

VIA email

October 5, 2015

NOTICE OF REQUEST FOR COMMENTS REGARDING NASAA'S PROPOSED MODEL LEGISLATION OR REGULATION TO PROTECT VULNERABLE ADULTS FROM FINANCIAL EXPLOITATION September 29, 2015

<http://nasaa.cdn.s3.amazonaws.com/wp-content/uploads/2015/09/Request-for-Comments-Model-Seniors-Legislation-Final-2.pdf>

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Kenmar is pleased to provide comments on the consultation. Kenmar Associates is an Ontario-based privately-funded organization focused on investment fund investor education via on-line research papers hosted at www.canadianfundwatch.com. Kenmar also publishes *the Fund OBSERVER* on a bi-weekly basis discussing investor protection issues primarily for investment fund investors. An affiliate, Kenmar Portfolio Analytics, assists, on a no-charge basis, abused investors and/or their counsel in filing investor complaints and restitution claims.

The North American Securities Administrators Association (NASAA) is proposing a model Act that aims to address issues faced by broker-dealers, investment advisor firms and their employees when they suspect financial exploitation of seniors and other vulnerable adults is taking place.

The proposals would: require employees of broker-dealers and investment advisors to report suspected financial exploitation; allow firms to delay disbursements from an account of a vulnerable adult if financial exploitation is suspected; allow employees to provide financial records to the authorities; and give employees immunity from administrative or civil liability for taking these actions.

The dramatic growth in the number of seniors with significant investable assets has led to a disturbing trend. Studies show that over 30 percent of investment abuse victims are seniors. According to regulators and investors, the schemes not only are carried out by non-certified individuals and companies, but also by certified individuals, broker-dealers and investment advisors. Of even more concern is the projection that these percentages may increase as the baby boomers continue to retire. For the first time ever, there are now more people in Canada age 65 and over than there are under age 15, according to Statistics Canada <http://www.statcan.gc.ca/daily-quotidien/150929/dq150929b-eng.htm>.

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We believe this NASAA proposal will assist in the protection of seniors and other vulnerable investors. We assume this refers to exploitation not by the B-D/financial advisor but by relatives, friends, caregivers or other organizations.

We however feel that that the definition of *Qualified employee* should be limited to Branch manager, Chief Compliance Officer or a representative of dealer management. This is because of the potential conflict- of- interest between the B-D (“advisor”) and the client and the serious nature of taking these unusual actions. While certain financial transactions may not pass the smell test and should be delayed and researched, financial professionals aren't medical professionals and shouldn't be put in the position of determining a client's competency. Accordingly, we recommend leaving the decision to senior personnel who would have received some basic training in this area.

We might also add that perhaps some context or framework should be provided to add more meat to the broad term “suspected”. As an example, can the mere suspicion of POA authenticity be sufficient to proceed under the Act?

While we support rules and acts that will protect seniors against elder financial abuse, we worry about the potential unintended consequences of bringing in adult protective services (in Ontario, the Office of the Public Guardian) every time the qualified employee feels there is a potential issue.

We are also concerned about the difference in ages between the Model Act and the FINRA proposed rule -why 60 for NASAA and 65 for FINRA? At the heart of the matter is cognition issues which can develop at any age.

We wonder if it would be constructive to amend the act so that it included the client himself / herself in addition to outside third parties. This would be applicable in the case where the client was suffering from diminished capacity or mental anxiety , adversely impacting rational decision making.

We also would suggest that the banking and insurance sector distribution channels pass a similar Act to minimize the opportunities for regulatory arbitrage.

While implementation of this Act would be a step in the right direction, there is still much more to be done to protect potentially vulnerable investors. While this Act has the potential to stop outsiders from exploiting senior or otherwise vulnerable investors, it would have difficulty preventing the exploitation of them by their own financial advisor and brokerage firm.

A review of the statistics maintained by FINRA, IIROC and the MFDA about customer complaints and arbitrations filed against financial advisors and their broker-dealers reveals how bad the problem still remains. Each and every year thousands upon thousands of customers file complaints against their financial advisors and broker-dealers. Likely more never complain because they mistakenly believe their losses were due completely to the market, when in fact they were caused by their advisor’s misconduct or they are embarrassed to admit they have been fleeced.

