the interests of the client." [153] While some provincial securities commissioners have rejected calls for a best interest standard, the Ontario Securities Commission and New Brunswick Financial and Consumer Services Commission are carrying out further consultations on a best interest standard, and have indicated their intention to move ahead with one.[154] We echo the OSC Investor Advisory Panel in noting that the recommendations for protective action included in this report "must also be consistent with a best interest regime as it evolves." We encourage regulators to think about how the best interest standard could be used to benefit and protect vulnerable investors.

[153] CSA Staff Notice 33-319,May 11, 2017.

[154] *Ibid*.

9. CONCLUSIONS

This report has focused on ways in which the financial industry can help support and protect vulnerable investors.

We encourage governments, securities regulators, policy-makers and stakeholders to give serious consideration to the six key recommendations made in this report:

1. **Trusted Contact Person** – reasonable efforts to obtain this for client accounts.

2. **Temporary Delay on Trades and Disbursements** - in order to address suspected elder abuse, undue influence and diminished mental capacity and protect clients from loss of funds.

3. **Legal Safe Harbour** – from regulatory and civil liability in respect of (i) the disclosure to a TCP or (ii) the delay in the disbursement of funds or execution of a trade.

4. **Conduct Protocol** – to provide the necessary steps to firms and their representatives.

5. **Required Education and Training** - to be able to address these issues in a capable and responsible manner.

6. **Investment Firms: Resources and Responses** - to become familiar with outside resources and responders, and to become mandatory reporters to the securities regulatory authorities.

We consistently underscore the importance of older adults and where possible vulnerable adults (for instance persons who may have a developmental disability who need help to understand and appreciate financial decisions) to be supported and empowered for their own personal and financial self-determination. Equipping all clients, but especially older adults, to independently plan for situations of diminished capacity or dependence supports autonomy and dignity, while helping to avoid later situations of vulnerability where possible.

Regulators and members of the financial industry are urged to consider how they can help older adults to plan for contingencies such as diminished mental capacity or the need for some form of support.

There are significant opportunities for investment firms and representatives to support client education on the use and misuse of POAs in particular. As the Alzheimer's Society report noted: enduring powers of attorney, "when properly operated, effectively protect people from abuse." Unfortunately, evidence is clear that POAs can and are often used for harm. However, conversations, which lead to appropriate preparation for attorneys make transitions much easier for all around. Enduring POAs could be helpful for a larger number of people, and are used more safely by attorneys who understand their role and obligations.

While a majority of people with dementia surveyed in the above Alzheimer Society's report said it was important to make plans for their finances, only a minority seemed aware of how to go about this. People frequently found guidance on powers of attorney lengthy, complicated and written "by professionals for professionals." This was supported in the consultation by a comment from a stakeholder from a retirement home noting: “There’s a vacuum of knowing what to do by holders of powers of attorneys.”

We encourage regulators and firms to promote greater understanding (by both donors and attorneys) of how to create and use POAs. Representatives should assist clients in creating them (particularly in cases where diminishing capacity is a concern), and should eliminate barriers to valid POAs being recognized and used within their firms. Firms should also create policies for recognizing POAs’ validity and identifying risks around their improper use or abuse.

At a broader level, governments, regulators and investment industry stakeholders should publish evidenced-based consumer-friendly information in formats which are easily accessible and usable. In particular, we recommend that governments, regulators and investment industry stakeholders strategically engage with the National Initiative for Care of the Elderly (NICE Network), the National Centre of Excellence on Knowledge Translation and Mobilization on Aging to leverage their expert, accessible and evidenced based tools, and/or consider creating new specific education or response tools. With more than 4000 members and 2 million of their evidence-based tools on more than 200 topics distributed across the Canada, and with specific expertise in elder financial literacy and abuse response and prevention, NICE is uniquely well placed to provide both targeted information, but also the needed distribution network, to reach consumers and their personal or professional supporters.

Canadians of various walks of life (including older adults, their family members, caretakers, and service-providers) have consistently identified the need to have a public agency or resource that they can turn to for older-specific information and advice, such as a call line, chat line or in person service. Websites were considered only moderately helpful but could have features added to allow for more in-person engagement. The Canadian Anti-Fraud Centre, for example, already collects information on matters such as mass marketing fraud, internet fraud, or identification theft. The Centre could be built out to respond to financial exploitation reports. In Ontario and across many other provinces, 211 is a 24-7 helpline that connects people to the community or social services they require. Alternatively, a national or provincial hotline could be developed in the same vein as 211, which triages senior-specific calls to the appropriate protective agency, health provider, enforcement agency, public guardian, or securities commission.

As discussed above in Section 4.8, different jurisdictions in Canada are trying to address the challenges of elder abuse and reporting.

