



THE CANADIAN
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February 13, 2019

Via email: FCAC.Seniors-Aines.ACFC@fcac-acfc.gc.ca

Jane Rooney
Financial Literacy Leader and Promotion
Financial Consumer Agency of Canada
427 Laurier Avenue West, 6th Floor
Ottawa, ON K1R 1B9

Dear Ms. Rooney,

Re: Code of Conduct for banks regarding service delivery to seniors

I am writing on behalf of the Canadian Bar Association Elder Law Section (CBA Section) in response to a request from the Financial Consumer Agency of Canada (FCAC) for input on a proposed code of conduct to guide banks in their delivery of products and services to seniors in Canada.

The CBA is a national association of 34,000 members, including lawyers, notaries, academics and students across Canada, with a mandate to seek improvements in the law and the administration of justice. The CBA Elder Law Section addresses issues of law and practice relating to the elderly in Canada and promotes education to raise awareness of their needs.

The CBA Section welcomes this initiative to develop a code of conduct and appreciates the opportunity to comment on issues to consider and elements to include in the proposed code of conduct.

Training and Education

We recommend that banks be required to deliver competency-based training to their staff, branch managers, representatives and compliance personnel on mental capacity, ageism, powers of attorney, power of attorney abuse, elder abuse, undue influence, common types of financial fraud, privacy and confidentiality obligations, cultural awareness, and the bank's escalation policies and procedures (to include information on external resources when fraud, elder abuse or mental capacity issues are identified).

Financial Abuse

Powers of Attorney

Our recommendations aim to offer reasonable protections in circumstances where substitute-decision making may be required for customers, which present particular risks for seniors.

- Banks should not be permitted to reject a customer's validly executed power of attorney for property and require instead that the customer execute the bank's form which effectively

revokes prior power of attorney for property documents. At a minimum, prior to executing a bank power of attorney document, the customer should have an opportunity to obtain legal advice.

- Accounts where valid and effective power of attorney for property documents have been presented to the bank should be flagged systematically. Banks should not recommend that customers simply add joint account holders as a substitute for the authority granted under the power of attorney for property (discussed further below). It is preferable that the account be changed to an 'in trust for' account or that some other mechanism be implemented to permit a substitute decision-maker to have access and control over an account without receiving any beneficial interest in the asset.
- There should be a formal, consistent process by which a customer's power of attorney for property document is vetted by the bank. Particular attention must be paid to the effective date of the document, which in many cases will be on execution, but in other cases not until the incapacity of the grantor. In the latter instance, bank staff must understand what evidence of the customer's incapacity to manage property is required (e.g. physician's letter, capacity assessment report).
- Banks should make information available to customers on the benefits and risks of planning documents (such as a power of attorney for property) and the importance of planning ahead of any type of cognitive impairment. The authority granted under a power of attorney, its potential for misuse and the obligations of the grantee should be explained in plain language and customers should be encouraged to seek legal advice.

Joint Accounts

Our recommendations address risks associated with joint accounts.

- Bank staff should be trained and advise all customers, and in particular seniors, of the consequences of opening and using a joint account, the operations that do not require approval of both account holders, the option of requiring both account holders to approve withdrawals, and the option of specifying other limitations on the operation of the account such as withdrawal limits or paying bills only.
- Banks should not routinely add the grantee of a power of attorney to the account of the grantor (making it joint). Staff should be trained on the risks of making the account joint with the grantee, and customers who make this request should be advised of the risks, implications and be offered alternatives. Many seniors are not aware that any joint account holder, under usual bank policy, will have full access to the funds without the need for another signature.
- Bank staff should be made aware that a non-spouse who is added to a joint account, at common law, does not have a right of survivorship on the funds in the account. Rather, there is a rebuttable presumption of resulting trust - when the original account holder dies, it is presumed that the funds were held for the account holder's estate. To grant a right of survivorship to a non-spouse joint account holder, further steps must be taken. We recommend disclosure and documentation requirements similar to requirements when signing loan documentation or becoming a guarantor. A right of survivorship 'check box' on a bank form is not a sufficient declaration, as many Canadians do not understand what a right of survivorship entails.
- Banks should be capable of flagging accounts where a grantee of a valid power of attorney has the authority to conduct transactions through the account, making a joint account unnecessary.

- Bank staff should advise the customer of the availability of an account in the name of grantee of a power of attorney *in trust for* the grantor, as an alternative to a joint account.