These "advisors" commit financial assault on the assets of seniors but this is mostly done under the

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guise of the “Suitability” standard. In fact, the exploitation of seniors and retirees by advisors is of a much larger scale and over a lifetime of investing than that of family and friends. The exploitation occurs via high fees, excessive leveraging, unsuitable investments, churning, reverse churning, unfair dispute resolution, personal financial dealings, Off book transactions and outright fraud. Misleading advertising, embellished Seniors titles and “Free lunch “seminars for seniors have taken a heavy toll on seniors’ ability to provide for their retirement.

While Free lunch sales seminars have long served as a legitimate marketing tool, regulators have rightfully expressed renewed concern that a growing number of these seminars are targeting senior citizens, often employing high-pressure sales tactics to persuade seniors to purchase inappropriate or overly risky financial products. The seminars have titles like “Senior Financial Survival Seminar” and “Senior Financial Safety Workshop”, “Retirement Secrets of the Rich: What your Accountant and Stockbroker don’t want you to know.” and advertise a suite of services, including investment advice, estate planning, retirement planning and inheritance advice.

B-D titles have also been used to deceive the elderly. What is in a name? For some, it is a means to develop trust where that trust is not warranted. “Certified Financial Gerontologist;” “Certified Wealth Preservation Planner;” “Retirement Income Specialist;” and “Senior Specialist” are a few of the many designations financial advisors use to signify expertise in senior-specific financial issues. While some of these designations may be attained only after completing extensive course work and logging a specified number of hours of in-the-field experience, according to NASAA “a number of entities formed in the last few years have created designations with much less stringent requirements,” and “the training they receive is often nothing more than marketing and selling techniques targeting the elderly.” Ref Press Release, *N. Am. Sec. Adm’rs Assoc., Regulators Urge Investors to Carefully Check Credentials of Senior Specialists* (Dec. 12, 2005), available at http://www.nasaa.org/NASAA_Newsroom/Current_NASAA_Headlines/4028.cfm .

We have been asking for rule changes to protect senior investors for at least the last 10 years. See our Report *Securities Regulators and the Protection of Seniors* <http://faircanada.ca/wp-content/uploads/2013/08/130820-KK-protection-of-seniors.pdf> .

We believe a fiduciary standard is essential for all advice providers. There have been studies, research reports, roundtables, Summits etc. but little real action.

We have fought hard, so far unsuccessfully, to prevent SRO’s in Canada from introducing a rule change that would permit brokers to act as executors/trustees. Requests for enhanced supervision and sanctions continue to be “studied” although the Federal Government in Canada did pass the *Protecting Canada’s Seniors Act*. It came into effect in December 2012. The official name is An Act to Amend the Criminal Code <http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Language=E&Mode=1&billId=5452728> -it got the code changed so that elder abuse convictions face increased sentencing.

It's time for action to protect our elderly and other vulnerable financial consumers.

Kenmar Associates agree to public posting of this Comment Letter.

We would be pleased to discuss our comments and recommendations with you in more detail at your convenience.

Sincerely,

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SELECTED REFERENCES

1. Why-A-Fiduciary-Standard

http://faircanada.ca/wp-content/uploads/2012/06/Why-A-Fiduciary-Standard_-Kivenko.pdf

2. What is the Impact of Financial Advisors on Retirement Portfolio Choices and

Outcomes? http://www.smeal.psu.edu/csfc/PERS3_201110.pdf “Although we cannot conclude that those investing through a broker would have been better off investing on their own, our findings suggest that brokers are a costly and imperfect substitute for financial literacy...”

3. The Pension Fund Advantage: Are Canadians Overpaying Their Mutual Funds? By

[Rob Bauer](#) Maastricht University and [Luc Kicken](#), October 1, 2008

[Rotman International Journal of Pension Management, Vol. 1, No. 1, Fall 2008](#)

Abstract: The institutional structure through which individuals accumulate retirement savings is an important issue. Ideally, it is expert and low-cost. This article compares the cost-effectiveness of the pension fund structure with the mutual fund structure. The authors hypothesize that the pension fund structure provides investment management services at lower cost because most mutual funds are conflicted between providing good financial results for their clients and good financial results for their shareholders. Specifically, they compare the investment performance of a sample of domestic fixed income portfolios of Canadian pension funds with those of a sample of Canadian fixed income mutual funds. They find an average performance differential of 1.8 percent per annum in favor of pension funds. This performance gap is approximately equal to the average cost differential between the two approaches. They conclude that high mutual fund fees significantly reduce the net returns of mutual fund investors. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1290645