Jurisdictions that are developing and implementing strategies on ways to take supportive and protective action for older adults – the U.S., the U.K., Australia, New Brunswick and Quebec—tend to be developing comprehensive aging strategies that look at how aging affects all areas of society, and brings together governmental and non-governmental actors across many sectors. We support this collaborative approach and we encourage Canada’s federal, provincial and municipal governments to develop a national comprehensive Seniors’ Strategy that emulates the approaches of those jurisdictions.

The investment community can play a key part in supporting and where needed protecting vulnerable adults, including seniors.

APPENDIX A

Regulatory Notice 17-11

March 2017

Notice Type

- Rule Amendment and New Rule

Suggested Routing

- Compliance
- Legal
- Operations
- Registered Representatives
- Senior Management

Key Topics

- Customer Accounts
- Financial Exploitation
- Senior Investors
- Temporary Holds on Disbursements
- Trusted Contact Persons

Referenced Rules

- FINRA Rule 2010
- FINRA Rule 2140
- FINRA Rule 2150
- FINRA Rule 2165
- FINRA Rule 3310
- FINRA Rule 4512
- FINRA Rule 11870
- Regulation S-P
- SEA Rule 17a-3

Financial Exploitation of Seniors

SEC Approves Rules Relating to Financial Exploitation of Seniors

Effective Date: February 5, 2018

Summary

The SEC approved: (1) the adoption of new FINRA Rule 2165 (Financial Exploitation of Specified Adults) to permit members to place temporary holds on disbursements of funds or securities from the accounts of specified customers where there is a reasonable belief of financial exploitation of these customers; and (2) amendments to FINRA Rule 4512 (Customer Account Information) to require members to make reasonable efforts to obtain the name of and contact information for a trusted contact person for a customer's account.[1] New Rule 2165 and the amendments to Rule 4512 become effective February 5, 2018.

The rule text is available in Attachment A.

Questions regarding this *Notice* should be directed to:

- James S. Wrona, Vice President and Associate General Counsel, Office of General Counsel (OGC), at (202) 728-8270 or *jim.wrona@finra.org*; or
- Jeanette Wingler, Associate General Counsel, OGC, at (202) 728-8013 or *jeanette.wingler@finra.org*.

Background and Discussion

With the aging of the U.S. population, financial exploitation of seniors is a serious and growing problem.[2] FINRA's Securities Helpline for Seniors® has highlighted issues relating to financial exploitation of this group of investors, including the need for members to be able to more quickly and effectively address suspected financial exploitation of seniors and other specified adults.[3] The amendments to Rule 4512 and new Rule 2165 provide members with a way under FINRA rules to respond to situations in which they have a reasonable basis to believe that financial exploitation has occurred, is occurring, has been attempted or will be attempted. Members can better protect their customers from financial exploitation if they have the ability to contact a customer's designated trusted contact person and, when appropriate, place a temporary hold on a disbursement of funds or securities from a customer's account.

FINRA

Financial Industry Regulatory Authority

1

Scope of Amendments and New Rule

Trusted Contact Person—Amendments to Rule 4512

The amendments to Rule 4512 require members to make reasonable efforts to obtain the name of and contact information[4] for a trusted contact person[5] upon the opening of a non-institutional customer's account or when updating account information for a non-institutional account in existence prior to the effective date of the amendments (existing account).[6] The amendments do not prohibit members from opening and maintaining an account if a customer fails to identify a trusted contact person as long as the member makes reasonable efforts to obtain the information.[7] Asking a customer to provide the name and contact information for a trusted contact person ordinarily would constitute reasonable efforts to obtain the information and would satisfy the rule's requirements.

The amendments also require that, at the time of account opening, a member disclose in writing (which may be electronic) to the customer that the member or an associated person is authorized to contact the trusted contact person and disclose information about the customer's account to address possible financial exploitation, to confirm the specifics of the customer's current contact information, health status, or the identity of any legal guardian, executor, trustee or holder of a power of attorney, or as otherwise permitted by Rule 2165.[8] In addition, a member is required to provide this disclosure when it attempts to obtain the name of and contact information for a trusted contact person when updating information for currently existing accounts either in the course of the member's routine and customary business or as otherwise required by applicable laws or rules.[9] Members are required to provide this disclosure even if a customer fails to identify a trusted contact.[10]

The trusted contact person is intended to be a resource for the member in administering the customer's account, protecting assets and responding to possible financial exploitation. A member may use its discretion in relying on any information provided by the trusted contact person. A member may elect to notify an individual that he or she was named as a trusted contact person; however, the rule does not require such notification.

