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February 5, 2018

Seniors Initiative Committee
c/o Deborah Gillis
Financial and Consumer Services Commission
85 Charlotte Street, Suite 300
Saint John, NB E2L 2J2

Dear Ms. Gillis:

Re: Financial and Consumer Services Commission Consultation
Improving Detection, Prevention and Response to Senior Financial Abuse in New Brunswick

On behalf of Advocis, The Financial Advisors Association of Canada, we are pleased to provide our comments in regards to the Financial and Consumer Services Commission's ("FCNB") consultation entitled *Improving Detection, Prevention and Response to Senior Financial Abuse in New Brunswick* (the "Consultation Paper").

1. ABOUT ADVOCIS

Advocis is the association of choice for financial advisors and planners. With more than 13,000 members across the country, Advocis is the definitive voice of the profession, advocating for professionalism and consumer protection. Our members are provincially licensed to sell life, health and accident and sickness insurance, as well as by provincial securities commissions as registrants for the sale of mutual funds or other securities. Members of Advocis are primarily owners and operators of their own small businesses, creating thousands of jobs across Canada. Advocis members provide advice in a number of key areas, including estate and retirement planning, wealth management, risk management, tax planning, employee benefits, critical illness and disability insurance.

Professional financial advisors and planners are critical to the ongoing success of the economy, helping consumers to make sound financial decisions that ultimately lead to greater financial

stability and independence both for the consumer and the governments that serve them. No one spends more time with consumers than financial advisors, educating them about financial matters and helping them to reach their financial goals. Advocis works with decision-makers and the public, stressing the value of financial advice and striving for an environment in which all Canadians have access to the advice they need.

2. CONSULTATION QUESTIONS

Before we address the consultation questions, we wish to commend the FCNB for bringing issues of senior financial abuse to the forefront. New Brunswick has been perhaps the most forward-thinking province on these issues. In our view, the trauma of suffering financial abuse as a senior lies not only in the amount of the loss – it is perhaps even more so the feeling that, as one ages, one is now vulnerable in ways that he or she may not have been in the past. As confirmed by a 2007 CSA Investor Study,[1] such events can have a real impact on mental and physical health.

THEME 1: OPPORTUNITIES FOR LEGISLATIVE CHANGE

1. Should 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?

Yes, the FCNB and other government agencies should seek a larger role in preventing and responding to the financial abuse of seniors. As the Consultation Paper notes, New Brunswick expects to have amongst the highest proportion of seniors amongst its citizenry in all of Canada. Ultimately, a major objective of financial services regulation is to protect consumers, so being cognizant of the coming demographic shift in its consumers and proactively focusing on senior issues is, in our view, a laudable example of proactive regulation.

We recommend that the FCNB and other government agencies, in preparing for this coming change, work to establish the legislative and regulatory framework that will:

a. Professionalize financial advice and promote an expansive role for professional advice;
b. Allow for the identification of a Trusted Contact Person;
c. Provide for the ability to place a temporary hold on trades and disbursements; and
d. Create a safe harbour that permits well-intentioned individuals who suspect senior financial abuse to report such instances to government authorities without concern of liability.

[1] Canadian Securities Administrators Investor Education Committee, *Understanding the Social Impact of Investment Fraud* (2007), at https://www.securities-administrators.ca/uploadedFiles/General/pdfs/2007InvestorStudy_ExecSummary-English.pdf.

These strategies are discussed in further detail below.

a. Professionalize Financial Advice and Promote an Expansive Role for Professional Advice

In *We Are All In This Together: An Aging Strategy for New Brunswick*,[2] the first identified goal is to enable seniors to live independently. New Brunswick seniors have clearly stated they want to remain in the home of their choice and in their community for as long as possible. Equally important to seniors is that when they do require services, they want timely access to appropriate programs and supports for daily living.[3]

If seniors are to achieve this goal, they will require the financial resources to do so. This will require having a degree of financial literacy and the discipline to stick to a financial plan. While financial self-management is helpful, the Aging Strategy acknowledges that "not all seniors have the same capacity to do this, so making sure that supports are in place to assist those who are vulnerable is important."[4]

Further, even if someone is financially literate in their younger years, studies have found that financial literacy scores decline steadily each year after age 60, and that investment performance declines significantly after age 70.[5] But at the same time, individuals do not necessarily lose confidence in their financial decision-making capabilities as they age; in some cases, their confidence can even increase.[6]

Given all of this, we believe that New Brunswick should promote an expansive role for financial advice. Studies have consistently proven that accessing financial advice has a material and significant impact on client wealth accumulation. According to the 2016 CIRANO Report,[7] advice has a positive and significant impact on wealth accumulation, relative to non-advised persons. Households with four-to-six year long advisory relationships accumulated 69% greater assets, and households with 15+ year advisory relationships accumulated 290% more assets, relative to non-advised peer households.

