Update to Nov 9 2017 Presentation

The final report for the report discussed in this presentation is available from the FAIR Canada website and the Canadian Centre for Elder Law websites here:


Report on Vulnerable Investors:

Elder Abuse, Financial Exploitation, Undue Influence and Diminished Mental Capacity

Foundation for the Advancement of Investor Rights
Canadian Centre for Elder Law 2017
Pre-Launch Presentation to 3rd Conference of STEP Academic Community Nov 9, 2017 - Singapore

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- Highlights of a Canadian Vulnerable Investor project
- Report to be released November 16, 2017
- Thank you to Laura Tamblyn Watts, Staff Lawyer, Canadian Centre for Elder Law, for presentation support

The Agenda

1. Project background
2. Issues:
   a) Mental capacity; elder financial abuse
   b) Investment sector response options
3. Canadian legal landscape
4. Comparator Jurisdictions
5. Consultation Qs & recommendations
Who We Are

- **Who is FAIR Canada? (FAIR)**
  Foundation for advancement of investor rights
  Independent, national, charitable organization focused on strengthening investor protection in securities regulation.

- **Who is the Canadian Centre for Elder Law? (CCEL)**
  Independent, national, non-partisan, non-political research centre on law and aging issues
  Division of BC Law Institute, independent law reform body and charitable organization

- **Project Funder:**
  Law Foundation of Ontario, Access to Justice Fund – Vulnerable Investors

Project Timelines: 2016-2017

- Nov 2016 – March 2017 – Research
- April – July 2017 – Consultation Period
- Nov 2017 – Project Release

https://faircanada.ca/
https://www.bcli.org/cCEL
Report Context

- Financial services firms and financial advisors serve millions of vulnerable investors every year.
- Loss of Mental Capacity issues increasing
- Undue Influence & Elder Financial Abuse increasing both in prevalence and in terms of public understanding

Core Issues:

- Financial sector very aware
- Elder abuse communities want financial firm involvement but...
- Privacy laws – restrict to who and when report can be made; penalties for breach of client privacy
- Regulators – follow instructions of client
- Risk of liability for losses/failure to act
How Can Firms Respond?

Project considered two issues – Response & Protection

- **Conduct Protocol**: Whether a protocol guiding Canadian financial services firms and advisors on protective action they may take for the benefit of vulnerable investors in situations of lost capacity or undue influence (including financial exploitation) was a good idea, and if so, what should it contain.

- **Legal Safe Harbour Provision**: Whether model legal mechanism that would shield firms and advisors from regulatory (and potentially civil) liability where they take protective action in good faith to safeguard vulnerable investors’ interests is also desirable, and if so, what should it contain.

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

- Unlike the US – No single organization (Adult Protective Services)

- Mix of mandatory and voluntary reporting
  - Ontario – mandatory in LTC
  - BC – mandatory if you work for a health authority

- Police

- Public Guardian and Trustee (different mandates)

- Other Social Service Agencies (varied)
PIPEDA amendments

- Bank Act / PIPEDA (privacy laws) – 2015
- Provides a Limited Safe Harbor

“Report to government institution, next of kin or authorized representative, [where an] Organization …has reasonable grounds to believe that the individual has been, is or may be the victim of financial abuse…disclosure made solely for the purposes related to preventing or investigating the abuse”

Concern: Key terms undefined – financial abuse, next of kin, authorized representative, government institution

Other Barriers to Reporting & Seeking Assistance

There are also many barriers to victims reporting abuse, including:

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

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

Defining Elder Abuse

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

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

Prevalence Study
Financial Elder Abuse Definition

“An action or lack of action with respect to material possessions, funds, assets, property, or legal documents that is unauthorized, or coerced, or a misuse of legal authority”

Undue Influence can be part of this
FINRA – Financial Exploitation

(A) the wrongful or unauthorized taking, withholding, appropriation, or use of a specified adult’s funds or securities;

or

(B) any act or omission by a person, including through the use of a power or attorney, guardianship, or any other authority, regarding a specified adult, to:

(i) obtain control, through deception, intimidation or undue influence, over the specified adult’s money, assets or property;

or

(ii) convert the specified adult’s money, assets or property."

Recognizing elder abuse & neglect

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

- Emerging areas: chemical, spiritual/cultural etc

- Abuse may be an isolated incident or a pattern of behaviour.

- Where there is financial abuse – there may be other abuse
Financial abuse most commonly:

- Misuse of funds or property
- Theft, exploitation or scams
- Abuse of power of attorney
- Fraud or document forgery
- Most abuse is by family and trusted others

What About Mental Capacity?
Capacity and Aging

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

The Capacity Continuum

Capable  Incapable
Substitute Decision Making

- Enduring Power of Attorney – effective upon making
- Enduring Power of Attorney – effective upon trigger, or in some jurisdictions, finding of incapacity by assessor or court
- Court ordered guardian – restricted powers
- Court ordered guardian – full powers
- Supervision depends on method and jurisdiction

Current Safeguards: KYC

Know Your Client (KYC):

In a first meeting with a client, the advisor must conduct due diligence—obtaining information about the client’s occupation, age, income, net worth, marital status, number of dependents, risk tolerance, investment objectives, investment experience, and investment horizon. The advisor must keep a record of the client’s answers and must annually update the KYC profile or have the client confirm that it remains accurate.
Current Safeguards: Judgment

- **Applying Judgment:** The advisor must understand the key characteristics and risks associated with any investment product it recommends or orders for a client, and should be able to clearly explain the reasons that a specific security is or is not suitable for a client based on the client’s KYC profile.

