



February 5, 2018

Seniors Initiative Committee, c/o Deborah Gillis
Financial and Consumer Services Commission, New Brunswick
85 Charlotte Street, Suite 300
Saint John, NB
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RE: Financial and Consumer Services Commission Consultation Paper November 2017: Improving Detection, Prevention and Response to Senior Financial Abuse in New Brunswick

1. FAIR Canada and the Canadian Centre for Elder Law are pleased to offer comments in response to the New Brunswick Financial and Consumer Services Commission (“FCNB”) on its November 2017 consultation paper “Improving Detection, Prevention and Response to Senior Financial Abuse in New Brunswick” (the “Consultation Paper”).
2. FAIR Canada is a national, charitable organization dedicated to putting investors first. As a voice for Canadian investors, FAIR Canada provides information and education to the public, governments and regulators about investor rights and protections in Canada’s capital markets. Visit www.faircanada.ca for more information.
3. 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. General Comments

- 1.1. FAIR Canada and CCEL commend the FCNB on its Consultation Paper and its leadership to find solutions to help prevent and respond to the financial abuse of New Brunswick’s growing older population.
- 1.2. With funding from The Law Foundation of Ontario’s Access to Justice Fund, FAIR Canada, in partnership with CCEL, has conducted research, held consultations and released a [joint report](#) in November 2017, entitled, “Report on Vulnerable Investors: Elder Abuse, Financial Exploitation, Undue Influence and Diminished Mental Capacity”.
- 1.3. With the significant demographic shift occurring in Canada and the greatest intergenerational transfer of wealth set to occur in the next decade or so, 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.
- 1.4. FAIR Canada and the CCEL conducted research to understand how other jurisdictions are tackling these issues. We also consulted with stakeholders to obtain their views on how



governments and regulators ought to protect vulnerable investors in Canada. The report summarizes the findings of our research and consultations. It also sets out our recommendations for how dealer firms and their representatives can better protect vulnerable investors. The report seeks to raise awareness of the growing problem of elder financial abuse, undue influence and mental capacity challenges and provides recommendations for how positive steps can be taken to address these issues.

- 1.5. The recommendations are designed to help the investment industry utilize their position in communities throughout Canada to play a critical role in abuse prevention.
- 1.6. The report makes six main recommendations to Canadian securities regulators:
 1. Require investment firms to make reasonable efforts to obtain the name and contact information of a Trusted Contact Person for each client, who can be contacted in case of suspicion of abuse or diminished mental capacity, so long as they themselves are not suspected of financial abuse or exploitation of the client.
 2. Allow authorized individuals within an investment firm to place a Temporary Hold on Trades and Disbursements of funds or securities when there is a reasonable suspicion of financial abuse – that has occurred, is occurring or will be attempted – or where the client has lost the capacity to provide instructions.
 3. Provide a Legal Safe Harbour for investment firms and financial service providers who reach out to appropriately report suspicions of financial abuse or mental incapacity.
 4. Create a Conduct Protocol that defines key terms and sets out the steps firms and financial services representatives should take to identify and protect vulnerable clients. This Conduct Protocol will require that investment firms mandatorily report suspected financial abuse of vulnerable investors to the appropriate securities regulator.
 5. Mandate Specific Education and Training for all investment firms in the areas of elder abuse, undue influence, mental capacity issues, enduring powers of attorney and ageism and have the required proficiencies.
 6. Require that Investment Firms Become Familiar with Outside Resources and Responders and learn how and when to appropriately refer a case of suspected elder financial abuse, undue influence or diminished mental capacity to local responders.
- 1.7. In addition to the above-noted 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 responsive framework in Canada.
- 1.8. We highlight the need to invest in initiatives that will empower older Canadians to plan for situations of vulnerability, including improving the understanding of the use and risks of enduring powers of attorney, and adding issues related to social vulnerability and ageing into the Know Your Client process. Finally, it urges further work to 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 further consideration.