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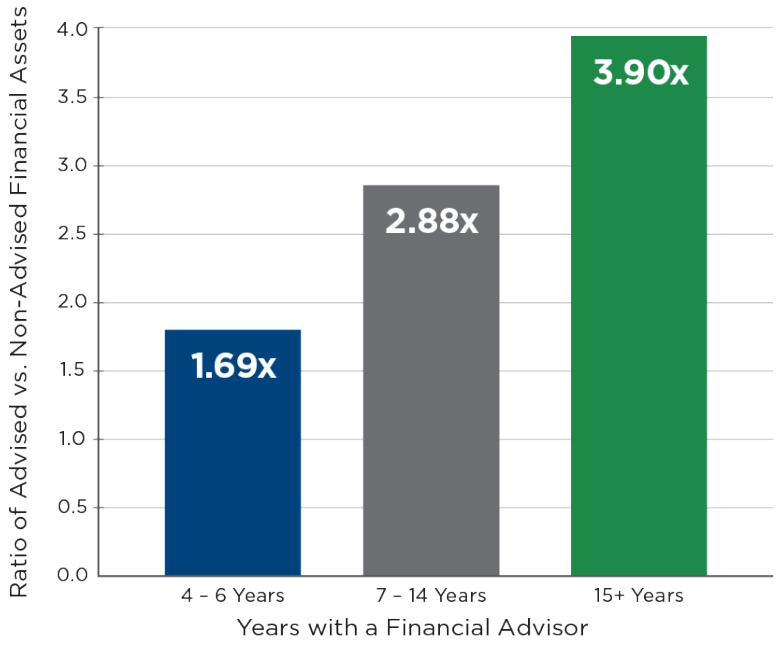
[2] *We are all in this together: An Aging Strategy for New Brunswick* (January 2017), at http://www2.gnb.ca/content/dam/gnb/Departments/sd-ds/pdf/Seniors/AnAgingStrategyForNB.pdf (the "Aging Strategy").
[3] *Ibid.*, at p. 21.
[4] *Supra*, note 2 at p. 23.
[5] Finke, Michael S. and Howe, John S. and Huston, Sandra J., *Old Age and the Decline in Financial Literacy* (August 24, 2011), Forthcoming in Management Science, at https://ssrn.com/abstract=1948627.
[6] *Ibid.*
[7] Claude Montmarquette and Nathalie Viennot-Briot, *The Gamma Factor and the Value of Financial Advice*, CIRANO, August 2016.



Source: The Gamma Factor and the Value of Financial Advice, CIRANO, August 2016

Clearly, accessing financial advice can help New Brunswick consumers accumulate the assets required for their goals in their senior years. But more germane to the issues in the Consultation Paper, financial advisors are in a unique position to act as a key consumer safeguard that can detect and prevent attempts at senior financial abuse.

This is because the advisor-client relationship is often one based on mutual trust that is fostered over many years or decades. Advisors help their clients focus on long-term goals and set up financial plans to achieve them. They stand by their clients through life's milestones, ensuring their financial preparedness. And in many circumstances, advisors are consumers' sole interface with the entire financial services sector.

With this unparalleled perspective, there is an opportunity for advisors to serve as a key consumer safeguard in preventing senior financial abuse. Advisors are in a position to recognize signs their clients may be suffering mental incapacity or the victims of financial abuse – including in regards to making unsuitable investments, transferring assets into vehicles that perpetrators may have access to, changing beneficiaries of insurance policies or changes to retirement funds that could jeopardize their retirement security. But to unleash this potential, the legal and regulatory framework must be reformed to reflect the modern role of advisors, the gravity of the responsibilities asked of advisors, and the tremendous life-altering repercussions that clients could suffer in the hands of unqualified or unethical advisors.

Currently, other than in the Province of Quebec, the provision of financial advice is not a recognized profession and anyone can purport to be a financial advisor. The regulatory framework is based on an outdated view of product-based transactions and advisors as conduits to those products. This must change. It is time to elevate financial advice to a profession – by raising proficiency standards across the board and re-aligning the regulation of advice so that it accords with the modern consumer's perspective, we could solve more consumer protection issues, more dynamically and effectively than prescriptive regulation ever could.

In **Appendix A**, we detail the problems with the current regulatory framework – most notably, the tremendous risks to consumers. We also provide a high level overview of our solution to professionalize the industry, known as the Professions Model, and its many benefits for all stakeholders. We urge New Brunswick to be a leader in Canada by enacting these reforms.

b. Trusted Contact Person

For non-institutional clients, we recommend that New Brunswick require advisors to take reasonable efforts to obtain the name and contact information of a trusted contact person ("TCP"). The TCP could serve as a resource for advisors to protect their client's interests by alerting the TCP about suspicions or concerns regarding the client's diminished mental capacity or undue influence, or potential financial exploitation by a third party over the client.

The requirement to seek TCP details should apply to all clients, regardless of their age (*i.e.*, this would not be limited to senior clients) and form part of the client's KYC profile. If a client refuses to name a TCP, the advisor should be able to continue servicing that client. The approach should be permissive, not mandatory: advisors should have discretion as to when and whether to contact the TCP, with the understanding that situations can be sensitive and rapidly-developing; the advisor will not wish to divulge potentially embarrassing information to the TCP unless absolutely necessary, or it could be the TCP him- or herself that is the suspected source of undue influence or exploitation.

In order to accommodate communication with the TCP, relevant privacy legislation would need to be amended to permit the advisor to make such outreach. Education for both the advisor and the client about the nature and purpose of identifying a TCP would be necessary, as well.

c. Temporary Hold on Trades and Disbursements

We recommend that securities dealers or insurance carriers be authorized to place a temporary hold on trades and disbursements from the accounts of vulnerable clients where the advisor notifies the dealer or carrier of a suspicion that: i) the client's request is substantially driven by the undue influence of another party on the client; or ii) the client does not have the mental capacity to make the instruction at the time the instruction is made; such that the trade or disbursement would

represent a deviation from the financial plan that the advisor and client have previously made and sought to fulfill. This should again be a permissive option that the advisor – through the firm or carrier – may, but is not required, to initiate or utilize, respectively.

Despite the foregoing, the advisor should continue to make trades or disbursements in furtherance of routine or expected payments that are consistent with the client's financial plan and which do not materially prejudice the client's financial standing.

If the advisor does initiate a temporary hold, the advisor should document the reasoning behind the hold and this documentation should be reviewed at the dealer or carrier level to confirm the next steps, such as whether to contact the Public Trustee or police. After all, the purpose of a temporary hold is to buy time – the source of the suspected undue influence or exploitation may not be deterred simply because a temporary hold is placed.

d. Safe Harbour

We recommend that New Brunswick implement a legal safe harbour that shields advisors and dealers from regulatory and civil liability so long as they are acting in good faith and have exercised reasonable care in taking steps to prevent senior financial abuse, which could include contacting the TCP or a government agency or placing temporary holds on trades or disbursements.

