NASAA

NASAA Insight

The Voice of State & Provincial Securities Regulation

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NASAA Brings Experts Together to Discuss Cybersecurity Risks

NASAA President and Minnesota Commissioner of Commerce Mike Rothman delivers opening remarks at NASAA's 2017 Cybersecurity Roundtable in Washington, D.C.

Cybersecurity experts convened in Washington on June 23 for NASAA's Cybersecurity Roundtable to assess current cyber threats to the financial services industry, how industry is responding, and regulatory efforts underway to help small- and mid-sized investment advisers and broker-dealers protect critical client information from cybercriminals.

"Cybersecurity is a growing challenge for the securities industry and for securities regulators at all levels," said NASAA President and Minnesota Commissioner of Commerce Mike Rothman. "No securities firm or investment adviser of any size can afford the loss in client trust – much less financial losses – that will result from a serious cybersecurity failure. And no investor should have his or her personal information compromised or hard-earned money stolen."

Calling cyberattacks "one of the greatest threats globally to our financial sector," Rothman noted that the number of data breaches in the United States reached an all-time high last year, and the costs to businesses of these cyberattacks continues to grow.

"These threats to the public mean that, as regulators, we must be vigilant. We need to closely monitor developments to promote best practices in the industry," Rothman said.

NASAA Study Focuses on Broker-Dealer Senior Practices

A new NASAA study, released on June 15 in recognition of World Elder Abuse Awareness Day, offers an inside look at the dangers seniors face from financial fraud and exploitation, and procedures that broker-dealers use to help protect senior clients.

The study, prepared by the NASAA Broker-Dealer Section's Investment Products and Services Project Group, presents findings of a survey of senior-related practices and procedures of more than 60 broker-dealer firms throughout the United States. The study includes information about firm supervisory procedures, training, escalation and reporting of senior issues, resolution of senior issues, and use of trusted contact forms.

"Being face-to-face with clients puts financial services professionals on the frontlines when it comes to stopping suspected cases of senior financial fraud and exploitation. As the U.S. population ages, the financial industry can help detect and report financial crime and abuse of the elderly and other vulnerable adults," said Mike Rothman, NASAA President and Minnesota Commissioner of Commerce.

Data collected for the study show responding firms reported nearly 2,300 cases of suspected senior-related fraud or exploitation to authorities in 2015. The vast majority of these external reports (45 percent) involved customers in the 81-90 year age group.

The study found that while more than half (54 percent) of the responding firms lacked a formal policy defining senior customers, 90 percent had either a dedicated team or at least some type of internal process for addressing senior issues.

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From the Leadership

President's Message: Mike Rothman

Cybersecurity is a top priority for NASAA and its members and I am pleased that our recent Cybersecurity Roundtable provided regulators and regulated entities with important information to help mitigate the risks from cyber attacks.

I continue to work with my fellow securities commissioners throughout North America, as well as with other financial regulators, to identify specific threats and develop strategies to protect our financial infrastructure. NASAA also continues to work on this vital issue as a member of the Treasury Department's Financial and Banking Information Infrastructure Committee (FBIIC).

Shortly after I became NASAA's president last fall, we began plans to bring together leading experts in an open forum to help build our informational arsenal in the fight against global cyberattacks, which have become one of the greatest threats to our financial sector.

Cyberattacks have become increasingly sophisticated and widespread, as we saw most recently with the massive "Petya" and "WannaCry" ransomware cyberattacks that crippled computer networks around the world.

Statistics help map the battleground we face. In 2016 alone, the number of U.S. data breaches reached a record 1,093, according to the Identity Theft Resource Center. That's up 40 percent from the 780 breaches reported in 2015. Criminal data breaches will cost businesses a total of $8 trillion over the next 5 years, predicts a new report from Juniper Research. This forecast also indicates that the number of personal data records stolen by cybercriminals will reach 2.8 billion this year and 5 billion by 2020. It is important that securities firms and professionals have the tools and information they need for cybersecurity. It is also essential to have the proper regulatory expectations and guidance in place for the securities industry.

