

Accreditation of senior investors and consumers through financial literacy testing

K. Yu. Molodyko, V. S. Veselsky, K. A. Annenkova

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In the US and UK, a lot of attention is paid to protecting the rights of older investors and consumers of financial services. In particular, a part of brokers, investment advisers are being tested in the US for understanding of the specifics of working with older investors. However, older investors themselves are only tested for scientific purposes, and the results of such tests have no regulatory implications. In some jurisdictions the brokers rejected the proposals of the regulators to include testing elements into the qualifications of investors. In Russia in 2021 the tests were introduced for non-qualified investors for access to the acquisition of medium-risk assets and margin loans, but without the separate test for elderly investor. We believe that older 63+ investors, given the high probability of dementia development, should be tested for financial literacy by independent from brokers universities annually. Testing should be separate for traditional products and cryptoassets respectively. Depending on the result of the test and the personal desire of the elderly investor, such dynamic restrictions may be introduced as the bans on purchasing certain products, margin loans, purchasing financial products remotely, also mandatory video recording of purchasing a product in the office, as well as a 'second hand', that is, confirmation all or major transactions by a family member. Testing will protect not older investors only but also the brokers, investment advisers from being accused of selling non-suitable products to these clients.

Keywords: senior investors, elderly consumers, mis-selling, retail investor protection, financial literacy, dementia.

Introduction

It is important to provide access to financial markets for those older people who maintain normal levels of cognitive skills. Psychologically it provides them the feeling they have equal opportunities as members of society and even sometimes imparts more of a sense of meaning in their lives.

The aging of the population, which is relevant today a lot for a lot of jurisdictions, leads to an increase in the number of people with cognitive disabilities and consequently an increase in the number of people who are more vulnerable to financial fraud. Thus, cognitive impairments and social isolation may hinder the ability of the elderly to invest effectively and safely. It appears that the current state of protection for this category of investors is not satisfactory. An aging population is a global phenomenon with corresponding socio-

Kirill Yu. Molodyko — PhD in Law, MPA (Harvard), Chief Expert, HSE University, 20, ul. Myasnitskaya, Moscow, 101000, Russian Federation; kmolodyko@hse.ru

Victor S. Veselsky — Master Student, School of Law, St. Petersburg State University, 7–9, Universitetskaya nab., St. Petersburg, 199034, Russian Federation; vs.veselsky@yandex.ru

Karina A. Annenkova — Bachelor Student, School of Law, HSE University, 20, ul. Myasnitskaya, Moscow, 101000, Russian Federation; karina.annenckova@yandex.ru

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economic implications for a multitude of countries. When considering investor protection, the trend of an aging population is a global problem that must be addressed, as related physical and cognitive challenges increasingly impact investor opportunities in markets around the world.

The US Securities and Exchange Commission faces several challenges in its work to protect senior investors. The first is the external challenge of demographic, financial and other trends that are driving dramatic expected growth in elder financial exploitation and diminished capacity. A second challenge arises from the advent of new technologies, which give wrongdoers new ways to exploit the elderly, but which also give the SEC new ways to identify risks and combat wrongdoing. A third challenge is the weight of responsibility to act proactively and swiftly to try to prevent elder financial exploitation from occurring in the first place. Finally, policymakers face the challenge of striking the right balance to protect seniors while respecting their rights to privacy and autonomy¹.

Financial capacity can be defined as the ability to independently manage one's financial affairs in a manner consistent with personal self-interest. Financial capacity is essential for an individual to function independently in society; however, Alzheimer disease and other progressive dementias eventually lead to a complete loss of financial capacity². According to Rolison *et al.* financial risk taking reduced steeply in later life for men but not for women, and risk taking on the social domain reduced more sharply for women than for men³. Seaman *et al.* concluded that older adults are disproportionately targeted by fraud schemes that advertise unlikely but large returns (positively skewed risks)⁴. As stated in the Senior Investor Vulnerability Report by the Board of the International Organization of Securities Commissions (IOSC) # FR03/2018, from the perspective of investor protection, the growing trend toward ageing populations is an important issue that should be addressed, as ageing and associated levels of physical and cognitive decline increasingly affect the capabilities of investors in markets worldwide. Indeed, research has detected a link between age-induced cognitive decline and impaired financial decision-making. Some research also correlates ageing with increased susceptibility to financial exploitation and fraud, at a time when many investors are assuming greater responsibility for their own retirement and financial future⁵.

It is of interest that older people give themselves very high scores regarding their own financial literacy, despite scoring poorly on the basic financial literacy questions and not just in the United States, but other countries as well⁶. Financial abuse in circumstances of dementia or medically-significant cognitive impairment, while serious and relevant, requires dramatically different protective responses and should be considered as a distinct

¹ Deane S. How the SEC works to protect senior Investors? / US Securities and Exchange Commission. Office of the Investor Advocate. 2019. May. Available at: <https://www.sec.gov/files/how-the-sec-works-to-protect-senior-investors.pdf> (accessed: 10.04.2023).

² Widera E., Steenpass V., Marson D., Sudore R. Finances in the Older Patient with Cognitive Impairment: He didn't want me to take over // The Journal of the American Medical Association. 2011. Iss. 305 (7). P. 698–706. Available at: <https://www.pubmed.ncbi.nlm.nih.gov/21325186/> (accessed: 10.04.2023).

³ Rolison J., Hanoch Y., Wood S., Pi-Ju L. P. Risk-Taking Differences Across the Adult Life Span: A Question of Age and Domain // The Journals of Gerontology. Series B. 2014. November. Vol. 69, iss. 6. P. 870–880. <https://doi.org/10.1093/geronb/gbt081>

⁴ Seaman K., Leong J., Wu C., Knutson B., Samanez-Larkin G. Individual differences in skewed financial risk-taking across the adult life span // Cognitive, Affective, & Behavioral Neuroscience. Iss. 17. P. 1232–1241. <https://doi.org/10.3758/s13415-017-0545-5>

⁵ Senior Investor Vulnerability Report / The Board of the International Organization of Securities Commissions (IOSC) # FR03/2018, March, 2018. Available at: <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD595.pdf> (accessed: 10.04.2023).