In designing the rules around a safe harbour, we ask New Brunswick to keep a steadfast focus on the purpose behind the safe harbour: to encourage advisors and firms to take certain positive actions in good faith in order to support and protect clients believed to be in genuinely vulnerable situations. To this end, New Brunswick should ensure an expansive and generous interpretation of the safe harbour protections.

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

Yes, having a definition of financial abuse would be helpful. The Consultation Paper itself states that the lack of a definition within the scope of the *Family Services Act* or other provincial legislation has hindered the ability of relevant authorities to investigate abuse. A definition of financial abuse would help empower the regulatory machinery charged with protecting consumers, including seniors. The definition would also help industry participants identify vulnerable clients on a more consistent basis by providing clarity around the situations that should attract scrutiny and require proactive steps to be taken.

A formal definition is also a critical element in carving out a safe harbour for those who would like to report suspected financial abuse to authorities but are concerned about breaching privacy laws or incurring liability despite acting in good faith. Without a clear and actionable definition, the safe

harbour discussed in Question 1 could not be relied upon in practice, which would deter industry participants from reporting suspected financial abuse and defeat the purpose of creating the incentive to report.

To assist New Brunswick in drafting a definition, we wish to draw attention to a scenario that we see often: seniors seeking to move assets out of their name and into the name of a related individual, such as a child. At first glance, one might suspect these transactions are being driven by senior financial abuse. But what we have often seen is that the senior client is actually motivated by a desire to avoid taxation on those assets, with the client incorrectly believing that shifting assets before death allows him or her to achieve tax savings. With this example, we wish to make two points: i) seniors need to be educated on estate tax issues, which by and large they do not understand; ii) New Brunswick should work hand-in-hand with professional advisors and their associations to ensure governments and regulators are getting the full client perspective when formulating laws.

Regarding the possible insertion of a definition within the federal *Criminal Code*, we are of the view that existing general offenses (such as theft, extortion, or forgery), combined with the application of the recently-added aggravating circumstances (such as abuse of trust or authority, the impact on the victim, or the victim's age or disability) are sufficiently broad and no amendments to the federal Code are required at this time.

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

While 65 is probably the most-cited age to define a senior, the number is up for debate.[8] We caution against placing too much emphasis on a particular numerical age. The underlying concerns in this consultation, under the proxy of the "seniors" label, are issues of mental capacity and undue influence associated with a segment of the population that are generally thought of as particularly vulnerable.

We accept as true the idea that as a person ages, there is a correlation with a decline in mental capacity. But we recognize that this is not a linear regression. As the Consultation Paper makes clear, one's mental capacity can be fluid on a day-to-day basis depending on stressors, energy levels and other factors. It is not as simple as saying that, say, a 64 year old has mental capacity and a 65 year old does not, and so only the latter warrants certain special considerations.

[8] For example, the MFDA defines "seniors" as investors 60 years of age or older. See definition at: http://www.mfda.ca/wp-content/uploads/EnfAR2014.pdf.

The challenge in identifying who a "senior" is, then, in any worthy attempt to prevent senior financial abuse, is to delineate where to draw that line – and how to do so with respect and dignity, as there are certain negative social stigmas associated with being categorized as needing special protections.

Based on the above, rather than using a specific age, we recommend that the FCNB consider the concept of a "vulnerable client", being someone of the age of majority who requires assistance (temporarily or permanently) due to physical or cognitive factors. The achievement of certain aging-related life milestones, including retirement from employment, the accessing of public pension benefits and so on, can inform the need for enhanced awareness of potential situations of senior financial abuse.

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

It would be preferable to have standalone legislation that deals specifically with powers of attorney in New Brunswick, rather than having authority to make a power of attorney remaining embedded in the *Property Act* and *Infirm Persons Act*. The powers which can be granted by a power of attorney are so broad and far-reaching that they should not be governed on an ancillary basis.

Ontario's *Substitute Decisions Act, 1992*[9] may be illustrative as a possible approach. Having dedicated legislation could help remove ambiguity for those accepting instructions from the donor to determine whether the power of attorney provides authority for a specific transaction or is more general in nature. We note that in British Columbia, the Public Guardian and Trustee works with health authorities and community organizations and is empowered to investigate and intervene in circumstances of financial abuse by a donee or other substitute decision-maker.

To protect against the misuse of powers of attorney, New Brunswick should ensure there is an active role for the Public Trustee, including certain accountabilities of the donee not only to the donor, but to the Public Trustee as well. For example, the Public Trustee could be empowered to demand an accounting from the donee if it receives a complaint of malfeasance. This would allow for a wider array of remedies if it is determined that the donee did not act in good faith.

Further, where the vulnerable client is incapacitated and there is an immediate risk to that client's assets, the Public Trustee could be empowered to investigate actions of a rogue attorney, demand

[9] S.O. 1992, c. 30.

an accounting, and temporarily freeze assets or prevent property transfers during the course of an investigation.

5. What conditions, if any, should restrict a person from acting as a donee under a power of attorney document?

The donee should be a capable individual who has reached the age of majority. The donee should not be an undischarged bankrupt. The donee should not be the owner, operator or employee of a nursing home or extended care facility in which the donor is a resident. Further, the donee should not provide personal care or health care services to the donor for direct or indirect compensation. These restrictions on acting as a donee are largely consistent with restrictions in other jurisdictions across Canada.

IIROC and the MFDA have rules that prohibit advisors from engaging in personal dealings with clients, including acting as donees in powers of attorney.[10] Exceptions include cases where the client is related[11] to the representative and the arrangement is disclosed to and approved by the firm. We believe that these prohibitions and exceptions are sensible and we recommend they remain in place.

THEME 2: REPORTING SUSPECTED FINANCIAL ABUSE

6. Would you be reluctant to report suspected financial abuse because of privacy concerns? Why or why not?

Yes, advisors are reluctant to report suspected financial abuse because of privacy concerns, including a desire to remain onside PIPEDA. Advisors face serious risks of incurring civil or administrative liability by intervening in clients' private matters even when that intervention is motivated by the best of intentions. This sensitivity is particularly acute in an era where concerns about privacy breaches regularly dominate the headlines.