Three years ago, NASAA conducted a survey of small and mid-sized registered investment adviser firms in nine states. Based on the survey results, NASAA developed a cybersecurity module for its coordinated examination program for use by members. This tool is now used as part of NASAA's investment adviser coordinated examinations to seek information about firm cybersecurity practices and procedures. This information will help inform consideration of a possible model cybersecurity rule for investment advisers.

NASAA has also worked with its members to develop resources for firms, and we established cybersecurity committees to strengthen our efforts. We have also enhanced our collaboration with other federal and state regulators. It is time for us to take a closer look at the current state of preparedness and at what kind of support NASAA can provide.

There's no question that cyberattacks are going to increase. As we go forward, we all have to focus on three basic areas: prevention, mitigation and, if you do happen to get hit, recovery. NASAA believes cybersecurity, like many of the issues we face, requires a collaborative approach involving industry and regulators. We are also looking at new ways to provide resources for regulators and industry members to address cybersecurity issues, and we will continue to work collaboratively, so that we are all better prepared against cyberattacks.

NASAA President Mike Rothman opens NASAA's Cybersecurity Roundtable with an assessment of the current cyber threat facing investors and the financial services industry, and outlines the need for a collaborative approach to help mitigate the risks. A virtual version of the roundtable enabled viewers to participate remotely.

NASAA Reports More Firms Using Model Fee Table

A growing number of securities firms are agreeing to provide their clients with fee disclosures based on a model format developed by NASAA's Model Fee Disclosure Working Group.

NASAA President and Minnesota Commissioner of Commerce Mike Rothman commended the following nine firms for agreeing recently to use the NASAA Model Fee Disclosure Schedule: Fidelity Investments; Prudential Financial, Inc.; 1st Global; Cambridge Investment Research Inc.; Commonwealth Financial Network; FSC Securities Corp.; Royal Alliance Associates Inc.; SagePoint Financial Inc. and Woodbury Financial Services Inc.

The addition of these firms brings to 13 the number of firms using fee schedules based on the NASAA model. The other firms are: LPL Financial LLC, Morgan Stanley Smith Barney LLC, Prospera Financial Services, and Signator Investors, Inc.

The NASAA Model Fee Disclosure Schedule helps investors better understand and compare various broker-dealer miscellaneous account and service fees and provides guidelines to make fee disclosure accessible and transparent. The working group's goal was to develop meaningful account and service fee disclosure and transparency. They must be simple to read, easily accessible and helpful for retail investors to understand and compare fees.

"This collaborative initiative between regulators and industry helps increase the transparency of fee disclosure for investors," Rothman said. "I commend all firms that have taken the initiative to help bring uniformity to the disclosure of broker-dealer service and maintenance-related fees and I encourage the implementation of this sound business practice to others to provide the same level of disclosure to their clients."

The working group consisted of state securities regulators, representatives of the Financial Industry Regulatory Authority (FINRA), the Securities Industry and Financial Markets Association (SIFMA), the Financial Services Institute (FSI), LPL Financial LLC, Morgan Stanley Smith Barney LLC, Prospera Financial Services, and Signator Investors, Inc.

SAMPLE (For Illustrative Purposes Only)

OGENT BROKERAGE FIRM

SCHEDULE OF MISCELLANEOUS ACCOUNT AND SERVICE FEES

The listed fees do not include commissions, markups, commission equivalents or advisory fees. Some of these fees may not apply to all account types. Some of these fees may be waived under certain conditions.