1.9. Below, FAIR Canada and CCEL provide responses to questions posed in the Consultation Paper. We ask that you also refer to our broader report when considering our responses.

2. Consultation Questions

Question 1: Should the FCNB or other government agencies seek a larger role in preventing and responding to financial abuse of seniors? If they should play a larger role, how?

- 2.1. Yes, it is imperative that governments and financial services regulators across Canada play a larger role in preventing and responding to the financial abuse of seniors. FAIR Canada urges securities regulators to implement the six recommendations contained in our report and consider the broader recommendations also contained in it. Financial elder abuse has serious consequences to the individual who has been harmed including devastating financial and physical consequences as well having a broader negative societal impact.
- 2.2. FAIR Canada and CCEL both believe that it is important to improve the prevention, detection, and the way elder abuse in Canada is addressed, with financial elder abuse being only one form of abuse. Our report indicates the prevalence of elder abuse in Canada and explains why the findings largely underestimate the problem given the fact that elder abuse allegations are often not believed, underreported, poorly tracked or little understood by third parties, in addition to often being perpetrated by individuals close to the older person.
- 2.3. We make six recommendations that will allow the investment industry to play a larger role in addressing this growing issue in our society. In addition, we raise broader recommendations including the need for better tracking and reporting structures regarding elder financial abuse. It is said that “What get measured gets done”. We highlight that this is a multidimensional issue which requires a collaborative approach and we encourage Canada’s federal, provincial and municipal governments to come together to develop a national comprehensive Seniors’ Strategy. In the shorter term, we recognize that existing structures in a given province can be built out so that progress can be made.
- 2.4. Related to the issue of elder financial abuse is the issue of the perpetration of investment fraud against Canadians. Investment fraud is perpetrated against vulnerable Canadians and this often includes the elderly and new Canadians. It is important that governments and financial services regulators work together to improve the prevention, detection, and prosecution of investment fraud in Canada, as well as address the issue of elder financial abuse, financial exploitation, undue influence and diminished mental capacity.
- 2.5. FAIR Canada wrote a research report on investment fraud in 2014 entitled “[Report on a Canadian Strategy to Combat Investment Fraud](#),” and has made other submissions in this area. Please visit our website at www.faircanada.ca/submissions to see those submissions.



- 2.6. There is a dearth of publicly-available information available in Canada relating to investment fraud and no authoritative measure of the size or scope of investment fraud in Canada. There is also no authoritative measure of the size or dollar value of elder financial abuse in Canada, though extrapolations from U.S. information can be made. Estimates of the financial cost of elder financial abuse vary.¹
- 2.7. We urge governments and regulators to build the reporting mechanisms and other structures needed to address elder financial abuse and investment fraud (also often perpetrated against vulnerable adults). Jurisdictions such as New York State and 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. Further, jurisdictions such as these track all crimes that involve an older person and have Adult Protective Services. The success of such structures could be a useful area of study for serious consideration and future adoption in Canada.
- 2.8. We believe that collaborative approaches are needed that are open, transparent and accountable. Structures need to report back on what they have found and what they have done. The “how” it is done is as important as the “what” is done to combat investment fraud and elder financial abuse.

Question 2: Would a definition of financial abuse be helpful to protect seniors? If so, how?

- 2.9. Yes, a definition of financial abuse would be helpful since there needs to be an understanding of what something is before steps can be taken to address it. In addition, if something is not defined, there is less willingness to address it for fear of taking steps that are not permissible within a given framework. See our discussion on the federal privacy legislation at pages 31 to 32 of our report, which discusses this problem. A definition of vulnerable investor is provided at pages 5 and 63, while a definition of financial abuse is provided at page 17 of the report.

Question 3: For the purposes of consumer protection, is the age of 65 appropriate to define a senior? If not, what age is more appropriate?