Yet at the same time, there is a tremendous desire for professional advisors to "do right" by their clients and protect those clients' interests above all else. They are loath to stand by and do nothing, despite such actions being in accordance with the letter of the law, when they suspect their clients

[10] See IIROC Notice 17-0079 (April 6, 2017) at: https://www.osc.gov.on.ca/documents/en/Marketplaces/iiroc_20170406_iiroc-notice-17-0079.pdf and MFDA Rule 2.3.1 and Bulletin #0712-P (January 19, 2017), at: http://mfda.ca/bulletin/0712-p/.
[11] "Related person" refers to the definition in the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.).

are being exploited or abused. The unique client-facing role of advisors requires them to navigate this difficult balancing act.

In 2015, PIPEDA was amended to be more permissive: it now purports to allow organizations that collect, use or disclose personal information in the course of their commercial activities to disclose such information to a government institution or the individual's next of kin or authorized representative, without the 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. Organizations may make such a disclosure only for the purpose of preventing or investigating the abuse, and only if it is reasonable to expect that disclosure with the knowledge or consent of the individual would compromise the ability to prevent or investigate the abuse.

Despite the apparent intention to make it easier for intermediaries such as advisors to relay confidential information to third parties, the amendments are not truly actionable as PIPEDA remains silent on the terms "governmental institution," "next-of-kin," "authorized representative," or "financial abuse".

As discussed in Question 2 above, without a clear definition or guidance on these critical elements, advisors will be reticent to rely on the provisions. Further, PIPEDA does not allow for non-consensual disclosure on the basis of concerns about the client's mental incapacity. While ideally, PIPEDA is amended to address these concerns, we suggest that in the meantime, the Office of the Privacy Commissioner issue clarifying guidance on the existing exceptions so that they can provide some comfort to those who would like to rely upon them.

We also suggest that New Brunswick add the concept of a 'financial advisor' to subsection 35.1(5) of the *Family Services Act* dealing with professional persons to make clear that advisors may disclose confidential personal information without consent if that individual suspects abuse or neglect and is acting in good faith. Currently, financial advisors are not one of the enumerated professionals in this legislation.

For all of these reasons, privacy concerns still loom large and deter advisors from reporting instances of suspected financial abuse.

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?

As discussed above in Question 2, a clear definition of financial abuse (and other key terms germane to the subject) could form the basis of safe harbour exemptions to existing restrictions related to the sharing of confidential information on a non-consensual basis.

Having clear definitions helps stakeholders navigate the issues and provides a pathway to follow that can demonstrate reasonable and prudent steps were taken to balance the competing interests of disclosure and privacy, with a focus on acting in good faith and for the protection of the client, such that there should be no liability arising from those actions.

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

While the FCNB should take definitive steps to make the reporting of suspected financial abuse easier (including in regards to establishing a supportive regulatory structure and promoting the professionalism and education of client-facing representatives), we believe that the reporting of suspected financial abuse should be done on a voluntary basis.

There are far too many 'grey areas' of possible scenarios in this area that cannot adequately be captured by legislation or regulation. We believe that reporting should continue to be voluntary and draw upon the judgment and experience of the competent and educated professional advisors who have intimate knowledge of their clients' situations.

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

- and -

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

Beyond the problems associated with breaching privacy legislation, the lack of safe harbours and the attraction of civil and regulatory liability, advisors are also reticent to report suspected financial abuse out of a concern of, simply, misreading the situation and being wrong about their suspicion. Such an error can seriously (and possibly irreparably) harm the relationship between the advisor and client, as a misstep navigating suspected abuse situations could result in significant embarrassment to the client.

Advisors often have one of the most complete pictures of a client's financial situation, through their working with clients over several years. But as good as that perspective is, it is ultimately only one perspective. There are always additional facts that are unknown and analyses that might require the input of other professionals, including lawyers and doctors, to get a complete picture. Ultimately, it is a judgment call. The best we can do is to make this judgment call as informed as possible, through professionalization and education.

If New Brunswick wishes to incent a greater degree of reporting of suspected financial abuse, it must reduce barriers to such reporting by establishing a regulatory structure that is supportive and permissive – by addressing the TCP, safe harbour and privacy considerations discussed previously and establishing guidance for identifying issues of undue influence and mental incapacity, which are discussed in further detail in Question 11 below.

THEME 3: IMPROVING BEST PRACTICES FOR INDUSTRY

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

Let us reiterate that first and foremost, we believe the provision of financial advice must be made a recognized profession, given the gravity of the work that advisors do and the impact they have on their clients' lives. The professionalization of advisors is the foundation upon which all enhanced consumer protections can be built upon. And as part of a professional's commitment to continuing education, advisors could take courses that focus on financial abuse and skills to effectively address senior-related issues.

When dealing with seniors specifically, training in regards to identifying mental incapacity and undue influence are particularly relevant. We note that New Brunswick's Public Legal Education and Information Service has recently produced materials that explain concepts of mental incapacity, its relation to the *Infirm Persons Act*, capacity assessments and appointments of substitute decision makers.[12] We believe these materials can serve as a starting point that can be tailored for financial advisors.

Undue influence can be a particularly difficult problem to detect. The British Columbia Law Institute's guide "Undue Influence: Recognition / Prevention, a Reference Aid",[13] is widely accepted as a useful tool for professionals in identifying and responding to situations of undue influence. The concepts there, too, could be tailored for use by client-facing professionals including financial advisors.

As part of our role in advancing the professionalism of financial advisors, Advocis offers several educational courses and programs.[14] We would be pleased to work with New Brunswick in

[12] Public Legal Education and Information Service of New Brunswick, *Mental Competence* (March 2015), at: http://www.legal-info-legale.nb.ca/en/uploads/file/pdfs/Mental_Competence_EN.pdf.
[13] British Columbia Law Institute, *Undue Influence: Recognition / Prevention, a Reference Aid* (October 2011), at: http://www.bcli.org/wordpress/wp-content/uploads/2015/10/undue-influence_guide_tool.pdf.
[14] The Advocis Learning Centre's course catalogue is available at http://www.advocis.ca/ALC/pdf/ALC-Course-Catalogue.pdf.

developing courses specifically on mental incapacity and undue influence. Advocis already offers a certificate program on long-term care, which canvasses the design and structure of long-term care insurance plans and explores the chronic conditions many seniors experience, the costs of continuing care, and the various government programs available.