ACCOUNT OR SERVICE	FEE AMOUNT	FREQUENCY
ACCOUNT MAINTENANCE		
Annual Account Fee	$X.00	Annual
Document Copies	$X.00	Per request
Estate Services Fee/Legal Transfer Fee	$X.00	Per position reregistered
Express/Overnight Mail	$X.00	Per Request
Minimum Balance Fee	$X.00	For accounts with a balance under $25,000
ACAT *Fee for transfers facilitated by ACATS (Automated Customer Account Transfer Service)*	$X.00	Per outgoing transfer
Postage and Handling	$X.00	Per statement/confirmation sent
Termination Fee	$X.00	Per termination
Transfer on Death	$X.00	Per request
Retirement Account Fees		
IRA Maintenance Fee	$X.00	Annual
Roth IRA Conversion	$X.00	Per conversion
CASH MANAGEMENT SERVICES		
ATM/Debit Cards		
ATM Withdrawal	$X.00	Per withdrawal at non-affiliated ATMs (other fees may be charged by the non-affiliated bank)
Additional Debit Card	$X.00	Per card request
Checking		
Check Reorder	$X.00	Per reorder-250 checks provided
Returned Checks for Insufficient Funds	$X.00	Per returned check
Check Stop Payment	$X.00	Per stop payment request
Credit Cards		
Platinum Credit Card	$X.00	Annually
Other Cash Management Services		
Wire Transfer • Domestic • International	 $X.00 $X.00	 Per wire request
Check Request-Overnight Delivery Fee	$X.00	Per request
Cash Advance	$X.00	Per request
Online Bill Payment	$X.00	Per request
Returned ACH Payment	$X.00	Per returned item

Effective as of 09/07/15

"This collaborative initiative between regulators and industry helps increase transparancy of fee disclosure for investors."

► **NASAA President Mike Rothman**

BD Senior Practices Study *(continued from Page 1)*

The study found that while more than half (54 percent) of the responding firms lacked a formal policy defining senior customers, 90 percent had either a dedicated team or at least some type of internal process for addressing senior issues. In addition, nearly all (95 percent) provided some type of training on senior issues, with the most common topic being recognizing signs of elder financial abuse. Also, 94 percent had a formal process to internally report concerns regarding diminished capacity and/or elder financial abuse. Most firms (81 percent) indicated they had a decision-maker responsible for reporting concerns to agencies or authorities outside of the firm. Less than half (41 percent) had developed a form for customers to identify an emergency or trusted contact person.

The study also collected examples of how broker-dealers prevented or resolved senior issues. More than half of the examples involved attempts by family members or third parties to access senior customers' accounts or funds or other potential forms of unauthorized access. In one example, a broker-dealer contacted adult protective services because an elder client on a church ministry trip met a prisoner (serving a long sentence for murder) and was attempting to add the prisoner as a beneficiary to her million-dollar account. The study can be found on the Broker-Dealer section of the NASAA website (nasaa.org) and in the Industry section of NASAA's Serve Our Seniors website (serveourseniors.org).

Investor Protection & Market Confidence: *Charting a Course for the Future*

Under the theme, “Investor Protection and Market Confidence: Charting a Course for the Future,” this year’s Public Policy Conference was chaired by Nebraska Deputy Securities Director Claire McHenry. The conference began with a luncheon opened by Stephen Taylor, Commissioner of the District of Columbia Department of Insurance, Securities and Banking, who welcomed attendees to Washington. NASAA President Mike Rothman next addressed the audience via Skype from his office in Minnesota (where ongoing budget negotiations required him to remain).

In his remarks, President Rothman outlined the accomplishments of NASAA and its members through the first half of his presidency. “We’ve accomplished many of our top agenda items for this year, and have much more to do. It all starts with a very ambitious agenda, not to mention new opportunities and challenges as we navigate a little turbulence in Washington D.C.,” Rothman said. He also reiterated NASAA’s opposition to many elements of the Financial CHOICE Act, stating “It is clear that the changes contemplated by the bill would significantly undermine and compromise the ability of regulators to effectively enforce financial laws and regulations.”

Conference Chair Claire McHenry, Deputy Director of the Nebraska Bureau of Securities, delivers welcoming remarks.

Keynote Speaker Mark Hamrick, Washington Bureau Chief of Bankrate and President of the Society of American Business Editors and Writers, discussed the changing business models of traditional news outlets and the erosion of press freedoms throughout the world.