- Where a client proposes a transaction that is unsuitable, the advisor has a responsibility to warn the client and to even “protect them against themselves.”

Current Safeguards: Disclosure

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

- “Best execution” - following a client’s instructions and considering a client’s investment objectives, and considering what the advisor knows about the markets and trading patterns.

- While advisors are therefore required to follow clients’ instructions, they are also required to consider clients’ objectives and market conditions when making trades.

- The best execution obligation suffers from the same issues as the suitability obligation, in that advisors cannot rely on it to prevent liquidation or disbursement of funds that may not be in their clients’ interests. NI 23-101CP, Section 4.1(3)

Comparator Jurisdictions: US

- Seniors Helpline – FINRA: a resource for senior investors who have securities-related questions and concerns. HELPS staff provide personalized assistance to seniors, and refer elder abuse concerns to Adult Protective Services


  Requires financial advisors to report suspected financial exploitation; authorizes them to disclose suspected abuse to designated third parties; and enables them to delay disbursements for up to 15 business days if financial exploitation is suspected.
Comparator Jurisdictions: US

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

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

- Rule 2165: Temporary hold on disbursements

Comparator Jurisdictions: UK


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

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

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

Comparator Jurisdictions: Australia

Non-Binding Banking Guidelines:

- **Protecting vulnerable customers from potential financial abuse:** This framework explains what financial abuse can look like, how it can affect clients, and how bank staff can respond to it.

- **Responding to requests from a power of attorney or court-appointed administrator:** This guideline explains how POA arrangements work, how clients use them, and how banks should respond to these arrangements.
Comparator Jurisdiction: Australia

Australian Law Reform Commission Elder Abuse Recommendations:

- **Proposal 7-1**: The Code of Banking Practice should require banks to take reasonable steps to prevent the financial abuse of older customers, including training staff, using software to identify suspicious transactions, and reporting suspected abuse to the authorities.

- **Proposal 7-2**: The Code of Banking Practice should increase the witnessing requirements for arrangements allowing people to authorize third parties to access their bank accounts. Clients should also have to sign a declaration stating that they understand the scope of the authority and the additional risk of financial abuse.

Consultation Strategy

- Individual meetings or small groups
- April 28 – Toronto Financial Industry group consultation
- May 9-10 – Expert and community consultations (NICE)
- May 11 – 2 sessions in Vancouver, industry and community
- May 27 - OSC – Seniors’ Expert Advisory Committee
- June Webinar – World Elder Abuse Awareness Day
- Individual consults in Quebec and Atlantic Provinces
- Additional webinars or conference calls
- Online distribution and email
- Conferences, seminars – we went everywhere we could
Consultation Questions: General

1. How are firms and advisors currently responding to clients who appear to have lost capacity or be subject to undue influence?
2. Are you aware of issues pertaining to vulnerable investors that we did not address in this discussion?
3. Are there regulatory provisions not highlighted in our discussion that firms or advisors could rely on to justify taking protective action or that impede such steps being taken?

Consultation Questions: Conduct Protocol

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

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

4. Recordkeeping and disclosure requirements for firms?

Consultation Questions: Legal Safe Harbour

Legal Safe Harbour Provision:
- Which regulatory body?
- Implemented under what legal instrument?
- Who would it shield?
- When would it apply?
- Would it afford protection against regulatory and civil liability (e.g. for loss)?
1. Do any of these case studies sounds familiar to you? Have you had versions of this happen in your experiences? What happened?

2. Absent an exception, notification of concerns about a client to a third party without consent is a violation of privacy law, and financial firms can get into trouble for breaching privacy. What happens at your firm or in your industry in these kinds of cases?

3. If any of these cases came to your firm or industry, what would the internal process be to resolve the issue. If there is escalation, what are the steps? Who gets to make the final decision?

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

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

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

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

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

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

Final Report – 2 Main Areas

**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, the situation can become complex and delicate.
Final Report – 2 Main Areas

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.

A client may also 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.

Six Recommendations

1. Trusted Contact Person:
   Firms should make reasonable efforts to add Trusted Contact Person (TCP) for client files

2. Holds on Trades and Disbursements:
   Securities Regulators should authorize qualified individuals in a firm to implement a temporary hold on trades and disbursements where good faith belief it is needed

3. Legal Safe Harbour:
   a) Securities Regulators should implement legal safe harbour from regulatory liability for a disclosure of information if acting on good faith, and according to a regulator-established Conduct Protocol.
   b) legislative change to provide civil liability
   c) in the meantime, courts should give administrative deference to the regulatory regime
Six Recommendations

4. **Conduct Protocol**
   Securities Regulators should publish a “Conduct Protocol” defining key terms and steps to be taken to identify and protect vulnerable clients.

5. **Education and Training**
   Firms should be required to have representatives and staff have Regulator established competency-based training on elder abuse, undue influence, mental capacity issues, enduring powers of attorney and ageism, and pass the proficiencies.

6. **Firms Become Familiar with Outside Resources & Responders**
   Firms should learn how and where to refer cases and learn about resources locally, regionally and nationally.

Other Issues
Research Opportunities?

1. Is it Time for Some Form of Canadian Adult Protective Agency?
2. Comprehensive Seniors’ Strategy (prov/federal)
3. Education and Competency-based Training
4. Privacy Legislation - clarification
5. Non-Advisory Delivery Channels – discount brokerages, online accounts etc
6. Best Interests Standards – should it be applied by representatives?
Discussion and questions?

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