⁶ Lusardi A., Mitchell O. The Economic Importance of Financial Literacy: Theory and Evidence // Journal of Economic Literature. 2014. Iss. 52 (1). P. 5–44. <http://dx.doi.org/10.1257/jel.52.1.5> (also referring to several their own earlier papers).

phenomenon from the victimization of cognitively healthy individuals⁷. Finke *et al.* found a consistent linear decline in financial literacy score after age 60. In their opinion confidence in financial decision-making abilities does not decline with age. A separate analysis using data that include measures of cognitive ability suggests that a natural decline in both fluid and crystallized intelligence in old age contributes to falling financial literacy scores⁸. According to Griffin many older Americans are often the targets of investment scams such as Ponzi schemes and illegal offshore investments. Knowing how to spot 'fraudsters' can often be challenging, especially when they have been referred by a friend or family⁹.

Some of the most common types of cognitive impairment caused by aging are mild cognitive impairment (MCI) and Alzheimer's disease. The Alzheimer's Association defines mild cognitive impairment (MCI) as a disorder that causes cognitive changes to such a degree that they are noticed by the people experiencing them themselves or by others, but not so severe as to interfere with routine daily tasks. Alzheimer's disease, on the other hand, is the most common type of dementia. Symptoms may include memory loss, mood changes, communication and thinking problems. Han *et al.* concluded that older persons with MCI may have poorer financial and healthcare decision-making in real-world situations, and perceptual speed may be an important contributor to poorer decision-making in persons with MCI¹⁰. Weissberger *et al.* pointed to a potential link between financial exploitation risk and Alzheimer's disease in older age¹¹.

According to the World Health Organization (WHO) dementia is characterized by the presence of marked impairment in two or more cognitive domains relative to that expected given the individual's age and general premorbid level of cognitive functioning, which represents a decline from the individual's previous level of functioning. Memory impairment is present in most forms of dementia, but cognitive impairment is not restricted to memory (i. e., there is impairment in other areas such as executive functions, attention, language, social cognition and judgment, psychomotor speed, visuoperceptual or visuospatial abilities). Neurobehavioural changes may also be present and, in some forms of dementia, may be the presenting symptom. Cognitive impairment is not attributable to normal aging and is severe enough to significantly interfere with independence in an individual's performance of activities of daily living. The cognitive impairment is presumed to be attributable to an underlying acquired disease of the nervous system, a trauma, an infection or other disease process affecting the brain, or to use of specific substances or medications, nutritional deficiency or exposure to toxins, or the etiology may be undetermined. The impairment is not due to current substance intoxication or withdrawal. *Dementia* includes the following categories:

- 6D80 Dementia Due to Alzheimer Disease;
- 6D81 Dementia Due to Cerebrovascular Disease;
- 6D82 Dementia Due to Lewy Body Disease;

⁷ Deevy M., Lucich S., Beals M. Scams, schemes, & swindles: A review of consumer financial fraud research / Financial Fraud Research Center at the Stanford Center on Longevity. Stanford, 2012. Available at: <https://www.longevity.stanford.edu/wp-content/uploads/2017/01/Scams-Schemes-Swindles-FINAL-On-Website.pdf> (accessed: 10.04.2023).

⁸ Finke M., Howe J., Huston S. Old age and the decline in financial literacy // *Management Science*. 2017. Vol. 63, No. 1. P. 213–230.

⁹ Griffin M. Older Americans and the CFPB. Consumer Financial Protection Bureau. Available at: <https://www.consumerfinance.gov/about-us/blog/older-americans-and-the-cfpb/> (accessed: 10.04.2023).

¹⁰ Han S. D., Boyle P., James B., Yu L., Bennett D. Mild cognitive impairment is associated with poorer decision-making in community-based older persons // *Journal of American Geriatrics Society*. 2015. Vol. 63, no. 4. P. 676–683. Available at: <https://www.pubmed.ncbi.nlm.nih.gov/25850350/>

¹¹ Weissberger G., Samek A., Mosqueda L., Nguyen A., Lim A. A., Fenton L. Han S. Increased Financial Altruism is Associated with Alzheimer's Disease Neurocognitive Profile in Older Adults // *Journal of Alzheimer Decease*. 2022. Iss. 88 (3). P. 995–1005. <http://dx.doi.org/10.3233/JAD-220187>

- 6D83 Frontotemporal Dementia;
- 6D84 Dementia Due to Psychoactive Substances Including Medications;
- 6D85 Dementia Due to Diseases Classified Elsewhere;
- 6D8Y Dementia, Other Specified Cause;
- 6D8Z Dementia, Unknown or Unspecified Cause.

Each of the above Dementia categories may be described as Mild, Moderate, or Severe¹².

Sometimes dementia affects young and middle-aged patients¹³. However we believe that a statistically insignificant number of such cases does not require intervention in terms of financial market regulation, since such intervention would be excessive. Dementia can affect people as young as 30, although this is extremely rare. The chances of developing dementia before 65 are relatively small. Men aged between 30 and 59 have a 0.16 per cent chance; for women it is 0.09 per cent. Men aged between 60 and 64 have a 1.58 per cent chance of developing dementia; for women it is 0.47 per cent. The chances of developing dementia are highest for people between 90 and 94 (32 per cent)¹⁴. Although these statistics show that at the age of 60–64 years, dementia occurs in men significantly more often than in women, we propose a compromise approach, which proposes regulatory intervention from the age of 63, regardless of gender.