The conference’s first of three discussions focused on the impact on investors stemming from a shrinking market for public securities. Anya Coverman, NASAA’s Deputy Director of Policy and Associate General Counsel, led the discussion, which featured Mary Condon, Associate Dean, Osgoode Hall Law School and former Vice Chair and Commissioner of the Ontario Securities Commission; William Bratton, Professor of Law and Co-Director, Institute for Law & Economics, University of Pennsylvania Law School; Dan James Suzuki, CFA, Senior U.S. Equity Strategist, Bank of America Merrill Lynch Global Research; and Daniel Zinn, General Counsel, OTC Markets Group Inc. In a wide-ranging discussion, panelists examined the state of the public and private securities markets, including trends regarding the number of publicly listed companies and whether retail investors are being deprived of opportunities to invest in new companies that choose to raise investment capital in the private markets.

NASAA Deputy Director of Policy and Associate General Counsel Anya Coverman (left) leads a discussion examining the impact of shrinking public markets.

The second discussion, which focused on the outlook for state and federal financial services regulation, was particularly timely, as the full House of Representatives gears up to consider the regulatory rollbacks contained in the Financial CHOICE Act. The Act has been characterized as an effort to repeal much of the Dodd-Frank Act.

New York Investor Protection Bureau Chief Katherine Milgram, University of Michigan Law Professor Michael Barr (center) and NASAA President-elect Joseph Borg discuss Dodd-Frank rollback efforts.

Policy Conference Highlights

Led by New York Investor Protection Bureau Chief Katherine Milgram, participants discussed how legislation and regulation enacted in response to the financial crisis can be adjusted while maintaining important investor protections. Participants included NASAA President-elect Joseph Borg, Michael Barr, Professor of Law, University of Michigan Law School, and David Lipton, Professor of Law and Director of the Securities Regulation Program, The Catholic University of America. While serving as the U.S. Department of the Treasury's assistant secretary for financial institutions, Barr was a key Dodd-Frank architect. Panelists also discussed fiduciary duty issues, investor protection, and where regulation is heading in the new administration, with an emphasis on the interplay of federal and state securities regulation.

SEC Investor Advocate Rick Fleming addressed the conference with a speech focused on enhancing the demand for initial public offerings, noting that the debate regarding the cause of declining numbers of IPOs must also focus on demand. "We need to continually remind policymakers that the IPO market cannot be revived in a one-sided fashion, by doing things like cutting back on disclosures that investors value or significantly altering the balance of power between shareholders and management," Fleming said. "By boosting the demand for smaller company shares, I believe policymakers could do far more to invigorate the IPO market than they are likely to accomplish by focusing on the supply side of the equation and whittling away at disclosure requirements or shareholder rights in an effort to attract more companies to the public markets."

In a speech, SEC Investor Advocate Rick Fleming addresses approaches to enhance the demand for initial public offerings.

The final discussion looked "under the dome," as Mike Canning, NASAA's Director of Policy, led a discussion among a bipartisan panel of senior congressional staffers, including Elisha Tuku, Senior Counsel, Senate Banking Committee; Mark LeDuc, General Counsel, Senate Special Committee on Aging; and Carol Wayman, Legislative Director to Rep. Keith Ellison.

NASAA Director of Policy Michael Canning moderates a panel of senior Senate and House staff members about the prospects for financial services legislation in the 115th Congress.

Their discussions covered a wide range of territory to provide attendees with a unique view of how Congress views the role of states in the financial regulatory and investor protection arenas and provided the audience with an insider's perspective on the legislative process. The discussion also explored the prospects for regulatory reform in the 115th Congress, and a discussion of the Senior$afe Act.

SEC Chair Jay Clayton Visits NASAA Members at Conference

Jay Clayton, (left) recently confirmed as Chair of the Securities and Exchange Commission, joined by Commissioner Michael Piwowar (right), visited with NASAA members and leadership, including Alabama Securities Director and NASAA President-elect Joseph Borg and NASAA Executive Director Joseph Brady, at NASAA's Spring Conference.

The Close-Up offers readers an in-depth look at key enforcement or legal issues for state and provincial securities regulators. This article was written by Don Young, Associate Director and Chief Litigation Counsel with the Alberta Securities Commission, and Chair of NASAA's Deposition and Litigation Skills Training Project Group.