4 The \$25 billion annual mutual fund rip-off

http://cupe.ca/pensions/The_25_billion_annua

A comprehensive study by Canadian pension fund expert Keith Ambachtsheer has found that defined benefit pension plans in Canada achieved annual average returns at least 3.8% higher than mutual funds

with comparable investments. Defined Benefit pension funds outperformed the market by 1.23% per year, while mutual funds had average returns that were 2.6% below the market during the 1996 to 2004 period. Returns for most mutual investors were even less than this, as a result of sales fees and consistently poor selection of mutual funds by misinformed investors: buying high and selling low. This means that those with savings in mutual funds lost a total of about \$25 billion a year from the higher management fees and lower returns compared to workplace pension funds. Higher management fees are responsible for about \$15 billion of this.

5 CSA 2012 Investor Index

Key findings show that almost 30 % of Canadians surveyed believe they have been approached with an investment fraud at some point in their life. Over half agreed they were just as likely to be a victim of investment fraud as anyone else. However, just 29 % of those who believe they have been approached with a fraudulent investment said they reported the most recent occurrence to the authorities. The *Investor Index* also shows that the overall investment knowledge of Canadians is low, with 40 per cent of Canadians failing a general investment knowledge test. According to the findings, 57 % of Canadians say they are confident when it comes to making investment decisions. Yet most Canadians have unrealistic expectations of market returns. When asked what they think the annual rate of return on the average investment portfolio is today, only 12 % of Canadians gave a realistic estimate, while 29 % provided an unrealistic estimate and 59 % explicitly chose not to hazard a guess. Nearly half of Canadians (49 per cent) say they have a financial advisor, up from 46 % in 2009 and 42 per cent in 2006. However, 60 % of those with a financial advisor have not ever completed any form of background check on their advisor. Thirty-one per cent of Canadians say they have a formal written financial plan, up from 25 % in 2009. Although more Canadians have a financial plan, they are reviewing it less frequently (78 % say they reviewed their plan in the past 12 months, down from 83 % in 2009). <http://www.securities-administrators.ca/investortools.aspx?id=1011>

6. Suitability from a Retiree Perspective: Canadianfundwatch.com

<http://www.canadianfundwatch.com/2013/08/suitability-from-retiree-perspective.html>

7. REP 240 Compensation for retail investors: The social impact of monetary loss

Released 19 May 2011. This report was commissioned by ASIC's Consumer Advisory Panel and produced by Susan Bell Research. It explores the social impact of investors not being fully compensated when they suffer financial loss because of their licensee's misconduct.

[Download REP 240 \(PDF 590 KB\)](#) [Read the advisory](#)

<http://asic.gov.au/regulatory-resources/find-a-document/reports/rep-240-compensation-for-retail-investors-the-social-impact-of-monetary-loss/>

8. Financial Self Defense Guide for Seniors

http://www.cfp.net/docs/publications/financial_self_defense_guide_for_seniors.pdf?sfvrsn=2

9. Protecting Senior Investors: IIAC

http://iiac.ca/wp-content/uploads/Canadas-Investment-Industry-Protecting-Senior-Investors_March-18-2014.pdf

10: State regulators report advisers' top five trouble areas for compliance

But the picture wasn't all rosy. The **biggest compliance problems** for state-based advisers involved books and records, with about 74.8% of advisers showing deficiencies. They tended to trip up on documenting the suitability of their client recommendations.

http://www.investmentnews.com/article/20150928/FREE/150929898/state-regulators-report-advisers-top-five-trouble-areas-for?utm_source=Morning-20150929&utm_medium=email&utm_campaign=investmentnews&utm_term=text

11. Crime and Abuse Against Seniors: A Review of the Research Literature With Special Reference to the Canadian Situation

<http://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/crim/sum-som.html>

12. National Senior Investor Initiative :A coordinated series of examinations

An examination of 44 broker-dealers by the Securities and Exchange Commission and the Financial Industry Regulatory Authority has found that while most seniors are purchasing simpler products like open-end mutual funds and variable annuities, some BDs are recommending unsuitable products to seniors.

<http://www.sec.gov/ocie/reportspubs/sec-finra-national-senior-investor-initiative-report.pdf> . In addition, FINRA has historically recommended that a firm's procedures and controls take into consideration the age and life stage (whether pre-retired, semi-retired or retired) of their customers. Of particular concern to FINRA is the suitability of recommendations to senior investors, communications targeting older investors, and potentially abusive or unscrupulous sales practices or fraudulent activities targeting senior investors.