1. Methodology

According to methodological classification for comparative legal research offered by Van Hoecke¹⁵ we use functional method researching at the general problems of protection of elderly people and mis-selling of financial products regardless of details of the political system of the US, UK, EU and Russia. We use analytical method to clarify how different legal orders vies at recognition of certain physicians as consumers and/or retail investors. The law-in context method is applied for explanation of new actual tendencies at Russian stock market which create prerequisites for regulatory intervention we offer.

At the same time, the non-doctrinal approaches represent a comparatively new avenue of studying law in the broader social and political context with the use of a range of other methods taken from disciplines in the social sciences and humanities. Socio-legal scholars point to the limitations of doctrinal research as being too narrow in its scope and application of understanding law by reference primarily to case law. Socio-legal scholarship employs a wide range of applied social science methods including quantitative and qualitative research¹⁶. For quantitative data analysis, we used UK quantitative data on the prevalence of dementia among the population at different ages, as well as Russian statis-

¹² World Health Organization. International Classification of Diseases (ICD). ICD-11 for Mortality and Mobility Statistics. Version: 01/2023. Available at: <https://www.icd.who.int/browse11/l-m/en/http://id.who.int/icd/entity/546689346> (accessed: 10.04.2023).

¹³ *Smirnov A. A., Gustov A. V., Kopishinskaya S. V., Antonova V. A.* Preddementnyye Sostoyaniya i Dementsiya u Lits Molodogo Vovzrasta // *Neurology, Neuropsychiatry, Psychosomatics*. 2014. No. 6 (2). P. 41–43.

¹⁴ The Social Care Institute for Excellence (SCIE). Available at: <https://www.scie.org.uk/dementia/symptoms/young-onset/key-issues.asp?text=The%20chances%20of%20developing%20dementia,it%20is%200.47%20per%20cent>. (accessed: 10.04.2023).

¹⁵ *Van Hoecke M.* Methodology of Comparative Legal Research // *Law and Method*. 2015. P. 1–35. Available at: <https://www.biblio.ugent.be/publication/7145504> (accessed: 10.04.2023).

¹⁶ *Research Methods for Law*. Edited by Mike McConville and Wing Hong Chui. Second Edition. Edinburgh University Press, 2017. P. 5–6. Available at: https://www.edinburghuniversitypress.com/pub/media/resources/9781474404259_Research_Methods_for_Law_-_Introduction_and_Overview.pdf (accessed: 10.04.2023).

tics on the structure of investments of older people on the Russian stock market and the first results of testing retail investors in Russia.

2. Some general tendencies in consumers / investors protection in the financial markets

We would like to make a reservation that the rights of consumers in the US are not completely identical with the rights of investors. However, we believe that in general ideological approaches, such as those in the area of financial literacy, can be applied to protect older investors, even if they were designed for consumers.

In the US, the protection of the rights of clients in the financial markets at the federal level (there is also protection at the level of individual states) is distributed among different federal agencies. CFPB and OCC protect *consumers* of traditional banking services such as payment, credit, deposit, etc., but also provided by non-banking financial corporations. The FDIC declares that it protects *depositors/consumers*, using these terms interchangeably. Investors on the stock market are protected by the CFTC and SEC, which, it seems to us, are not very fond of the term *consumers* in their supervised area, preferring a different terminology. As usual, CFTC talk of *customers*. The SEC documents usually state about protecting the rights of *investors*. From the speech of the Chairman of the SEC, Gary Gensler, we can conclude that he at least partially separates *consumer* protection and *investor* protection in the financial sector, considering himself responsible primarily for the rights of investors:

As new technologies come along, we need to be sure we're achieving our core public policy goals. In finance, that's about protecting investors and consumers, guarding against illicit activity, and ensuring financial stability. So how does the SEC fit into all this? The SEC has a three-part mission — to protect investors, facilitate capital formation, and maintain fair, orderly, and efficient markets in between them. We focus on financial stability as well. But at our core, we're about investor protection¹⁷.

Also North and Buckley when analyzing the Dodd — Frank Wall Street Reform and Consumer Protection Act, speak separately about the protection of consumers and investors respectively, referring to the various provisions of this regulatory act¹⁸.

There is no doubt that the sphere of retail investments is highly risky, and some investors, including the elderly, will certainly suffer losses. Accreditation protects investors, including the elderly, from certain types of losses. However, they are allowed to invest in some other risky assets. The SEC explains:

We are concerned that allowing investors receiving recommendations or investment advice to be considered accredited investors, regardless of their financial sophistication, experience, or ability to bear loss, could undermine the purpose of the accredited investor definition in identifying investors who possess a sufficient level of financial sophistication to participate in investment opportunities that do not have the additional protections provided by registration under the Securities Act and our framework for regulating the

¹⁷ Chair Gary Chair Gensler Remarks Before the Aspen Security Forum / US Securities and Exchange Commission. 3 Aug., 2021. Available at: <https://www.sec.gov/news/public-statement/gensler-aspen-security-forum-2021-08-03> (accessed: 10.04.2023).

¹⁸ North G., Buckley R. The Dodd-Frank Wall Street Reform and Consumer Protection Act: Unresolved Issues of Regulatory Culture and Mindset // Melbourne University Law Review. 2011. Vol. 17, No. 35 (2). P.479–522. Available at: <http://www.classic.austlii.edu.au/au/journals/MelbULawRw/2011/17.html> (accessed: 10.04.2023).

offering process...The presence of a financial intermediary may not solve for certain of the investment protection concerns associated with private offerings, such as illiquidity, agency costs (including bargaining power in contracting when the investor has less money to invest), information asymmetry, as well as high transaction and search costs¹⁹.