- 3.1. Instead of a bright age line, we suggest an approach where “vulnerable client” or “vulnerable person” is defined, not by age as it is in some comparator jurisdictions. Older age should be understood as a strongly co-related factor due to ageism and social vulnerability. A “vulnerable person” is 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.”
- 3.2. Instead of a bright age line of 65 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, and so on). This may in practice amount to much the same outcome. However,

¹ Tobie Stranger, “Financial Elder Abuse Costs \$3 Billion a Year. Or is it \$36 Billion?” *Consumer Reports*. see online: <https://www.consumerreports.org/cro/consumer-protection/financial-elder-abuse-costs--3-billion----or-is-it--30-billion->>.



it is important normatively. There are increased social vulnerability risks associated with ageing. In this way, the issue of older Canadians will be drawn to the fore, without supporting the myth that all old people are vulnerable and in need of protection. A younger person may be a “vulnerable person” and subject to financial exploitation, undue influence or diminished mental capacity.

Question 4: What additional safeguards, criteria or regulations would be helpful to protect seniors from the misuse of power of attorney documents?

- 4.1. We believe that greater awareness by individuals of the risks and benefits of powers of attorney would be beneficial as well as more awareness on the part of donees of their duties and obligations. There is no simple solution which will protect seniors from the misuse of power of attorney documents. Please see section 4.3 Power of Attorney at pages 27 to 29 of our report for a discussion of the issue.
- 4.2. Some jurisdictions, such as the United Kingdom, have suggested a digital power of attorney system and central database. Please see page 46 of our report. Requiring an annual accounting by the donee of any transactions involving the donor’s property has also been suggested as a way to create greater accountability on the part of the donee and lessen risks of misuse of powers of attorney.

Question 5: What conditions, if any, should restrict a person from acting as a donor under a power of attorney documents?

- 5.1. We are aware that the Law Commission of Ontario has recently issued a report on reforms to powers of attorney. We suggest that this body and similar law reform bodies and experts be consulted. We believe that those who have proven to lack the integrity to discharge the role should be disqualified (those with a criminal record or who have been sanctioned by a regulator or professional body for misconduct) or those for whom it would not create an immaterial conflict of interest (financial services representative of the donor acting as a donee of a power of attorney for example).

Question 6: Would you be reluctant to report suspected financial abuse because of privacy concerns?

- 6.1. Our consultations revealed that advisors and firms are deterred from addressing elder financial abuse due to the risk that they may breach their privacy or regulatory obligations in doing so. Section 4.6 of our report discusses the federal privacy legislation, the Personal Information Protection and Electronic Documents Act (PIPEDA) and the need for further changes to PIPEDA in order to make the exemption of practical assistance.

Question 7: Would having a definition of financial abuse clarify the ability to report suspected financial abuse and protections for reporting under privacy legislation? Why or why not?

- 7.1. Please see Section 4.6 of our report. Defining “financial abuse” in PIPEDA is one of the many steps needed to address the needed changes to this legislation.



Question 8: What are your thoughts on mandatory versus voluntary reporting of suspected financial abuse?

- 8.1. We believe that if firms or persons in positions of authority take steps to impact the privacy or freedom of an individual (for example, placing a hold on their investment account), then they should be required to notify the client and promptly notify the securities regulator and provincial guardian and trustee. This ensures that there is a balance between the authority to combat financial exploitation with the rights of the investors to their property. 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 marshalled 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.
- 8.2. It should be noted that this does not mean that there is an obligation to take action in every single case. Rather, implementing the recommendations contained in the report will allow the individual to have the necessary training, education, conduct protocol and framework (including legal safe harbour) to facilitate the ability to take action, when warranted.
- 8.3. Finally, such reporting will allow for data to be collected on the instance and prevalence of these issues, which is of vital importance. Police and other bodies will be less likely to dedicate financial and other resources to the issue of financial elder abuse in the absence of empirical evidence demonstrating how prevalent it is and how such crimes cost victims financially, emotionally and physically. See part 7 of our report, Recommendations, for a discussion.