R v Aitkens; R v Peers
No Jury Trials for Securities Offenses in Canada

Key Takeaway

In a very significant case for the future of regulatory actions in Canada, where there is no infrastructure, system, or procedure in place for jury trials in regulatory proceedings, securities regulators can continue prosecuting cases before a judge of the provincial court

On February 24, 2017, in a case of significant Canadian national ramifications, the Supreme Court of Canada (SCC) dismissed two appeals stemming from an Alberta Court of Appeal decision denying a right to a jury trial for Ronald Aitkens and Jeremy Peers.

The long roads to the Supreme Court for the two accused began in Calgary and Edmonton, Alberta, over two years ago. In separate proceedings, Aitkens and Peers were each charged with several offenses under the Alberta Securities Act (Act), including fraud. The Alberta Securities Commission (ASC), like some but not all Canadian provinces and territories, can choose to initiate proceedings under the Act before an administrative tribunal or in provincial court. Proceedings in provincial court are quasi-criminal, and terms of imprisonment, fines, probation, securities bans, etc., are available upon conviction. The proceedings against Aitkens and Peers were initiated in provincial court, and it was the prospect of imprisonment and a substantial fine that spawned the legal challenges that led all parties to the SCC on February 14, 2017.

Under s. 194 of the Act, a person found guilty of an offense is liable for a maximum $5 million penalty, or to imprisonment of five years less a day, or both. The five years less a day maximum term of imprisonment was adopted by the Alberta government in 1989, to provide greater deterrence to wrongdoers and ensure that the marketplace was fair and honest. The "less a day" language was chosen to ensure the penalty did not engage the jury trial right in the Canadian Constitution, contained in section 11(f) of the Canadian Charter of Rights and Freedoms (Charter). That section of the Charter provides that any person charged with an offense punishable by five years or more of imprisonment has a right to a jury trial.

Aitkens and Peers argued in motions before different trial judges that a five-year-less-a-day prison term, combined with a fine of up to $5 million, was a more severe punishment than a five year prison term, engaging the right to a jury trial. According to their arguments, any reasonable person would much rather spend one day in jail (cresting the five year threshold) than pay a fine of $5 million. The Peers motion was argued first, and Judge Day was persuaded that the combination of penalties in the Act amounted to a more severe punishment than imprisonment for five years, and that a jury trial was warranted. In the Aitkens motion, Judge Camp rejected the same argument, holding that the phrase more severe punishment in s. 11(f) of the Charter meant more imprisonment, not some other punishment such as a fine.

The ASC challenged through judicial review Judge Day's decision (Peers) in Alberta's next level court, the Court of Queen's Bench. Madame Justice Topolniski favored the ASC's arguments and overturned the lower court decision. The court concluded the right to a jury trial in s. 11(f) was intended to safeguard liberty interests protected in s. 7 of the Charter. That section of the Charter guarantees everyone the right not to be deprived of life, liberty and security of the person, except in accordance with the principles of fundamental justice. A fine, said the court, is not an interest protected under s. 7, and therefore cannot be added to the prospect of imprisonment for five years less a day to boost it across the jury trial threshold in s. 11(f). Applying principles of constitutional statutory interpretation, the court held the words "more severe punishment" in s. 11(f) must relate back to the preceding clause imprisonment for five years. Only more imprisonment, or other liberty affecting interest, could be combined with the five-years-less-a-day penalty for jury trial threshold analysis.

Some months later, an appeal by Aitkens of Judge Camp's decision was heard by Mr. Justice Wilson of the Court of Queen's Bench. In similar fashion, the court rejected the argument that a fine added to imprisonment for five years less a day was a more severe punishment than five years in jail.

Justices Topolniski and Wilson both commented on the uncertainty that would result from the interpretation of s. 11(f) of the Charter sought by Aitkens and Peers. Under that interpretation, anything considered a "punishment" could be quantified and added to the five year less a day maximum term of imprisonment for comparison against the threshold for a jury trial. If the added punishment was found to be greater in severity than one day in jail, then the total punishment exceeded the five year threshold for a jury in s. 11(f). 'What is a day in jail worth?' became their battle cry.