In the UK, the regulator — the Financial Conduct Authority — (FCA) is responsible for both the protection of the rights of investors on the stock market and consumers who purchase traditional payment, credit and deposit products. According to FCA:

Most of the consumer investment market meets the goals of retail investors. But there are some areas where the market is causing real consumer harm. Some of the most serious harms we see relate to investments outside our regulatory perimeter and online scams, many based overseas. We are also seeing a concerted and conscious effort to promote higher risk investments that are not appropriate for the people being targeted. Most retail investors' needs can and should be met by more straightforward, mass-market investments. Our research shows that consumers, particularly the more vulnerable, are less likely to understand the risks, read the small print and don't know what to do when things go wrong. These consumers can also often neither afford the loss nor recover from it. Preventing this consumer harm is a key focus for us. We seek to prevent dishonest firms and individuals entering the perimeter and to act against firms and individuals we authorise who cause consumers harm²⁰.

Sheldon Mills, the FCA Executive Director, Consumers and Competition says:

The UK has one of the world's leading financial services industries, offering consumers access to a wide range of investment products. In some areas however, the consumer investment market is not working as well as it should and too often consumers are offered unsuitable products or advice. Protecting consumers and ensuring they have confidence in the suitability of advice they receive is a key priority for the FCA and today's report highlights some of the work we are undertaking to achieve this²¹.

According to later Mills statement:

We would expect products to come with timely and clear information that customers can understand so they can make informed financial decisions. Customers are making complex choices about debt, mortgages, pensions, investments, and other products, often on a smartphone. It's more important than ever to ensure they have the key product information, such as its features and charges, easily accessible and understandable. This is about the consumer journey, the digital user experience as well as the disclosure of contract terms...Firms should be offering customers products that meet their needs, rather than pushing products that aren't suitable or needed²².

¹⁹ US Securities and Exchange Commission. 17 CFR Parts 230 and 240 [Release Nos. 33-10824; 34-89669; File No. S7-25-19] RIN 3235-AM19 / Accredited Investor Definition. 2020. Available at: <https://www.sec.gov/rules/final/2020/33-10824.pdf> (accessed: 10.04.2023).

²⁰ Financial Conduct Authority. Strategy and Feedback Statement. 2021. September. Available at: <https://www.fca.org.uk/publications/corporate-documents/consumer-investments-strategy> (accessed: 10.04.2023).

²¹ Financial Conduct Authority. FCA clamps down on consumer investment harm. 2021. January. Available at: <https://www.fca.org.uk/news/press-releases/fca-clamps-down-consumer-investment-harm> (accessed: 10.04.2023).

²² Financial Conduct Authority (FCA). What firms and customers can expect from the consumer duty and other regulatory reforms. 2022. September. Available at: <https://www.fca.org.uk/news/speeches/what-firms-and-customers-can-expect-consumer-duty-and-other-regulatory-reforms> (accessed: 10.04.2023).

The emergence of new types of assets such as crypto assets has raised the question of whether investments in these types of assets can be considered consumer. In April 2019 The High Court of Justice in *Ramona Ang v Reliantco Investments Limited* decided:

Applying the ‘purpose’ test to the facts before him, Andrew Baker J concluded that Ms Ang’s purpose in contracting with Reliantco was to invest her surplus funds as a private individual. Her choice of crypto-currency as the form of investment, the fact that she was knowledgeable about Bitcoins and her substantial personal wealth — none of these meant that she could not be a consumer. These factors are not sufficient to establish that her investment was being pursued for a business purpose either. What is determinative is that the purpose of her contract with Reliantco was... outside any business of hers²³.

The protection of the rights of retail investors de facto merges with the protection of consumer rights is evidenced by such facts. In EU documents related to retail investors in complex structured products the term *consumers* is used in relation to them²⁴. The joint G20/OECD (2021) report focuses on retail investors in the context of financial consumer protection²⁵.

Let’s come back to the US. The SEC’s exam program constitutes one of the pillars of the Commission’s activities to protect senior investors. Staff from the Office of Compliance Inspections and Examinations (OCIE) regularly examine broker-dealers, investment advisers, and other entities. OCIE’s mission is to improve compliance, prevent fraud, monitor risk, and inform policy. The SEC uses exam findings to inform rule-making initiatives, identify and monitor risks, improve industry practices and pursue misconduct — all of which are highly relevant to the goal of protecting senior investors²⁶.

Financial Industry Regulatory Authority (FINRA) has maintained a longstanding commitment to protecting senior investors and continues to work to address risks facing this investor population as part of our regulatory mission, including by:

- launching the dedicated FINRA Securities Helpline for Seniors (the Helpline);
- conducting rulemaking to give firms tools to address suspected financial exploitation of senior investors and other vulnerable adults;
- identifying senior investor issues as a priority for our risk monitoring and examination programs;
- bringing disciplinary actions for misconduct against senior investors;
- collaborating with other regulators and organizations to address senior investor protection;
- and funding and conducting research on senior investors and fraud, and educating investors on potential risks²⁷.

²³ The High Court of Justice. Business and Property Courts of England and Wales Commercial Court (QBD). 12 Apr., 2019. *Ramona Ang v Reliantco Investments Limited* [2019] EWHC 879 (Comm). Available at: <https://www.judiciary.uk/wp-content/uploads/2019/05/Case-Summary-Ramona-Ang-v-Reliantco-Investments-Ltd-2.pdf> (accessed: 10.04.2023).

²⁴ European Commission Directorate-General for Financial Stability, Financial Services and Capital Markets Union (FISMA) Consumer testing services — Retail investors’ preferred option regarding performance scenarios and past performance information within the Key Information Document under the PRIIPs framework. 2020. February. FISMA/2019/016/C Final Report. Available at: <https://www.op.europa.eu/en/publication-detail/-/publication/3210fded-7a09-11ea-b75f-01aa75ed71a1> (accessed: 10.04.2023).

²⁵ G20/OECD. Report on Lessons Learnt and Effective Approaches to Protect Consumers and Support Financial Inclusion in the Context of COVID-19. Paris, 2021. Available at: <https://www.oecd.org/daf/fin/financial-education/G20-OECD-report-on-financial-consumer-protection-and-financial-inclusion-in-the-context-of-covid-19.pdf> (accessed: 10.04.2023).