Accessibility and Technology

The code of conduct should include a commitment to improve accessibility of banking services for seniors, including accommodations for mobility limitations, hearing impairments, visual impairments, seniors in remote areas (including remote indigenous communities), and seniors on low incomes. Our suggestions are aimed at enhancing accessibility.

- Banks should offer seniors the opportunity to meet with bank staff one-on-one periodically, where the senior may feel more comfortable disclosing personal issues that impact their financial situation, such as elder abuse.
- ATMs should be designed to accommodate people with hearing, vision, fine motor skill or mild cognitive decline. The use of biometrics, voice assistance or form of security other than a PIN number may be advantageous. Adding an arrow or otherwise making the insertion of a debit card into the ATM machine easier for those with arthritis or other similar limitations would also help seniors to access banking services. ATMs should be situated in well-lit locations and be accessible to those with mobility impairment. Instructions on using an ATM should be available in booklets, audio-files and other types of materials.
- Access by seniors to online banking might be improved by use of biometrics rather than PIN numbers. Screens and screen prompts should be designed to accommodate vision, hearing or cognitive challenges, and instructions should be in plain language.
- Banks should work with individuals, as appropriate, to determine ways to better access and undertake their banking. For example, if the client appears to be having difficulty with a transaction at the teller's counter, the teller or other staff could offer a quieter meeting place, allowing the client to sit down and to take more time.
- Telephone banking and easy access by phone to a live individual would improve access to banking services for seniors with mobility issues, who cannot use the internet or who live in remote areas.

Communication

Given low levels of financial literacy (regardless of age), and the difficulties experienced by financial consumers in understanding complex financial products¹, both oral and written communications, in plain language, should advise the consumer of key product or service characteristics, including benefits, costs and risks. Pictorial tools should be used (considering accessibility colour-blind individuals).

Communications between banks and customers must meet accessibility requirements such as larger print size, clear fonts, Easy Read and audio, and limiting the amount of information on a page.

The efficacy of a communication tool should be tested to ensure it is understood by seniors, including those who may be more vulnerable.

¹ The recent FCAC report on consumer knowledge and behaviour for home equity lines of credit (HELOC) found that "...many consumers appear to lack awareness of the terms and conditions, according to FCAC's survey results.": <https://www.canada.ca/content/dam/fcac-acfc/documents/programs/research-surveys-studies-reports/home-equity-lines-credit-consumer-knowledge-behaviour.pdf> at p. 13. On average, HELOC owners answered only 4 out of the 9 questions correctly about key product characteristics: <https://www.canada.ca/content/dam/fcac-acfc/documents/programs/research-surveys-studies-reports/home-equity-lines-credit-consumer-knowledge-behaviour.pdf> at p. 6.

An illustration especially pertinent to seniors is the reverse mortgage, a complex product. The risks must be carefully explained, particularly the impact of compound interest on the owner's equity interest in the property, if required to move into a long-term care facility or hospitalized for an extended period. Alternative financial options (like a secured line of credit) should be offered and carefully explained. All costs and fees and interest rates should be translated into dollars and cents.

Compliance with Code of Conduct

We support this initiative to create a voluntary code of conduct but urge the FCAC to consider whether developing Regulations to ensure compliance would be more effective. As stated in the FCAC Backgrounder provided with consultation materials, "[u]nlike breaches of legislation or regulations, FCAC cannot impose administrative monetary penalties for a breach of a voluntary code of conduct, nor can it make public the name of the entity that breached it."

In the meantime, we trust procedures for compliance will be overseen, and implementation reviewed, by each bank's consumer protection Committee² and assessed against the standard set by new section 627.06 of the *Bank Act*, which requires that products and services offered or sold are appropriate for the person's circumstances, including their financial needs.³

Thank you for the opportunity to comment. We hope our recommendations are helpful and would be pleased to discuss them with you.

Yours truly,

(original letter signed by Sarah MacKenzie for Kavina Nagrani)

Kavina Nagrani
Vice Chair, CBA Elder Law Section

² Pursuant to subsections 157 (2)(e) and (f) of the [Bank Act](#), SC 1991, c. 46 and new *Bank Act* section 195.1, in [Budget Implementation Act, 2018, No. 2](#), s. 329 (Royal Assent, December 13, 2018)

³ **627.06** An institution shall establish and implement policies and procedures to ensure that the products or services in Canada that it offers or sells to a natural person other than for business purposes are appropriate for the person having regard to their circumstances, including their financial needs.: C-86, [Budget Implementation Act, 2018, No. 2](#), s. 329 (Royal Assent, December 13, 2018)