Members and customers may benefit from the trusted contact information in many different settings. For example, consistent with the disclosure, if a member has been unable to contact a customer after multiple attempts, a member could contact a trusted contact person to inquire about the customer's current contact information. Or if a customer is known to be ill or infirm and the member has been unable to contact the customer after multiple attempts, the member could contact a trusted contact person to inquire about the customer's health status. A member also could reach out to a trusted contact person if it suspects that the customer may be suffering from Alzheimer's disease, dementia or other forms of diminished capacity. A member could contact a trusted contact person to address possible financial exploitation of the customer before placing a temporary hold on a disbursement. In addition, as discussed below, pursuant to Rule

2165, when information about a trusted contact person is available, a member must notify the trusted contact person orally or in writing, which may be electronic, if the member has placed a temporary hold on a disbursement of funds or securities from a customer's account, unless the member reasonably believes that the trusted contact person is engaged in the financial exploitation.

Temporary Hold on Disbursement of Funds or Securities—New Rule 2165

Rule 2165 permits, under FINRA rules, a member that reasonably believes that financial exploitation has occurred, is occurring, has been attempted or will be attempted to place a temporary hold on the disbursement of funds or securities from the account of a "specified adult" customer.[11] The rule creates no obligation to withhold a disbursement of funds or securities in such circumstances. In this regard, Supplementary Material to Rule 2165 explicitly states that the rule provides members and their associated persons with a safe harbor from FINRA Rules 2010 (Standards of Commercial Honor and Principles of Trade), 2150 (Improper Use of Customers' Securities or Funds; Prohibition Against Guarantees and Sharing in Accounts) and 11870 (Customer Account Transfer Contracts) when members exercise discretion in placing temporary holds on disbursements of funds or securities from the accounts of specified adults consistent with the requirements of the rule. The Supplementary Material further states that the rule does not require members to place temporary holds on disbursements of funds or securities from the account of a specified adult.[12]

The definition of "specified adult" in Rule 2165 covers those investors who are particularly susceptible to financial exploitation.[13] A "specified adult" is (A) a natural person age 65 and older or (B) a natural person age 18 and older who the member reasonably believes has a mental or physical impairment that renders the individual unable to protect his or her own interests. Supplementary Material to Rule 2165 provides that a member's reasonable belief that a natural person age 18 and older has a mental or physical impairment that renders the individual unable to protect his or her own interests may be based on the facts and circumstances observed in the member's business relationship with the person.[14] The rule defines the term "account" to include any account of a member for which a specified adult has the authority to transact business.[15]

The rule has a broad definition of "financial exploitation." Specifically, financial exploitation would include: (A) the wrongful or unauthorized taking, withholding, appropriation, or use of a specified adult's funds or securities; or (B) any act or omission taken by a person, including through the use of a power of 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.

Rule 2165 permits, under FINRA rules, a member to place a temporary hold on a disbursement of funds or securities from the account of a specified adult if the member reasonably believes that financial exploitation of the specified adult has occurred, is occurring, has been attempted or will be attempted.[16] A temporary hold pursuant to the rule may be placed on a particular suspicious disbursement(s) but not on other, non-suspicious disbursements.[17] Rule 2165 does not apply to transactions in securities. For example, Rule 2165 would not apply to a customer's order to sell his shares of a stock. However, if a customer requested that the proceeds of a sale of shares of a stock be disbursed out of his account at the member, then the rule could apply to the disbursement of the proceeds where the customer is a "specified adult" and there is reasonable belief of financial exploitation.[18]

If a member places a temporary hold, Rule 2165 requires that the member immediately initiate an internal review of the facts and circumstances that caused the member to reasonably believe that financial exploitation of the specified adult has occurred, is occurring, has been attempted or will be attempted.[19] In addition, the rule requires the member to provide notification of the hold and the reason for the hold to the trusted contact person and all parties authorized to transact business on the account, including, but not limited to, the customer, no later than two business days after the date that the member first placed the hold.[20] A member is not required to provide notification to the trusted contact person or a party authorized to transact business on an account, respectively, if the trusted contact person or party is unavailable or the member reasonably believes that the trusted contact person or party has engaged, is engaged, or will engage in the financial exploitation of the specified adult.[21] While oral or written (including electronic) notification is permitted under the rule, a member would be required to retain records evidencing the notification.[22]

Unless a member reasonably believes that doing so would cause further harm to a specified adult, FINRA encourages the member to attempt to resolve a matter with a customer before placing a temporary hold. If a temporary hold is not placed, the rule does not require notifying the trusted contact person. However, once a member places a temporary hold on a disbursement, the rule requires the member to notify the trusted contact person unless the trusted contact person is unavailable or the member reasonably believes that the trusted contact person has engaged, is engaged, or will engage in the financial exploitation of the specified adult. Furthermore, Rule 2165 does not preclude a member from terminating a temporary hold after communicating with either the customer or trusted contact person. A customer's objection to a temporary hold or information obtained during an exchange with the customer or trusted contact person may be used in determining whether a hold should be placed or lifted. While not dispositive, members should weigh a customer's or trusted contact person's objection against other information in determining whether a hold should be placed or lifted.

