



Consultation on FSRA's Approach to Strengthening Protection of Vulnerable Consumers (ID: 2024- 002)

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Authority of Ontario

Submitted by: Ontario Bar Association

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Introduction

The Ontario Bar Association (“**OBA**”) welcomes the opportunity to make this submission in response to the Financial Services Regulatory Authority of Ontario’s (“**FSRA**”) public consultation regarding the proposed approach to strengthening protections for vulnerable consumers.

Ontario Bar Association

Established in 1907, the OBA is the largest and most diverse volunteer lawyer association in Ontario, with close to 16,000 members, practicing in every area of law in every region of the province. Each year, through the work of our 40 practice sections, the OBA provides advice to assist legislators and other key decision-makers in the interests of both the profession and the public and we deliver over 325 in-person and online professional development programs to an audience of over 20,000 lawyers, judges, students, and professors.

This submission was prepared and reviewed by members of the OBA’s Business Law (Consumer Law Committee), Insurance Law, Pensions & Benefits Law, and Elder Law sections. Members of these sections include barristers and solicitors in public and private practice in large, medium, and small firms, and in-house counsel across every region in Ontario.

Comments & Recommendations

The OBA provides the following comments and recommendations for consideration in FSRA’s development of policies to protect vulnerable consumers.

Prescribing or Encouraging Plain Language in Forms

Many of the forms used by FSRA’s regulated sectors are complex and difficult for even experienced lawyers to understand. Plain language should be used as much as possible to



make it easier for all consumers, especially vulnerable consumers, to understand. FSRA should explore providing form completion instructions or guidance documents with the updated and improved forms. These additional materials could function in a way similar to passport renewal instructions which provide details on how to complete the forms and the types of information or documentation that is required.

Appropriateness of Products and Services

Consideration should be given to consulting on the potential adoption of an appropriateness standard for FSRA's regulated entities. This is a current obligation placed on Banks, Authorized Foreign Banks, and Federal Credit Unions, requiring consideration of the appropriateness of products and services for their consumer customers. A similar principle could be considered for FSRA's regulated entities. Specifically, this analysis could include, for example, analyzing a customer's circumstances, their financial needs, and the purpose or intent of the transaction, among other considerations. An additional factor could include evaluating whether the customer is a "vulnerable consumer", utilizing FSRA's guidelines and guidance documents on assessing vulnerability. To ensure a proper balance is struck, and to avoid overly burdensome obligations for brokers or services providers, we recommend a full consultation on this topic if FSRA is considering moving forward.

Education and Resources for Front Line Service Providers

There should be a focus on educating service providers who engage directly with consumers on scenarios that warrant further consideration or investigation. One area that would benefit from additional guidance involves the types of authority that can be relied on (such as Powers of Attorney). For example, a broker could inadvertently run into issues when an attorney under a Power of Attorney provides trading or other transactional instructions, and the broker later finds out that the execution of the document was invalid due to capacity issues. Educating front-end service providers who deal directly with consumers on the types



of authority they can accept, the flags to look out for, and safety precautions that should be implemented, would be beneficial to protecting vulnerable consumers and consumers as a whole.

FSRA could provide guidance on best practices and things to look out for when entering into specific instruments. This could include acceptable forms of documents, signs of exploitation or vulnerability, transactions that have a higher risk of fraud, and more. This would not be formal legal advice, but it would provide useful guidance to entities creating and engaging with these forms and transactions, provided the information and materials are readily accessible and drafted in plain language. Additionally, there should be guidance on what “fairness” looks like, recognizing that fairness is not the same for everyone and that one size does not fit all. Fairness for vulnerable consumers may require additional assistance and information beyond the default services offered.

We recognize that there will never be a complete checklist that can deal with every unique circumstance that FSRA’s regulated entities face, but FSRA is in a position to guide the industry towards a better understanding of identifying and dealing with vulnerable consumers in a fair and respectful way. Providing best practices and examples on how to handle common scenarios would be a win-win for institutions and vulnerable consumers alike.