12. Should this type of training be mandatory?

While we believe that all advisors should be able to offer professional service, we do not believe that intensive or specialist-level senior-related training should be mandatory for all advisors. Financial advising is an expansive profession, allowing for many specializations – including specializations on estate planning, living benefits and senior clients. We believe that specializations can be part of the professionalism model that we envision, and such specializations can also serve as competitive advantages for those advisors that achieve those qualifications.

THEME 4: COLLABORATION, SAFEGUARDING AND INTER-AGENCY COOPERATION

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

Given Canada's constitutional framework, to effectively address senior financial abuse, industry, provincial ministries and agencies, and federal departments and agencies will have to work collaboratively.

New Brunswick is empowered to enact legislation recognizing financial advice as a profession, as well as establishing (through its agencies as applicable) regulations that can enact the TCP, temporary hold, safe harbour and power of attorney reforms. The federal government must lead the reform of PIPEDA (including the relevant safe harbours therein) as well as any future *Criminal Code* amendments. Financial advisors, representing the day-to-day face of industry, have a critical role to play that must be realized through the elevation of standards into professionalism. From there, advisors may specialize to service various client subsets, including seniors, by taking further education.

A collaborative approach should ensure that parallel initiatives promulgated by individual stakeholders are in sync with one consistent overall vision. For example, in May 2016, IIROC issued its "Guidance on Compliance and Supervisory Issues When Dealing with Senior Clients",[15] which sets

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

out certain industry best practices for protecting vulnerable older investors. Going forward, we recommend the development of a pan-Canadian aging strategy that includes representatives from all levels of government and industry stakeholders. Advocis would be very pleased to join such a committee and provide insights based on the unique perspective afforded to its members.

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

As New Brunswick's population ages, we believe the government must take an active role in educating the public on issues of mental incapacity, undue influence and abuse of powers of attorney. Educational programming should be aimed at the populace generally, so they are received by both seniors and their caregivers (whether they are third-party professionals or layperson friends or family of the senior). As noted in Question 2 above, while not an example of senior financial abuse, we also ask New Brunswick to include education on the tax implications of estate planning, being an area we have found to be particularly misunderstood.

We also urge the government to promote the importance of seeking professional financial advice, not only in terms of equipping the senior with a professional intermediary who is well positioned to protect their financial interests and detect possible financial abuse, but also for their established ability to improve clients' wealth accumulation over time so that seniors are more likely able to achieve their objectives as described in the Aging Strategy.

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

New Brunswick should focus on strategies to detect and prevent senior financial abuse rather than the application of criminal or civil sanctions after the abuse has occurred. As noted in the Consultation Paper,[16] proceedings under the *Infirm Persons Act* can be onerous and time consuming. In situations of senior financial abuse, the recovery process can be slow and in the intervening time, the repercussions can be devastating for the victim. So everything that can be done to *prevent* the abuse at first instance should be done.

The FCNB Senior Engagement Sessions Final Report[17] mentions fostering the use of technology to detect potential financial abuse. We believe there is tremendous opportunity in this area. Currently,

[16] At p. 13.
[17] FCNB Senior Engagement Sessions Final Report (July 2015), at: http://0104.nccdn.net/1_5/29b/21a/222/Senior-Engagement-Session-Report-Final-EN.pdf.

there are systems that detect whether clients over a given age are buying mutual funds using deferred sales charges, which flags a requirement for advisors to justify the rationale behind that selection. Other checks include whether the weighting of a portfolio is too tilted towards equities, given the age and goals of the client.

We are of the view that there is great promise in future developments in artificial intelligence that will assist in detecting patterns of unusual behaviour that could be a result of diminished capacity or exploitation. We encourage New Brunswick to be supportive of these technologies, including allowing for a regulatory framework that takes a permissive approach for their integration into the financial services sector.

But whether now or in the future, the front line of the sector – the main interface for the majority of consumers – will remain the professional financial advisor. It is critical that advisors have the professionalism and knowledge to identify and address suspected cases of senior financial abuse.

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

The FCNB's *Forum on Senior Financial Abuse: Summary Report*[18] found that there is a need to raise awareness and knowledge of financial abuse, from a senior's point of view, a service provider's point of view and a law enforcement point of view. The report went on to recommend the establishment of a "registration regime for caregivers" which would accord very well with a key element of our Professions Model. Having a government-endorsed registry of qualified and professional advisors would make it much easier for seniors to access competent and trustworthy financial services.

3. CONCLUSIONS

We support the FCNB's leadership in thinking about these seniors-related issues, as they will only grow in prominence over the coming years. These are challenging issues that deal with sensitive matters – they deal with people entering a phase in their lives where they may lose the ability to control their own outcomes, or where they may be exploited by those who they trust intimately, so they must be handled with dignity and tact.

[18] FCNB forum on Senior Financial Abuse: Improving detection, prevention and response to senior financial abuse in New Brunswick (August 2016), at: http://0104.nccdn.net/1_5/247/360/266/FCNB-Senior-Forum-Report--2016-08-31-EN-FINAL-Website-version.pdf.

We truly believe that the most impactful way to protect consumers – all consumers – is to ensure the utmost in professionalism of those that interact with them on the front lines of the financial services industry. Advisors are in the fortunate position to know their clients through relationships of trust over many years. And so advisors are also there as their clients age, able to see and respond as their clients' circumstances change.