While the rule does not require notifying the customer's registered representative of suspected financial exploitation, a customer's registered representative may be the first person to detect potential financial exploitation. If the detection occurs in another way, a member may choose to notify and discuss the suspected financial exploitation with the customer's registered representative, unless the member suspects that the registered representative is involved in the financial exploitation.

The temporary hold authorized by Rule 2165 would expire not later than 15 business days after the date that the member first placed the temporary hold on the disbursement of funds or securities, unless otherwise terminated or extended by an order of a state regulator or agency or court of competent jurisdiction.[23] In addition, provided that the member's internal review of the facts and circumstances supports its reasonable belief that the financial exploitation of the specified adult has occurred, is occurring, has been attempted or will be attempted, the rule permits the member to extend the temporary hold for an additional 10 business days, unless otherwise terminated or extended by an order of a state regulator or agency or court of competent jurisdiction.[24]

Rule 2165 requires members to retain records related to compliance with the rule, which shall be readily available to FINRA upon request. Retained records required by the rule are records of: (1) requests for disbursement that may constitute financial exploitation of a specified adult and the resulting temporary hold; (2) the finding of a reasonable belief that financial exploitation has occurred, is occurring, has been attempted or will be attempted underlying the decision to place a temporary hold on a disbursement; (3) the name and title of the associated person that authorized the temporary hold on a disbursement; (4) notification(s) to the relevant parties pursuant to the rule; and (5) the internal review of the facts and circumstances supporting the member's reasonable belief that the financial exploitation of the specified adult has occurred, is occurring, has been attempted or will be attempted.[25]

In addition, Rule 2165 requires a member that anticipates using a temporary hold to establish and maintain written supervisory procedures reasonably designed to achieve compliance with the rule, including procedures on the identification, escalation and reporting of matters related to financial exploitation of specified adults.[26] The rule requires that the member's written supervisory procedures identify the title of each person authorized to place, terminate or extend a temporary hold on behalf of the member pursuant to the rule and that any such person be an associated person of the member who serves in a supervisory, compliance or legal capacity for the member.[27] The rule also requires a member that anticipates placing a temporary hold pursuant to the rule to develop and document training policies or programs reasonably designed to ensure that associated persons comply with the requirements of the rule.[28]

Endnotes

1. *See* Securities Exchange Act Release No. 79964 (Feb. 3, 2017), 82 FR 10059 (Feb. 9, 2017) (Notice of Filing of Partial Amendment No. 1 and Order Granting Accelerated Approval of File No. SR-FINRA-2016-039) (Approval Order).

2. *See* FINRA Investor Education Foundation, Financial Fraud and Fraud Susceptibility in the United States: Research Report from a 2012 National Survey (2013) (which found that U.S. adults age 65 and older are more likely to be targeted for financial fraud, including investment scams, and more likely to lose money once targeted); The MetLife Study of Elder Financial Abuse: Crimes of Occasion, Desperation, and Predation Against America's Elders (June 2011) (discussing the increasing prevalence of elder financial abuse and noting the many forms of vulnerability that "make elders more susceptible to [financial] abuse," including, among others, poor physical or mental health, lack of mobility, and isolation). *See also* National Senior Investor Initiative: A Coordinated Series of Examinations, SEC's Office of Compliance Inspections and Examinations and FINRA (Apr. 15, 2015) (noting the increase in persons aged 65 and older living in the United States and the concentration of wealth in those persons during a time of downward yield pressure on conservative income-producing investments); Protecting Elderly Investors from Financial Exploitation: Questions to Consider (Feb. 5, 2015) (noting that one of the greatest risk factors for diminished capacity is age).

3. *See* FINRA Launches Toll-Free FINRA Securities Helpline for Seniors (Apr. 20, 2015) and Report on the FINRA Securities Helpline for Seniors (Dec. 2015).

4. While the amendments do not specify what contact information should be obtained, FINRA believes that a mailing address, phone number and email address for the trusted contact person may be the most useful to members.

5. The trusted contact person must be age 18 or older. *See* Rule 4512(a)(1)(F).

6. Consistent with the current requirements of Rule 4512, a member would not need to attempt to obtain the name of and contact information for a trusted contact person for accounts in existence prior to the effective date of the amendments (existing accounts) until such time as the member updates the information for the account either in the course of the member's routine and customary business or as otherwise required by applicable laws or rules. *See* Rule 4512(b). With respect to any account subject to the requirements of Securities Exchange Act (SEA) Rule 17a-3(a)(17) to periodically update customer records, a member is required to make reasonable efforts to obtain or, if previously obtained, to update where appropriate the name of and contact information for a trusted contact person consistent with the requirements in SEA Rule 17a-3(a)(17). *See* Supplementary Material .06(c) to Rule 4512. *See also* SEA Rule 17a-3(a)(17)(i)(A) and (i)(D).