The ASC asserted that uncertainty and absurdity would result from Peers' and Aitkens' interpretations. Under criminal and securities laws, all probation, restitution, cease trade orders, director and officer bans, disgorgement of funds, etc., were possible outcomes from a finding of breach. Does the prospect of a five-year-less-a-day prison sentence plus a 10-year cease trade and director and officer ban exceed the five-year threshold for a jury trial in the minds of some judges? Does imprisonment for four years plus a $2 million fine exceed five years imprisonment? If not, and you add a term of probation

"Unlike in the United States, where jury trials are the rule rather than the exception, juries in Canada historically have been reserved for the most serious criminal offenses, measured by imprisonment for five years or more."

to that equation, does it now exceed five years imprisonment? Referring to the expansive subjective interpretation of the phrase more severe punishment sought by Aitkens, Justice Wilson asked "how can we turn criminal law in our country on its head?"

Aitkens and Peers appealed the Queen's Bench decisions to the Alberta Court of Appeal. The two appeals were combined at the highest court in the province, heard together, and dismissed. The court held as obvious that the purpose of s. 11(f) of the Charter was to entrench the traditional right to a jury for the most serious offenses in Canada – and severity was measured by imprisonment for five years. The court concluded the phrase "more severe punishment" primarily engages the deprivation of liberty inherent in the maximum sentence of imprisonment imposed by the statute. Only punishments that have a like quality to imprisonment (ie. liberty impairing) factor into the threshold analysis in s. 11(f). The interpretation sought by Aitkens and Peers, involving subjective quantitative comparisons between imprisonment and other general punishments, was "entirely unworkable" and not capable of "reasonable definition and application."

The two men sought and were granted permission by the SCC to argue their cases before the Court. Numerous interested parties participated in the appeals, including on the ASC's side the Ontario Securities Commission and the Attorneys General for Canada, Ontario and Quebec. The Attorney General of Alberta had joined forces with the ASC early in the process, and supported the ASC's position at all levels of court. Several civil liberties organizations argued in support of Aitkens and Peers.

The ASC argued before the SCC that adoption of the appellants' interpretation would not only impact securities commissions across the country, but also other regulatory statutes that had similar combinations of punishments involving five years less a day plus large fines. Responding to the hurdle posed by lower courts regarding uncertainty and subjectivity of their proposed interpretation, Peers invited the Court to look to the United States and its treatment of the jury threshold (involving the subjective assessment of the words "serious" and "petty").

In the end, the Court took less than two weeks to dismiss both appeals – significantly for the reasons determined by the Alberta Court of Appeal.

This was a very significant case for the ASC, and for the future of regulatory actions in Canada, where there is no infrastructure, system, or procedure in place for jury trials in regulatory proceedings. The economic cost to create such a system, not to mention the social cost in pulling in citizens to sit on juries, would be enormous.

Unlike in the United States, where jury trials are the rule rather than the exception, juries in Canada historically have been reserved for the most serious criminal offences – measured by imprisonment for five years or more. For now, at least, that reservation has been upheld by the highest court in the land.

Netz, Posner, Hartnett and Reeves Receive NASAA Service Awards

Former securities administrators Cheryn Netz of Mississippi (left), Laura Posner of New Jersey, Andrew Hartnett of Missouri, and Rhonda Reeves of Louisiana (not pictured) were honored with NASAA's Outstanding Service Award during NASAA's Spring Conference in Washington, D.C.

NASAA: Because Every Investor Deserves Protection

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About NASAA

The North American Securities Administrators Association (NASAA) is a voluntary association of securities administrators in the 50 states, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, Canada and Mexico.

Organized in 1919, NASAA is the oldest international organization devoted to investor protection.

As the preeminent organization of securities regulators, NASAA is committed to protecting investors from fraud and abuse, educating investors, supporting capital formation and helping ensure the integrity and efficiency of financial markets.

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