Protecting seniors from financial abuse will require the collaborative effort of federal and provincial governments and agencies, and industry alike. By implementing legislative and regulatory amendments that would allow for the establishment of a trusted contact person, temporary holds on trades or disbursements, amendments to privacy legislation and safe harbours for well-intentioned interveners who act in good faith, along with comprehensive education campaigns that promote awareness of issues and access to community resources, significant progress can be made in preventing senior financial abuse. But all of these efforts must be based on the foundational professionalism of the client-facing financial advisor.

We look forward to continuing a dialogue with New Brunswick in considering and implementing policies to protect seniors from financial abuse. Should you have any questions, please do not hesitate to contact the undersigned, or Ed Skwarek, Vice President, Regulatory and Public Affairs at 416-342-9837 or eskwarek@advocis.ca.

Sincerely,

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APPENDIX
A BETTER WAY FORWARD: THE PROFESSIONS MODEL

All Canadians, regardless of their age, wealth or financial expertise deserve access to sound and trustworthy financial advice delivered by qualified professionals. Financial advice creates tremendous value for consumers due to the *gamma factor,*[19] the advisor-driven behavioural change that pivots consumers' inherently poor savings and investing habits towards a more forward-looking vision. But because gamma is built on trust, we must ensure that advisors are worthy of this trust.

In the current regulatory environment, there are legitimate concerns about the quality of financial advice and the proficiency and conduct of those who purport to provide this advice to consumers. It is these concerns that should be the primary focus of regulators. After all, the financial advisor is at the front line of the entire financial services industry – their standing is the culmination of the work and effort of all stakeholders, from regulators, product manufacturers, dealers, industry associations and advisors themselves. For the majority of consumers, it is the financial advisor that is their only point of contact with the industry. And as such, advisors can serve as the key consumer safeguard.

The existing framework puts consumers at risk

Given this critical role, consumers should be able to trust that their financial advisors are proficient, up-to-date in their knowledge, and compliant with the highest standards of conduct and ethics. While many advisors meet these expectations, there are inevitably some who do not – and due to persistent gaps in the current regulatory framework, retail investors are unnecessarily exposed to risk. There are five major sources of this risk:

(i) Anyone can call him- or herself a financial advisor and offer financial advice.

Across Canada, other than in Quebec, anyone can hold themselves out to the public as a financial advisor, financial planner, investment advisor, or countless other titles, regardless of their training, experience or education. Neither the title of 'financial advisor' nor the scope of the work under that title is protected in law, so there is nothing to prevent an unscrupulous, incompetent or merely inexperienced individual from calling themselves a financial advisor and offering what is purported to be financial advice to the public.

[19] *Supra*, note 7.

This is a significant risk which must be addressed; time and again, research has shown that most consumers mistakenly believe that titles such as financial advisor are regulated and someone holding themselves out as such has earned the right to do so through education and experience. But unlike doctors, lawyers or architects, anyone can claim to be a financial advisor or offer financial advice and planning — which leaves the public vulnerable to incompetence or outright fraud.

(ii) Existing regulation focuses on products, rather than the most critical aspect — the ongoing relationship between financial advisors and their clients.

Much of our existing regulatory framework does not reflect the reality of how most consumers access financial advice and planning. Existing regulation is often based on the type of product being sold to the retail consumer. And while existing regulators are adept at regulating their member dealers or brokers, including regulating the constant product innovation in the industry, they do not have a focus on the retail consumer's complete advisory experience.

Considering the issue from the consumer's perspective is illustrative: many advisors hold multiple licenses which allows them to provide consumers with complete risk management and wealth solutions from across the insurance, mutual fund and securities sectors. But as a practical matter, most consumers do not conceive of the retail financial services industry as structured in such rigid 'silos.' Nor should they be expected to understand the laws and regulatory processes which have produced this model. Consumers work with their advisors to develop holistic financial plans which reflect their personal circumstances; they do not receive piecemeal product-centred advice. Above all, consumers want assurances that their advisors are professional, knowledgeable and accountable, so they can get the most out of the relationship.

Most consumers are not particularly interested in knowing that product *x* comes from the insurance universe and product *y* comes from the mutual fund universe. But, in the current regulatory framework which is so tied to product sales, it is often the case that the advisor-client relationship is not governed by a single regulatory entity, but by a combination of them. The result is that the protections which consumers currently receive vary widely as they are based on the sector from which the product originates. We have seen the importance of this distinction coming to light if problems arise, leaving consumers confused and disappointed.

This sectoral approach also explains why the existing regulatory framework cannot effectively regulate today's holistic advisory relationships. It is true that in recent years, regulators have given greater attention to the advisory relationship — such as the CSA's Client Relationship Model reforms. Despite this laudable effort, existing regulators are structurally limited by their jurisdictions of authority; for example, even if an insurance regulator were to completely overhaul its expectations of licensees, those changes would only impact the consumer's experience in regard to purchases of insurance products, leaving the consumer's experience with other products

unaffected. This is what necessarily happens when consumer protections are ancillary to the sale of product.

In an ideal world, all regulators would set comparable standards so that clients would be equally protected, regardless of the product's origination. But a century of experience and general common sense tells us that when you have multiple regulators that were created on the basis of regulating products – rather than the advisory relationship – and which already have standards that (in some cases) vary widely from each other, coordinating policies on financial advice is nearly impossible. And even if regulators did manage to agree to a uniform set of policies, those policies would do nothing to capture those individuals who are not registered at all, such as a fee-only planner who does not sell product.

(iii) There is no firm, clear, and universal requirement for advisors to keep up-to-date their core areas of knowledge.

One of Advocis' core membership requirements is that advisors keep their knowledge up to date by completing continuing education courses each year, including courses on professionalism and ethics. But for the same reasons discussed above, the regulatory requirements for continuing education vary based on a product's sector of origination. For example, Ontario requires that life insurance licensees commit to 30 hours of continuing education every two years, without requiring a minimum learning component on professionalism or ethics. Several provinces do not have any CE requirements with respect to insurance licensees. And while IIROC has continuing education requirements for registered representatives, the MFDA only states that continuing education "should be provided" to its approved persons.[20] And those advisors who are not registrants with any regulator have no continuing education requirements whatsoever.