²⁶ Deane S. How the SEC works to protect senior Investors? ...

²⁷ Financial Industry Regulatory Authority (FINRA) / Protecting Senior Investors. Washington, 2020. Available at: <https://www.finra.org/sites/default/files/2020-04/protecting-senior-investors-2015-2020.pdf> (accessed: 10.04.2023).

FINRA's exams for the securities industry professionals focus on a broad range of topics relating to the protection of senior investors, including:

- the types of securities and suitability of securities sold to senior investors;
- training of firm representatives with regard to senior specific issues and how firms address issues relating to aging (e. g., diminished capacity and elder financial abuse or exploitation);
- use of senior designations;
- firms' marketing and communications to senior investors;
- types of customer account information required to open accounts for senior investors;
- disclosures provided to senior investors;
- complaints filed by senior investors and the ways firms track those complaints;
- supervision of registered representatives as they interact with senior investors²⁸.

In January 2016, the North American Securities Administrators Association (NASAA) adopted a model rule for member-state and territories to do just that. The model rule provides not only the guidance for reporting suspected financial exploitation of seniors, but also a method for reporting potential cases. In May 2018, the Senior Safe Act was signed into law and provides provisions similar to the NASAA model rule and includes immunity from liability for firms and certain associated persons so long as they satisfy the safe harbor requirements outlined within the Act. The SEC and the FINRA are charged, in part, with the enforcement of those requirements under the Senior Safe Act. The SEC and state regulators have provided clear expectations of investment advisers compliance programs with respect to protections of senior investors. While each jurisdiction may vary in the scope of their expectations, the common controls these regulators expect a firm to have in place include:

- policies and procedures for identifying and reporting warning signs;
- increased supervisory oversight for servicing of at-risk senior clients;
- gathering trusted contact information;
- providing ongoing training to firm personnel; and
- having complete records for all communications and contact with, and regarding at-risk senior clients²⁹.

We also consider it important to say a few words about protecting the rights of older people as consumers of traditional financial services. The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act) requires the Consumer Financial Protection Bureau (CFPB) to create a program to provide grants to states that fund technology and equipment or hire staff to enhance protect seniors from fraud (12 U.S.C. § 5537(b)). In addition, the Elder Justice Act of 2010 was the first comprehensive federal elder financial anti-fraud law, including the creation of the Institute for Elder Justice. This law also provided funding for agencies that seek to protect seniors from financial fraud.

The Dodd-Frank Act also required the creation of an *Older Americans Financial Protection Authority* under the CFPB, whose functions include activities designed to improve the financial literacy of persons age 62 and older for protection against unfair, deceptive, and abusive practices (12 U.S.C. § 5493 (g)). Thus, the U.S. federal government has been

²⁸ Financial Industry Regulatory Authority (FINRA) / Senior Investors. Washington, 2022. Available at: <https://www.finra.org/rules-guidance/key-topics/senior-investors> (accessed: 10.04.2023).

²⁹ Senior investor protection. Steps for Investment Advisers / Core Compliance & Legal Services (Core Compliance). San Diego, CA, 2021. Available at: <https://www.corecls.com/risk-management-updates-rmu/senior-investor-protection-steps-for-investment-advisers/> (accessed: 10.04.2023).

empowered to directly address elder financial abuse through a comprehensive exercise of the authority granted by the Dodd-Frank Act to protect seniors.

The CFPB publishes several times per year important documents related to older Americans protection³⁰.

The U. K. Government's Future of an Aging Population project completed in 2017 presented scientific evidence to inform a range of strategies and actions to:

- support lifelong well-being for all people, regardless of their generation;
- improve the quality of life for older adults and enable them to participate more fully in society;
- ensure that everyone has access to the tools and means to live a long and healthy life³¹.

In February 2021, the FCA published finalised Guidance on the fair treatment of vulnerable customers. The Guidance sets out the actions firms should take to treat vulnerable customers fairly. It also highlights examples of how they can put these actions into practice and includes case studies showing good and bad practice. In July 2021, the FCA distributed the responses to some of most common questions from firms related to Guidance. In June 2022, the FCA published an update on the progress firms are making to embed our Guidance. This update set out examples of firms taking positive action to understand and meet the needs of customers in vulnerable circumstances. It also set out the areas where we expect to see improvement and additional focus from firms³². Also the FCA has developed ScamSmart, a platform aimed primarily at older investors. The platform includes materials designed to resonate with potential victims and help them realize that they have fallen victim to an illegal or fraudulent scheme.

3. Testing of consumers (investors)

Ideas to instruct market entities to assess the knowledge of their clients themselves were expressed by some regulators, but were not supported by market entities. Thus, in 2011, the Australian financial regulator proposed to reform the categories of investors, for example, to cancel the lower *wholesale investor* category or to allow companies to transfer their clients from the *wholesale investor* category to the higher *professional investor* category based on a subjective assessment of their knowledge. The financial sector objected, believing that the elimination of the *wholesale investor* category would reduce individual investors' access to many products, citing the complexity of knowledge

³⁰ See: The Consumer Financial Protection Bureau (CFPB) / Recovering from Elder Financial Exploitation: A Framework for Policy and Research. 2022. September. Available at: <https://www.consumerfinance.gov/data-research/research-reports/recovering-from-elder-financial-exploitation-framework-for-policy-and-research/> (accessed: 10.04.2023); The Consumer Financial Protection Bureau (CFPB) / Issue Spotlight: Nursing Home Debt Collection. 2022. September. Available at: <https://www.consumerfinance.gov/data-research/research-reports/issue-spotlight-nursing-home-debt-collection/> (accessed: 10.04.2023); The Consumer Financial Protection Bureau (CFPB) / Data Spotlight: Financial challenges faced by recently widowed older adults. 2022. May. Available at: <https://www.consumerfinance.gov/data-research/research-reports/data-spotlight-financial-challenges-faced-by-recently-widowed-older-adults/> (accessed: 10.04.2023); The Consumer Financial Protection Bureau (CFPB) / Data Spotlight: Profiles of older adults living in mobile homes. 2022. May. Available at: <https://www.consumerfinance.gov/data-research/research-reports/data-spotlight-financial-well-being-in-america-2017-2020/> (accessed: 10.04.2023).