   With regard to updating the contact information once provided for other accounts that are not subject to the requirements in SEA Rule 17a-3, a member should consider asking the customer to review and update the name of and contact information for a trusted contact person on a periodic basis or when there is a reason to believe that there has been a change in the customer's situation.

Members should note as well that a customer's request to change his or her trusted contact person may be a possible red flag of financial exploitation. For example, a senior customer instructing his registered representative to change his trusted contact person from an immediate family member to a previously unknown third party may be a red flag of financial exploitation.

7. *See* Supplementary Material .06(b) to Rule 4512.

8. As the SEC's Approval Order confirms, members' disclosures to trusted contact persons pursuant to Rules 4512(a)(1)(F) and 2165 would be consistent with Regulation S-P because such disclosures would be made with customers' consent or authorization, to protect against fraud or unauthorized transactions, or to comply with federal, state, or local laws, rules and other applicable legal requirements. *See* Approval Order, *supra* note 1, at 10068 and n.159.

9. *See* Supplementary Material .06(a) to Rule 4512.

10. Among other things, such disclosure may assist a customer in making an informed decision about whether to provide the trusted contact person information.

11. *See* Rule 2165(b)(1). Members also must consider any obligations under FINRA Rule 3310 (Anti-Money Laundering Compliance Program) and the reporting of suspicious transactions required under 31 U.S.C. 5318(g) and the implementing regulations thereunder.

    In addition, during the rulemaking process some commenters asked whether Rule 2165 complied with the requirements of Section 22(e) of the Investment Company Act of 1940. FINRA noted that most mutual fund customer accounts are serviced and record-kept by intermediaries. In the small proportion of circumstances where mutual fund customers purchase shares directly from the mutual fund, the customer's account may be maintained by a mutual fund's principal underwriter. The SEC's Approval Order confirms that, in general, a broker-dealer's delay of a disbursement of mutual fund redemption proceeds to its customers in reliance on Rule 2165 and based on a reasonable belief of financial exploitation of the customer would not be imputed to the mutual fund, including where the broker-dealer is the fund's principal underwriter. *See* Approval Order, *supra* note 1, at 10066. However, this conclusion is limited to situations where the mutual fund does not have a role in the disbursement of redemption proceeds from the customer's account held by the broker-dealer, including any role in the decision to delay the disbursement of funds in reliance on Rule 2165. *Id.*

12. *See* Supplementary Material .01 to Rule 2165.

13. *See supra* note 2.

14. *See* Supplementary Material .03 to Rule 2165. FINRA notes that a member may not ignore contrary evidence in making a determination based on the facts and circumstances observed in the member's business relationship with the natural person (*e.g.,* a court order).

15. More than one financial institution may be providing services in some arrangements and business models. In such arrangements, the financial institution that has a reasonable belief that financial exploitation is occurring may not hold the assets that are subject to the disbursement request. For example, with respect to introducing and clearing firm arrangements, an introducing firm may make the determination that placing a temporary hold pursuant to the proposed rule change is appropriate. The clearing firm may then place the temporary hold at

the direction of and in reasonable reliance on the information provided by the introducing firm. FINRA recognizes that members making a determination or recommendation to place a hold on a disbursement may not be in the position to place the actual hold on the funds or securities.

16. *See* Rule 2165(b)(1)(A).

17. FINRA recognizes that a single disbursement could involve all of the assets in an account. For purposes of Rule 2165, moreover, FINRA would consider disbursements to include ACATS transfers but, as with any temporary hold, a member would need to have a reasonable belief of financial exploitation in order to place a temporary hold on the processing of an ACATS transfer request pursuant to the rule. FINRA reminds members of the application of FINRA Rule 2140 (Interfering With the Transfer of Customer Accounts in the Context of Employment Disputes) to the extent that there is not a reasonable belief of financial exploitation. Furthermore, in the case of a temporary hold on an ACATS transfer request, the member must permit disbursements from the account where there is not a reasonable belief of financial exploitation regarding such disbursements (*e.g.*, a customer's regular bill payments). FINRA also re-emphasizes that where a questionable disbursement involves less than all assets in an account, a member may not place a blanket hold on the entire account. Each disbursement must be analyzed separately. In addition, taking into account a member's size and business, FINRA would closely examine a member that places an outsized number of holds on customer accounts to determine whether there was any wrongdoing on the part of the member.