Advisors who do not keep their knowledge current fail to properly serve their clients and very likely puts their clients at risk. Moreover, the breadth of knowledge that advisors should have is continually expanding, as product change and innovation is constant. Therefore, static knowledge quickly becomes obsolete and impedes the ability of advisors to act in the best interests of their clients. We believe that all individuals who offer financial advice and planning to retail consumers should be required to complete continuing education on a regular basis, with an emphasis on education related to professionalism and ethical conduct.

[20] On June 22, 2015, the MFDA launched a consultation to consider whether it should require mutual fund dealer representatives to fulfill continuing education requirements. Available at www.mfda.ca/regulation/bulletins15/Bulletin0644-P.pdf.

(iv) There is no effective, industry-wide disciplinary process.

The majority of advisory relationships are beneficial to the public, but some inevitably do not work out as anticipated. Sometimes, this is a result of negligence, incompetence or fraud on the advisor's part. Accordingly, the industry requires a strong and effective disciplinary process, one which will ensure that those advisors who have committed misconduct are appropriately disciplined, and which will also protect the public and deter other advisors from similar misbehaviour.

Insurance regulators, the MFDA or IIROC are each empowered to impose a variety of sanctions, including the stripping from an advisor of his or her license or registration. However, the limitations of the existing product-based regulatory framework become most apparent when considering the practical impact of having multiple regulatory authorities investigate and act on matters of discipline: each regulator's enforcement powers are limited to its respective sector, creating unacceptable gaps in consumer protection.

Suppose, for example, an advisor engages in misconduct so egregious in the course of selling a mutual fund that the MFDA determines he or she is unfit to work in the fund industry and, as a result, revokes the advisor's registration. In such a case, there is nothing to prevent that same advisor from continuing to provide advice, and sell segregated funds through his or her insurance license.

We believe this sector-hopping represents an unacceptable consumer risk. The type of serious misconduct which warrants an advisor's outright expulsion from one sector, such as fraud or gross negligence, is clearly indicative of that advisor's inadequate commitment to ethical and professional conduct. This is not a sector-specific concern. It is, rather, an industry-wide concern that speaks to larger underlying issues.

Permitting such an advisor to continue to service any consumer is a disservice to the public. And even if that advisor is eventually identified and removed by other regulators in their respective sectors (quite possibly, with a lag measured in years, not weeks), that person can simply continue offering advice on an unlicensed basis since the scope of work is not protected: for example, he or she could "advise" clients to invest in an affiliate's Ponzi scheme.

(v) There is no centralized, pan-sectoral way to review an advisor's credentials.

Also currently lacking is an effective, accessible and industry-wide mechanism through which the public can easily verify their advisor's credentials and disciplinary history. While several regulators, SROs and industry bodies maintain websites where the public can search for information on their advisor, the information returned is confined to the particular entity's sector. As discussed above, the general public does not understand the difference between the various regulatory bodies

governing their one holistic relationship with their advisor and is not likely to canvass the registries or databases of each individual regulator to investigate a potential advisor.

In the example from the previous subsection, if a client were to review their prospective advisor's credentials and disciplinary history solely through the insurance regulator's website, they would not become aware of the advisor's expulsion from the mutual funds sector. The client might then mistakenly believe that the advisor's overall disciplinary history was clean.

Advocis strongly believes that consumers should have a one-stop access point for reviewing a prospective advisor's complete disciplinary history that is not limited to the domain of one product sector and respective regulator. It must also capture those individuals who offer advice and planning without the sale of product who are therefore not registered with any existing regulator. That is, rather than being based on today's archaic product-focused regulatory structure, this critical consumer tool must be reconceived at the level of the advisor-client relationship, in order to properly ensure regulation is informed by the consumer's perspective – as all good regulation should be.

These five major shortcomings of the existing regulatory framework expose consumers to unnecessary and unacceptable risk. They arise from the fact that current product-based regulation does not reflect the modern, holistic and cross-sectoral approach to financial advice and planning that most consumers receive. But these risks are addressable with the will and courage to re-align the regulation of financial advice with the consumer's perspective. It is to such a solution that this submission now turns.

The solution: Raise standards and make financial advice a profession

The solution to these problems is simple, straightforward, and does not require significant government resources to implement. What it does require is a willingness to re-think the regulation of financial advice, taking it away from its product-based roots to a client relationship-centric model.

The solution envisions recognizing the provision of financial advice as a true profession, through the creation or accreditation of a professional body that regulates financial advisors and the practice of financial advice in the public interest. The professional body would be responsible for the licensing, registration, standard-setting, investigation and disciplining of financial advisors. This would be akin to how other professional bodies operate, such as the College of Physicians and Surgeons of Ontario and the various provincial law societies.

The following is a high-level overview of the defining characteristics of the professional body.

(i) Mandatory membership.

Analogous to the professional bodies for engineers or accountants, the solution requires that anyone who holds themselves out as a financial advisor, or who is in the business of offering financial advice or planning services to the retail public, be a member in good standing of the professional body for financial advisors.[21] The membership requirement would cross traditional product sector boundaries, capturing everyone who offers retail-level financial services – thus introducing a unified oversight of all retail client-facing advisors, including financial planners and those that do not transact in product.

(ii) Enhanced proficiency and continuing education requirements.

The professional body would establish a mandatory minimum baseline of skills, education and other competencies which all financial advisors, including financial planners, would be obligated to meet in order to achieve membership. These requirements would apply across product sectors, thereby harmonizing advisor skill and competency and ensuring that clients interact with proficient advisors in all cases.

Continuing education would be a mandatory requirement, including content dedicated to topics on professionalism and ethics. The professional body would monitor and enforce continuing education requirements designed to ensure that all financial advisors maintain a high standard of proficiency. It would also require member advisors to maintain errors and omissions insurance to protect the clients they serve.[22]

[21] Certain exemptions could apply to the mandatory membership requirement, such as professionals licensed by another recognized body that offer financial advice as ancillary to their main service offering, such as lawyers or real estate agents. It may also be desirable to distinguish between the holistic full-service financial advisor and those who purely offer one-time transactional services, such as discount brokers. The number of service providers falling into this latter group would likely be relatively small.