³¹ Future of ageing / UK Government Office for Science. London (2013. Updated 2017). Available at: <https://www.gov.uk/government/collections/future-of-ageing> (accessed: 10.04.2023).

³² Financial Conduct Authority / Consumer Duties Implementation Plan. 2023. January. Available at: <https://www.fca.org.uk/publications/multi-firm-reviews/consumer-duty-implementation-plans> (accessed: 10.04.2023).

assessment implementation and potential liability issues. As a result, the reform did not take place. In Singapore, consideration has been given to introducing exemptions to requirements relating to prospectuses if financial advisers are confident that investors are properly assessing the risks involved. Industry reaction to the proposed reform was overwhelmingly negative, citing the complexity, cost of compliance, client scoring problems, and potential consultant liability. Thus, the offer was rejected. In Hong Kong, prior to 2016, market entities were entitled to be exempt from suitability based on their own assessment of the experience, knowledge and trading volume of professional investors, but in practice this rarely happened, and in 2016 this rule was abolished. Nevertheless, under the influence of these proposals, a number of scientists put forward a reasonable thesis that the qualifications of investors and their admission to products may be based not on the size of assets, but on testing by investment advisers. At least for those retail investors who have no experience in the market and at the same time want to keep a significant percentage of their assets in complex products³³.

However, we are not aware that any qualification testing for retail investors have actually been introduced in any jurisdictions other than Russia. It is understandable that brokers-dealers, investment advisers are unwilling to take on the risks associated with a purely subjective decentralized assessment of their customers at their own risk. What if the court does not agree with their assessment? In this regard, the traditional qualification of clients based on the assessment of their assets, professional certificates, market experience, did not seem to the business to entail such risks. The clear testing system which would protect, among other things, market participants, was not proposed.

The European Commission provided an interesting program of consumer testing including retail investors in different EU Memberstates. However, we don't have information that the results of the last testing of retail investors for their understanding of Key Information Documents (KID)³⁴ were used by ESMA or any national regulator among the EU for direct restriction the access for unsuitable products.

4. The Russian experiment for qualification of retail investors

The investors and consumers protection can't be unlimited. The Justice of the European Court of Human Rights ret. Dedov exploring the possibility of restricting freedom of entrepreneurship, refers to the principles of proportionality. He reasonably believes that in addressing the issue of granting a particular social group special protection of rights it is necessary to answer the question of whether the protection of these rights and freedoms is urgent and relevant? In addition, it should be determined whether the protection of these rights is consistent with the means to achieve them?³⁵

Indeed, the expansion and protection of the rights and freedoms of certain social groups entail the restriction of the rights of other social groups. Thus, the excessive protection of the rights of some groups of investors is increasing the costs for financial institutions and could lead to a situation where brokers will just shift these costs to other groups of retail investors.

³³ *Wan W., Godwin A., Yao Q.* When Is an Individual Investor Not in Need of Consumer Protection? A Comparative Analysis of Singapore, Hong Kong, and Australia // Singapore Journal of Legal Studies. March, 2020. P. 190–216. Available at: <https://www.ssrn.com/abstract=3510134> (accessed: 10.04.2023).

³⁴ European Commission Directorate-General for Financial Stability, Financial Services and Capital Markets Union (FISMA) Consumer testing services — Retail investors' preferred option regarding performance scenarios and past performance information within the Key Information Document under the PRIIPs framework. Febr., 2020. FISMA/2019/016/C. Available at: <https://www.op.europa.eu/en/publication-detail/-/publication/3210fded-7a09-11ea-b75f-01aa75ed71a1> (accessed: 10.04.2023).

³⁵ *Dedov D. I.* Sorazmernost' ogranicheniia svobody predprinimatel'stva. Moscow: Iurist Publ., 2002.

From a regulatory point of view, it is important to distinguish between black, red and orange areas. The black zone includes outright scammers without a license who call or write to people, offer completely illegal financial products, and then disappear if their offer is accepted. The ability of central banks to deal with such criminals is very limited and the main responsibility here lies on police.

There is no doubt that older people gradually learn from newspapers, Internet, television, their relatives and friends about different types of fraud. Therefore, the types of fraud used become obsolete over time, and criminals update their schemes. They come up with new ways adapted to the psychology of older people, for example, the Russian senior people trust in the police and other government agencies. Accordingly, scammers approach the elderly on behalf of the police and other authorities. In technical terms, the use of chatbots and QR codes by scammers is increasing, since psychologically many older people associate them with the federal and local authorities.

The red area represents licensed companies that sell legal financial products but mislead investors about their properties. The practice of selling financial instruments by manipulating the information provided to the consumer is called mis-selling. It is mainly the central bank that fights against such practices, but they must have the necessary tools for this. For example, the red zone practice is, for example, instead of opening a deposit, pensioners are offered by licensed financial institution the complex investment products that imply income over the long term. The danger is that upon early withdrawal from such products the amount of initially invested funds are not returned. Due to mis-selling, financial institutions receive fees, transfer their risks on the shoulders of clients, and often earn more on the difference between the sale price of the product to the client and the purchase price of the product in the market³⁶. The official website of the Russian central bank (officially named as the Bank of Russia) provides more than 50 analytical materials that mention different sorts of mis-selling of financial products.