18. While Rule 2165 does not apply to transactions, FINRA may consider extending the safe harbor to transactions in securities in future rulemaking.

19. *See* Rule 2165(b)(1)(C).

20. *See* Rule 2165(b)(1)(B). FINRA understands that a member may not necessarily be able to speak with or otherwise get a response from such persons within the two-business-day period. FINRA would consider, for example, a member's mailing a letter, sending an email, or placing a telephone call and leaving a message with appropriate person(s) within the two-business-day period to constitute notification for purposes of Rule 2165.

21. FINRA would consider the lack of an identified trusted contact person, the inability to contact the trusted contact person, or a person's refusal to act as a trusted contact person to mean that the trusted contact person was not available. Furthermore, FINRA would consider the inability to contact a party authorized to transact business on an account to mean that the party was not available.

22. *See* Rule 2165(d).

23. *See* Rule 2165(b)(2).

24. *See* Rule 2165(b)(3).

25. *See* Rule 2165(d).

26. *See* Rule 2165(c)(1).

27. *See* Rule 2165(c)(2). This provision is intended to ensure that a member's decision to place a temporary hold is elevated to an associated person with appropriate authority.

28. *See* Supplementary Material .02 to Rule 2165.

Attachment A

New and Amended Rule Text

New language is underlined; deletions are in brackets.

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Text of New FINRA Rule

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2100. TRANSACTIONS WITH CUSTOMERS

* * * * *

2165. Financial Exploitation of Specified Adults

(a) Definitions

(1) For purposes of this Rule, the term "Specified Adult" shall mean: (A) a natural person age 65 and older; or (B) a natural person age 18 and older who the member reasonably believes has a mental or physical impairment that renders the individual unable to protect his or her own interests.

(2) For purposes of this Rule, the term "Account" shall mean any account of a member for which a Specified Adult has the authority to transact business.

(3) For purposes of this Rule, the term "Trusted Contact Person" shall mean the person who may be contacted about the Specified Adult's Account in accordance with Rule 4512.

(4) For purposes of this Rule, the term "financial exploitation" means:

(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 of 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.

(b) Temporary Hold on Disbursements

(1) A member may place a temporary hold on a disbursement of funds or securities from the Account of a Specified Adult if:

(A) The member reasonably believes that financial exploitation of the Specified Adult has occurred, is occurring, has been attempted, or will be attempted; and

(B) The member, not later than two business days after the date that the member first placed the temporary hold on the disbursement of funds or securities, provides notification orally or in writing, which may be electronic, of the temporary hold and the reason for the temporary hold to:

(i) all parties authorized to transact business on the Account, unless a party is unavailable or the member reasonably believes that the party has engaged, is engaged, or will engage in the financial exploitation of the Specified Adult; and

(ii) the Trusted Contact Person(s), unless the Trusted Contact Person is unavailable or the member reasonably believes that the Trusted Contact Person(s) has engaged, is engaged, or will engage in the financial exploitation of the Specified Adult; and

(C) The member immediately initiates an internal review of the facts and circumstances that caused the member to reasonably believe that the financial exploitation of the Specified Adult has occurred, is occurring, has been attempted, or will be attempted.

(2) The temporary hold authorized by this Rule will expire not later than 15 business days after the date that the member first placed the temporary hold on the disbursement of funds or securities, unless otherwise terminated or extended by a state regulator or agency of competent jurisdiction or a court of competent jurisdiction, or extended pursuant to paragraph (b)(3) of this Rule.

(3) Provided that the member's internal review of the facts and circumstances under paragraph (b)(1)(C) of this Rule supports the member's reasonable belief that the financial exploitation of the Specified Adult has occurred, is occurring, has been attempted, or will be attempted, the temporary hold authorized by this Rule may be extended by the member for no longer than 10 business days following the date authorized by paragraph (b)(2) of this Rule, unless otherwise terminated or extended by a state regulator or agency of competent jurisdiction or a court of competent jurisdiction.

(c) Supervision

(1) In addition to the general supervisory and recordkeeping requirements of Rules 3110, 3120, 3130, 3150, and Rule 4510 Series, a member relying on this Rule shall establish and maintain written supervisory procedures reasonably designed to achieve compliance with this Rule, including, but not limited to, procedures related to the identification, escalation and reporting of matters related to the financial exploitation of Specified Adults.

(2) A member's written supervisory procedures also shall identify the title of each person authorized to place, terminate or extend a temporary hold on behalf of the member pursuant to this Rule. Any such person shall be an associated person of the member who serves in a supervisory, compliance or legal capacity for the member.