Question 9: If you have not reported suspected financial abuse, what kept you from reporting? How could the process be improved?

- 9.1. See answer to question 10, below.

Question 10: If you have reported suspected financial abuse, what challenges or barriers did you face in reporting? How could the process be improved?

- 10.1. Please see Section 6 of our report, entitled “Our Consultations: What We Heard”, and in particular, section 6.3, page 53 to 54, which deals with the Lack of a Central Agency to Report to, and What Firms are Doing Now. We heard that there are few clear systems to follow, few experts within the organization, few clear procedures, and when in doubt, the issue is sent to the legal department, which has mixed outcomes. A key finding was that 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 welcomed.

Question 11: What training opportunities or tools would help you identify, respond, and deal with issues related to capacity or financial abuse of seniors?

- 11.1. Please see section 6.3, Education and Training on pages 54 to 55 of our report as well as Recommendation 5: Need for Mandatory Education and Training, at pages 74 to 75.
- 11.2. There was consensus in all of our consultations with stakeholders that mandatory education and training was required for firms and representatives in the area of elder abuse – broadly and not just financial elder abuse – undue influence and mental capacity challenges. The desire to have specific competencies established by regulators was very clear. The actual delivery of the education was not held to be as important as ensuring that the core competencies needed for education and training were identified and met.
- 11.3 Firms tend to approach situations that may involve financial elder abuse, undue exploitation, or loss of mental capacity on an ad hoc basis and do not have procedures in place for identifying and responding. There is a real need for clarity around when and to whom to report concerns about elder abuse of financial exploitation. Stakeholders agreed that 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 persons. See Recommendation 4, Implement a Conduct Protocol, at pages 70 to 73 of the report.

Question 12: Should this type of training be mandatory?

- 12.1. Our recommendation is that there be mandatory education and training. We recommend that securities regulators also develop unified standards and definitions and a single conduct protocol for firms and representatives to follow.

Question 13: What might a collaborative approach to addressing financial abuse of seniors look like? What agencies and groups should be involved?

- 13.1. An ageing population creates challenges that affect all sectors of society. These challenges are not specific to any one industry, and, should not be addressed in silos. A collaborative approach would involve federal, provincial and municipal governments. It would involve financial services regulator(s), criminal authorities, the health care sector and non-governmental organizations. What is needed is multidisciplinary community collaboration and interagency cooperation in order to address this problem, especially financial exploitation.

Question 14: What information, tools, programs or community resources could effectively reach and assist seniors from becoming victims of financial abuse?

- 14.1. This is an extremely complex and difficult question with no easy solution. While extremely important to try to prevent elder financial abuse as well as prevent older adults from being victims of fraud, fraudsters and those who exploit the social vulnerabilities of older adults will continue to try to do this for various reasons, not all of which are financial gain.



Question 15: Are there alternative solutions to relying on the courts (criminal or civil) to combat financial abuse and exploitation?

15.1. We are not entirely clear what this question means. But those who have been victims of elder financial abuse and exploitation deserve to have recourse to the courts and criminal justice system, which should have adequate resources provided to address these issues.

Question 16: What can be done to make it easier for seniors to access the services and support they need when faced with financial abuse?

16.1. If the 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. The more fragmented the system, the more difficult it is to protect people's rights. As an Alzheimer Society's report recognized: "Inadequate or patchy inter-sector work makes it harder to robustly protect people's rights" (please see footnote 150 of report). As noted in our report, maybe it is time for some form of Canadian Adult Protective Agency (see pages 76 to 77).

We thank you for the opportunity to provide our comments and views in this submission. We welcome its public posting and would be pleased to discuss this letter with you at your convenience. Feel free to contact Marian Passmore at [647-256-6691](tel:647-256-6691)/marian.passmore@faircanada.ca or Laura Tamblyn Watts at ltamblynwatts@gmail.com/647-969-6793.

Sincerely,

Canadian Foundation for Advancement of Investor Rights

Canadian Centre for Elder Law