Among the sales of financial products or services that do not meet the interests of customers (unsuitable selling), the Bank of Russia highlights the sale of products to socially unprotected and vulnerable categories of customers. Examples of such sales are:

- sale of investment products that assume receipt of income in the long term, to socially vulnerable groups of the population and citizens of retirement age. In case of early exit from such products, the amount of initially invested funds is not returned;
- selling high — risk products without assessing the client's appetite for risk³⁷.

The problem of insufficient quality of regulation ensuring the protection of brokers' clients becomes more and more evident. According to Selivanovsky (2021) the inequality of opportunities in the relationship between the financial institutions and their clients can be described as contractual, informational and procedural disproportions. Taking advantage of these disparities, financial institutions often use unfair sales practices to induce their clients to enter into contracts, which can be extremely burdensome for them. Selivanovsky analyzed the contracts of all leading Russian retail brokers found that they contain numerous provisions that discriminate investors first of all related to fees³⁸.

³⁶ Bank Rossii. Obzor Nepriemlykh Praktik i Rekomendatsii. Moscow, 2020. Available at: https://www.cbr.ru/Content/Document/File/112216/ObzNeprPactic_20200821.pdf (accessed: 10.04.2023).

³⁷ Bank Rossii. Vidy Nedobrosovestnogo Povedeniya Uchastnikov Finansovogo Rynka. Moscow, 2021. Available at: https://www.cbr.ru/protection_rights/np/ (accessed: 10.04.2023).

³⁸ Selivanovsky A. S. 1) Roznichnyi Investor na Rynke Tsennykh Bumag: Dogovor s Brokerom // Zakon. 2021. No. 9. P.67–93; 2) Roznichnyi Investor Malo Chem Otlichaetsya ot Potrebitelei Bankovskikh Produktov no Zashchishchen Gorazdo Khuzhe Nikh // Zakon. 2021. No. 10. P.8–19.

The orange very controversial zone is for example the possibility of selling long-term investment products to older investors. Let's imagine that a 70 year old investor wants to buy a 5 year product citing his/her good heredity and excellent health. But what about 10 or 15 years products? The Bank of Russia is currently forced to consider such contentious cases manually on a case by case basis, but that's not good. The new general parliamentary law is necessary here.

Nevertheless, it is impossible to predict and describe in the parliamentary statutes all potential future disputable situations. Therefore, of course, the sphere of principle-based regulation with the discretion of regulators will remain. We agree with Mikheeva that it is practically impossible to include all the criteria of good faith behavior to the statutes, however it would be advisable to include at least some general and specific criteria, which are repeatedly confirmed by practice³⁹. Earlier the similar position was expressed by Vitryansky⁴⁰.

In December 2021, the Board of the Bank of Russia approved a number of general measures to improve the availability of financial services. Among others, such goals have been set as creating conditions in the financial market that prevent financial losses for people with disabilities, the elderly and other people with limited mobility as a result of fraudulent activities, including using social engineering methods, in particular by issuing recommendations for financial organizations and evaluating the need to change the law. It was also recognized as necessary to increase the level of financial literacy of people with disabilities, the elderly and other people with limited mobility, including the creation of specialized training materials⁴¹. The authors support these measures, but note that they are of a general nature and apply simultaneously to all types of financial services. While 2022 the Bank of Russia did not propose any special measures to protect older investors specifically on the stock market. In December 2022, the Bank of Russia published the directions for the development of the financial market until 2025⁴² and updated the professional standard for retail investors⁴³. The latter was jointly developed by two Russian self-regulatory organizations operating on the stock market. Unfortunately, there are no special provisions in these two documents to strengthen the protection of older retail investors. Nevertheless, during 2021–2022, the Bank of Russia actively recommended the banks to provide older clients with the opportunity to introduce a 'second hand' rule for their payments. This means that payments above a certain amount, in addition to the client himself, must be additionally authorized by a one of the relatives of the client whom he appointed. Many banks followed this recommendation. We do not object against the 'second hands', although we believe that it is not enough. First, there is the risk of deception of older clients by their relatives. Secondly, a relative may be even less financially literate than the client himself. Thirdly, the age of the spouses in most cases does not differ very much. The appointment of a 'second hand' of a spouse, which often could take place

³⁹ *Mikheeva I. E.* Otdelnye Kriterii Dobrosovestnogo Povedeniya v Bankovskoi Deyatel'nosti // Jurist. 2020. No. 8. P.60–67.

⁴⁰ *Vitryansky V. V.* Reforma Rossiiskogo Grazhdanskogo Zakonodatel'stva: Promezhutochnye Itogi. 2nd ed., amend. and suppl., Statut Publ. Moscow, 2018.

⁴¹ Bank Rossii. Prioritetnye Napravleniya Povysheniya Dostupnosti Finansovykh Uslug v Rossiiskoi Federatsii, Plany Meropriyatii (Dorozhnye Karty). Moscow, 2021. Available at: http://www.cbr.ru/development_afford/strategy_fd/ (accessed: 10.04.2023).

⁴² Bank Rossii. Osnovnye Napravleniya Razvitiya Finansovogo Rynka Rossiiskoi Federatsii na 2023 God i Period 2024 i 2025 Godov. Moscow, 2022. Available at: https://www.cbr.ru/about_br/publ/onfinmarket/ (accessed: 10.04.2023).

⁴³ Bank Rossii. Bazovyi Standart Zashchity Prav i Interesov Fizicheskikh i Iuridicheskikh Lits — Poluchatelei Finansovykh Uslug, Okazyvaemykh Chlenami Samoreguliruemyykh Organizatsii v Sfere Finansovogo Rynka, Ob"ediniayushchikh Brokerov (v Novoi Redaktsii). Moscow, 2022. Available at: <http://www.cbr.ru/Queries/UniDbQuery/File/90002/30> (accessed: 10.04.2023).

in practice, does not protect against a situation where both elderly spouses begin to fall into dementia.