[22] Current requirements to maintain errors and omissions insurance vary by province, industry sector and product type.

(iii) Meaningful titles and designations.

Select titles such as “financial advisor” and “financial planner” would be defined as a professional title and protected from misuse by the unqualified, just like the titles of lawyer, doctor or landscape architect are protected by those respective self-governing professions. Additionally, it is of critical importance that title protection not only be about the use and misuse of specific titles. Rather, protections must encompass both the title and the scope and function of the work, as they do for other professions.

A number of leading designations would also be granted proficiency recognition by the professional body, as conceptualized in the figure below, and these areas would denote areas of specialization – for example, through designations such as the CFP®, CLU® and CH.F.C®. Specialization is common in established professions: consider the medical profession, where all doctors must meet a minimum standard to be called a medical doctor and be a member of their professional body. But within that larger group, there are smaller groups who have specialized further: while every member of the profession is a doctor, only those who have completed additional training are allowed to use designations which identify their specialization, such as cardiologist and oncologist.

The basic principle should be that an advisor cannot hold him- or herself out to the public in a manner that deceives or misleads – or could reasonably be expected to deceive or mislead – a client or prospective client with regard to the advisor's proficiency, qualifications and service offerings (including specializations).

(iv) An enforceable code of conduct.

The professional body would have, at the cornerstone of its commitment to professionalism, a code of conduct that inculcates ethical norms in individual advisors. The code would address, *inter alia*, the duties surrounding conflicts of interest; the duty to provide competent service; the duty to act with honesty and integrity; the duty to preserve and protect client confidentiality; and the duty to cooperate with the professional body and regulators. At the core of the code of conduct, as its first tenet, would be the priority of the client's best interest; this is discussed in greater detail in the following subsections.

The code of conduct would be backed by a complaints, investigation and disciplinary process that empowers the professional body to suspend or cancel the advisor's membership. What is unique about this is that because membership in the professional body is mandatory across product sectors, discipline conditions or suspensions are not limited to one product sector. Instead, they are able to address the serious issues of negligence, incompetence or fraud directly in a complete manner, bolstering consumer protection.

(v) An accessible, consumer-facing central registry.

The professional body would maintain a public-facing database whereby consumers can conduct a "one-stop" check of a prospective advisor's credentials and disciplinary history. Unlike the registries maintained by existing regulators and SROs, which only contain information pertaining to the advisor's activities in the regulator's or SRO's respective sector, the professional body's registry would be based on the conduct of offering advisory services to the retail public. It would therefore transcend product sectors, addressing the "sector hopping" problem of miscreants. This focus on scope of work and conduct would also capture those advisors and planners who are currently not registrants of any regulator.

(vi) Advisor representation in their own regulation.

One of the hallmarks of a true profession is involvement of its members in their own regulation – this is true of lawyers, doctors, dentists, architects and so on. Involving members allows the professional body, including the government to which the body ultimately reports, to leverage the vast accumulated knowledge and real-world experience of the membership to set policy in a way that is more likely to achieve its objectives.

Financial advisors are currently regulated without representation. Advisor oversight is presently in the hands of regulators such as the MFDA, IIROC, and so on – these are product-based regulators who do not consider advisors to be true members of their organizations and refer to advisors as mere 'approved persons'. Indeed, because of how detached they are from the ground level of working with clients, these organizations often do not fully understand what advisors do in their day-to-day work.[23] And advisors lack true standing and a 'voice' within these organizations. For example, neither the MFDA nor IIROC mandate the presence of advisors on their boards of directors.

The professional body would have a board of directors comprised of financial advisors, members of the public, and government appointees, among other persons. The mandate of the body would be, first and foremost, the regulation of financial advisors and the provision of financial advice in the public interest. The professional body, through its board, would report directly to the provincial finance minister, rather than indirectly through a product regulatory body. As financial advice has evolved into a true profession, it is time to give professional financial advisors a dedicated voice in their own regulation.

All stakeholders would benefit from advisor professionalization

In summary, the establishment of financial advice as a profession would create benefits for all market participants: first and foremost, consumers would benefit from working with true professionals that are driven by an underlying duty to place clients' interests first. They could rely on the fact that all advisors would meet proficiency and ongoing education requirements, just as they do with their architects or engineers. They would also benefit from a simple way to verify their advisor's credentials and disciplinary history without having to navigate the maze that is the current regulatory landscape. Finally, they would enjoy the support of a disciplinary system with teeth: it

[23] While branch managers and other dealer staff receive and review paperwork documenting the advisor-client interaction, it is usually only the advisor that has a direct relationship with the client. As with any in-person, face-to-face interaction, there are many nuances that are difficult or impossible to distill into writing. The advisor's ability to understand the "human" elements in a client interaction is critical to the quality of that relationship.

would be a system that actually protects the public, rather than potentially off-loading one sector's problem onto another product sector and a new set of unsuspecting consumers.

Professionalizing the industry would align regulation with what is most important from the consumer's perspective: the relationship of trust with their advisor, which is the key to establishing the gamma factor and unlocking retirement readiness. Advisor regulation could finally be moved away from being a corollary of the byzantine world of product regulation. And professionalization would permeate through all facets of the advisor-client relationship and would be far more effective than prescriptive rules ever could be in addressing consumer protection issues that arise in a rapidly-changing environment.

Financial advisors would benefit from enhanced public trust, status and confidence as true professionals, and we know that our members would be very supportive of seeing unethical advisors who tarnish their collective reputation being removed once and for all.

Governments and regulators would benefit from enhanced consumer outcomes, including reduced public financial reliance, and the expertise and support of the professional body in crafting and implementing their policy agenda. And product manufacturers and distributors would benefit from the professionalism of the advisors who represent their companies to the public on a day-to-day basis.