Encouraging Legal Advice

In scenarios where a transaction or consumer has markers of risk or vulnerability, seeking legal advice should be strongly encouraged. FSRA’s guidance could assist in identifying and flagging common situations where consumers should be encouraged to seek independent legal advice or, conversely, where front line staff should be encouraged to use in-house counsel or other legal resources in order to help staff understand their obligations. To ensure that vulnerable consumers have access to independent legal advice, and to assist smaller



institutions or those without in-house counsel, FSRA could consider exploring the possibility of introducing an ombudsman who could act as a shared resource, or by having its own central legal counsel that institutions and consumers can engage with. This service could, for example, be limited to smaller institutions who opt into the arrangement for a small fee, providing a more cost-effective way to seek legal advice than what is available today.

We expect the insurers of these institutions to also see a benefit due to the decreased liability risks when involving competent legal counsel. Although not guaranteed, this could result in a discount or reduction in premiums that can reduce the burden placed on institutions, while also better protecting vulnerable consumers.

Defining “Vulnerable Consumer”

Defining and identifying vulnerable consumers is a difficult task that requires pragmatism and investigation into each individual client an organization deals with. We acknowledge that in certain instances that most practical approach is to focus on commonly shared vulnerabilities. However, while there are numerous factors including those identified in FSRA’s consultation paper, that are often markers of vulnerability, care should be given not to assume that an individual is vulnerable simply because they fall into one of the pre-defined categories or that a consumer is not vulnerable because they do not fall into any of the pre-defined categories. Moreover, it should be clear that any categories identified are merely illustrative, and not exhaustive or determinative on their own, of the types of factors and/or personal characteristics that constitute vulnerability. In our view, having a concrete definition of a “vulnerable consumer” may have unintended consequences, particularly when considering that vulnerability is fluid and needs to be assessed on a case-by-case basis in light of the specific circumstances. For example, a consumer can be vulnerable at one point in time but not another, despite the presence of factors that may suggest they fall into the category of a vulnerable consumer. Similarly, a consumer may be vulnerable but not necessarily fit a rigidly pre-defined category.



FSRA's proposed definition addresses this issue by simply stating that a vulnerable consumer is someone at higher risk of mistreatment, hardship, or harm, due to various factors and personal circumstances. In our view, guidance from FSRA will be key to service providers understanding the limitations of simply categorizing individuals based on a set of pre-determined factors. Guidance should focus on how to identify vulnerability or capacity issues and provide helpful flags, mitigation measures, and tips on monitoring individuals who may have moved to or from the vulnerable consumer label. We also note that the definition and guidance on vulnerable consumers should be cognizant of the differences among FSRA's regulated sectors (for example, pension plan members are not "consumers" in the traditional sense).

Consider a Process for Holding Transactions

FSRA could consider implementing a process for holding transactions that have hallmarks of coercion or exploitation. The Ontario Securities Commission has implemented something similar. Specifically, there is a positive obligation for brokers to not carry out certain transactions until they seek advice and direction, or until it is verified by the consumer's trusted contact person on file. While we do not support a formal requirement to seek advice and direction, in circumstances where a suspicion is raised, institutions should be able to use their discretion to put a transaction on hold if it is necessary to protect vulnerable consumers. For this to be effective, institutions need to be empowered both to identify vulnerability or exploitation, and to seek advice without fear of repercussions. This may require some form of immunity from civil proceedings in the event a transaction is put on hold in good faith. We recommend a fulsome consultation on this topic if FSRA considers implementing it.



Firm Policies to Support Fairness

Firm policies are an important complement to actions taken by FSRA on this topic. Some firms have implemented policies around creating a “culture of fairness” that seeks to provide additional recourse for consumers that feel they have been treated unfairly. For example, some firms have a complaints process within their organization that allows consumers to escalate decisions and/or grievances. An example would be a claims decision where a person is denied disability benefits. In this case, having an internal appeal process with a separate complaints process for grievances or frustrations relating to the treatment of the individual or process would be helpful, as it would increase transparency and the likelihood that the initial decision was reasonably made given that the matter could be escalated. Policies should be procedurally fair yet proportionate to provide appropriate solutions for consumers. FSRA could encourage these types of policies through its guidance materials and provide a starting point for the development of these policies.

The OBA would be pleased to discuss this further and answer any questions that you may have.