(d) Record Retention

Members shall retain records related to compliance with this Rule, which shall be readily available to FINRA, upon request. The retained records shall include records of: (1) request(s) for disbursement that may constitute financial exploitation of a Specified Adult and the resulting temporary hold; (2) the finding of a reasonable belief that financial exploitation has occurred, is occurring, has been attempted, or will be attempted underlying the decision to place a temporary hold on a disbursement; (3) the name and title of the associated person that authorized the temporary hold on a disbursement; (4) notification(s) to the relevant parties pursuant to paragraph (b)(1)(B) of this Rule; and (5) the internal review of the facts and circumstances pursuant to paragraph (b)(1)(C) of this Rule.

• • • Supplementary Material: --------------

.01 Applicability of Rule. This Rule provides members and their associated persons with a safe harbor from FINRA Rules 2010, 2150 and 11870 when members exercise discretion in placing temporary holds on disbursements of funds or securities from the Accounts of Specified Adults consistent with the requirements of this Rule. This Rule does not require members to place temporary holds on disbursements of funds or securities from the Accounts of Specified Adults.

.02 Training. A member relying on this Rule must develop and document training policies or programs reasonably designed to ensure that associated persons comply with the requirements of this Rule.

.03 Reasonable Belief of Mental or Physical Impairment. A member's reasonable belief that a natural person age 18 and older has a mental or physical impairment that renders the individual unable to protect his or her own interests may be based on the facts and circumstances observed in the member's business relationship with the natural person.

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Amendment to FINRA Rule

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4500. BOOKS, RECORDS AND REPORTS

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4512. Customer Account Information

(a) Each member shall maintain the following information:

(1) for each account:

(A) through (C) No Change.

(D) signature of the partner, officer or manager denoting that the account has been accepted in accordance with the member's policies and procedures for acceptance of accounts; [and]

(E) if the customer is a corporation, partnership or other legal entity, the names of any persons authorized to transact business on behalf of the entity; <u>and</u>

<u>(F) subject to Supplementary Material .06, name of and contact information for a trusted contact person age 18 or older who may be contacted about the customer's account; provided, however, that this requirement shall not apply to an institutional account.</u>

(2) through (3) No Change.

(b) through (c) No Change.

• • • Supplementary Material: --------------

.01 through .05 No Change.

.06 Trusted Contact Person

(a) With respect to paragraph (a)(1)(F) of this Rule, at the time of account opening a member shall disclose in writing, which may be electronic, to the customer that the member or an associated person of the member is authorized to contact the trusted contact person and disclose information about the customer's account to address possible financial exploitation, to confirm the specifics of the customer's current contact information, health status, or the identity of any legal guardian, executor, trustee or holder of a power of attorney, or as otherwise permitted by Rule 2165. With respect to any account that was opened pursuant to a prior FINRA rule, a member shall provide this disclosure in writing, which may be electronic, when updating the information for the account pursuant to paragraph (b) of this Rule either in the course of the member's routine and customary business or as otherwise required by applicable laws or rules.

(b) The absence of the name of or contact information for a trusted contact person shall not prevent a member from opening or maintaining an account for a customer, provided that the member makes reasonable efforts to obtain the name of and contact information for a trusted contact person.

(c) With respect to any account subject to the requirements of SEA Rule 17a-3(a)(17) to periodically update customer records, a member shall make reasonable efforts to obtain or, if previously obtained, to update where appropriate the name of and contact information for a trusted contact person consistent with the requirements of SEA Rule 17a-3(a)(17).

* * * * *

APPENDIX B

NASAA MODEL LEGISLATION OR REGULATION TO PROTECT VULNERABLE ADULTS FROM FINANCIAL EXPLOITATION

Adopted January 22, 2016

Prefatory note:

Jurisdictions considering this model legislation or regulation, whether through legislative sessions or rulemaking, may need to consider certain small changes to terms, particularly with regard to certain designated terms. For example, this model refers to the "commissioner of securities" or "state securities commissioner" but in certain jurisdictions, that position may be held by a director of securities, or commissioner of banking and securities, or commissioner of corporations. Furthermore, this model refers to Adult Protective Services, but certain jurisdictions may require a more specific reference to the agency by exact name. Finally, with regard to Section 2 (Definitions), certain jurisdictions may use different defined terms (e.g. salesmen instead of broker-dealer agents); therefore, Section 2 may require certain slight changes to the definitions to align with existing securities statutes.

An Act to Protect Vulnerable Adults from Financial Exploitation.

Section 1. Short title. Sections___ to ___ may be cited as "An Act to Protect Vulnerable Adults from Financial Exploitation" and in this chapter as this act.

Section 2. Definitions. In this act, unless the context otherwise requires:

(1) **"Agent"** shall have the same meaning as in [insert state code section].

(2) **"Broker-dealer"** shall have the same meaning as in [insert state code section].

(3) **"Eligible adult"** means:

(a) a person sixty-five years of age or older; or
(b) a person subject to [insert state Adult Protective Services statute]

(4) **"Financial exploitation"** means:

(a) the wrongful or unauthorized taking, withholding, appropriation, or use of money, assets or property of an eligible adult; or

(b) any act or omission taken by a person, including through the use of a power of attorney, guardianship, or conservatorship of an eligible adult, to:

i. Obtain control, through deception, intimidation or undue influence, over the eligible adult's money, assets or property to deprive the eligible adult of the ownership, use, benefit or possession of his or her money, assets or property; or

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ii. Convert money, assets or property of the eligible adult to deprive such eligible adult of the ownership, use, benefit or possession of his or her money, assets or property.

(5) "**Investment Adviser**" shall have the same meaning as in [insert state code section].

(6) "**Investment Adviser Representative**" shall have the same meaning as in [insert state code section].

(7) **"Qualified individual"** means any agent, investment adviser representative or person who serves in a supervisory, compliance, or legal capacity for a broker-dealer or investment adviser.

Section 3. Governmental Disclosures. If a qualified individual reasonably believes that financial exploitation of an eligible adult may have occurred, may have been attempted, or is being attempted, the qualified individual shall promptly notify Adult Protective Services and the commissioner of securities (collectively "the Agencies").

Section 4. Immunity for Governmental Disclosures. A qualified individual that in good faith and exercising reasonable care makes a disclosure of information pursuant to section 3 shall be immune from administrative or civil liability that might otherwise arise from such disclosure or for any failure to notify the customer of the disclosure.

Section 5. Third-Party Disclosures. If a qualified individual reasonably believes that financial exploitation of an eligible adult may have occurred, may have been attempted, or is being attempted, a qualified individual may notify any third party previously designated by the eligible adult. Disclosure may not be made to any designated third party that is suspected of financial exploitation or other abuse of the eligible adult.

Section 6. Immunity for Third-Party Disclosures. A qualified individual that, in good faith and exercising reasonable care, complies with section 5 shall be immune from any administrative or civil liability that might otherwise arise from such disclosure.

Section 7. Delaying Disbursements. (1) A broker-dealer or investment adviser may delay a disbursement from an account of an eligible adult or an account on which an eligible adult is a beneficiary if:

(a) the broker-dealer, investment adviser, or qualified individual reasonably believes, after initiating an internal review of the requested disbursement and the suspected financial exploitation, that the requested disbursement may result in financial exploitation of an eligible adult; and

(b) the broker-dealer or investment adviser:

i. Immediately, but in no event more than two business days after the requested disbursement, provides written notification of the delay and the reason for the delay to all parties authorized to transact business on the account, unless any such party is reasonably believed to have engaged in suspected or attempted financial exploitation of the eligible adult;

ii. Immediately, but in no event more than two business days after the requested disbursement, notifies the Agencies; and

iii. Continues its internal review of the suspected or attempted financial exploitation of the eligible adult, as necessary, and reports the investigation's results to the Agencies within seven business days after the requested disbursement.

(2) Any delay of a disbursement as authorized by this section will expire upon the sooner of:

(a) a determination by the broker-dealer or investment adviser that the disbursement will not result in financial exploitation of the eligible adult; or

(b) fifteen business days after the date on which the broker-dealer or investment adviser first delayed disbursement of the funds, unless either of the Agencies requests that the broker-dealer or investment adviser extend the delay, in which case the delay shall expire no more than twenty-five business days after the date on which the broker-dealer or investment adviser first delayed disbursement of the funds unless sooner terminated by either of the agencies or an order of a court of competent jurisdiction.

(3) A court of competent jurisdiction may enter an order extending the delay of the disbursement of funds or may order other protective relief based on the petition of the commissioner of securities, Adult Protective Services, the broker-dealer or investment adviser that initiated the delay under this Section 7, or other interested party.

Section 8. Immunity for Delaying Disbursements. A broker-dealer or investment adviser that, in good faith and exercising reasonable care, complies with section 7 shall be immune from any administrative or civil liability that might otherwise arise from such delay in a disbursement in accordance with this section.

Section 9. Records. A broker-dealer or investment adviser shall provide access to or copies of records that are relevant to the suspected or attempted financial exploitation of an eligible adult to agencies charged with administering state adult protective services laws and to law enforcement, either as part of a referral to the agency or to law enforcement, or upon request of the agency or law enforcement pursuant to an investigation. The records may include historical records as well as records relating to the most recent transaction or transactions that may comprise financial exploitation of an eligible adult. All records made available to agencies under this section shall not be considered a public record as defined in [State public records law]. Nothing in this provision shall limit or otherwise impede the authority of the state securities commissioner to access or examine the books and records of broker-dealers and investment advisers as otherwise provided by law.