According to Chistyuhin, the Vice-Governor of the Bank of Russia, sales of structured products are growing, and a significant proportion of these sales are for citizens 60+ or even 70+. At the same time, there are often 5-year products that cannot be early terminated. The regulator may assume that this is the belief of individual brokers in the longevity of investors and that adults understand what products they are purchasing, but, of course, the regulator is seriously alarmed by this situation⁴⁴.

We believe the problem is that it is impossible to grant access to the acquisition of financial products only on the basis of a formal age assessment, since it does not always correlate with the actual cognitive abilities of a particular person. The authors personally know several people aged 70–75 with advanced dementia. At the same time, it is known that US Supreme Court Associate Justice Ginsburg considered cases until the age of 87, the federal Justice Brown until the age of 103⁴⁵. In our opinion, research and teaching at the university significantly reduces the likelihood of dementia. As a joke, we note that this is the most important reasons why we do this work. In particular, several very well-known and respected Russian law professors continue their active work at a respectable age, for example, Professor Tolstoy aged 95, professor Tikhomirov aged 92.

The Bank of Russia reports that, as of June 30, 2022, among approximately 21 mln clients of the Russian brokers, 59% were male and 41% were female. If to speak of senior investors separately, 3% of broker clients were men 60+ and 4% were women 60+ respectively. In the general structure of assets of clients of Russian brokers 18% belonged to men 60+ and 8% to women 60+ respectively. Very interesting, that 95% of Russian brokers clients 60+ submitted their trading orders to their brokers online⁴⁶. Despite the existence of non-banking brokers, the overwhelming majority of retail investors on the Russian stock market prefer to use the services of commercial banks as brokers, and the share of actively trading clients of these brokers is approximately 10% of the total number of clients. This means that mainly retail investors open now a brokerage account for the future, which de facto gives now the regulator some lag in time to improve their protection. At the same time, even 2 million citizens already constantly trading on the stock exchange is a very large number.

The Russian stock market regulation divides retail investors into three categories:

- a) ordinary (basic level) non-qualified investors who can buy low-risk instruments only;
- b) tested non-qualified investors who can buy low-risk and medium-risk instruments and/or take marginal credits from their brokers;
- c) qualified investors who can buy high-risk instruments. This level can be obtained through high wealth, high volume of transactions on the stock market, special education, or work in certain positions in the financial market while 2–5 years.

The tests are a novelty of the Russian legislation, they appeared at the end of 2021. Since on the stock market, unlike consumer credits, a 14-day cooling-off period after the transaction is impossible, its function is to a certain extent performed by the test before the transaction. So any non-qualified investor who wants to buy medium-risk assets or be involved in any margin trading is requested to stop before the deal, think some time and try

⁴⁴ TsB Obesposkoen Rostom Prodazh Strukturnykh Finansovykh Produktov Pozhilym Rossiianam // TASS. 12022. 2022. February 15. Available at: <https://www.tass.ru/ekonomika/13710601> (accessed: 10.04.2023).

⁴⁵ *Sulzberger A.* At 103, a Judge Has One Caveat: No Lengthy Trials // The New York Times. 2010. September 16. Available at: <https://www.nytimes.com/2010/09/17/us/17judge.html> (accessed: 10.04.2023).

⁴⁶ Bank Rossii. Portret Roznichnogo Investora. Moscow, 2023. Available at: https://www.cbr.ru/analytics/rcb/port_inv/ (accessed: 10.04.2023).

to pass a special financial literacy test. If he fails the test, he can still sign a special additional risk acceptance form and then make a deal, but only up to 100,000 Russian Rubles (about \$1,500) or a 1 lot if it's more expensive. The real problem is that the examiners are brokers, which certainly creates a serious conflict of interest.

There are total 15 types of tests implemented, of which one is a test for access to margin trading, and other 14 tests for access to the acquisition of various types of medium-risk assets, such as repo, bonds with structured income, derivatives, etc. The number of attempts to pass the test is not limited. The assets could be classified as medium risk based on two different criteria. Some assets are classified as medium-risk by the Bank of Russia based on an assessment of the complexity of the product type for example derivatives. Some other products are classified as medium-risk due to doubts about the reliability of their specific issuers, although the product itself is simple, for example, shares of issuers with a low credit rating or no credit rating at all. Each test consists of the first set of questions for self-assessment, in which the investor is asked to evaluate his personal experience in investing, and the second set of questions in essence of the corresponding type of financial product respectively. There is no any secret about the test questions, the Bank of Russia has published them. The purpose of the test is not to 'catch' the investor in ignorance. The purpose of the test is for the person to stop and think carefully about their knowledge and actions. Nevertheless, the high level of passing the tests caused concern of the Bank of Russia, therefore, since October 2022, the test questions have become more complicated, and their number increased.

From the beginning of testing in September 2021 to September 2022, 6,13 million Russian citizens tried to pass the test and 1,92 million people successfully passed it respectively. At the same time, investors who failed the test, as a rule, refused to purchase relevant medium-risk instruments and/or take marginal credits. The citizens almost did not use their right to buy an asset, even the test is failed, up to 100,000 Russian Rubles (about \$1,500) or a 1 lot of asset if its price exceeds 100,000 Russian Rubles⁴⁷.

In our opinion, the test plays a positive role in cooling off the potential investors who fall under the influence of aggressive advertising of financial products. Although there is no cross-recognition of tests between brokers, that is, if the investor desires to have several brokers, must pass it to each of his brokers separately, a positive test result is actually valid for life for particular broker. At least the Russian regulation now does not contain a rule that the test expires after a while. We believe this is a significant shortcoming of the Russian testing system, since it does not protect the investor if he began to fall into dementia in some time after successful passing the test.

According to Mamuta, Head of the Office of the Bank of Russia for the Protection of Rights of Financial Services Consumers and Financial Literacy:

Testing will not insure against a decrease in portfolio, but will give a person confidence that he understands the logic of prices fluctuations, which means that his behavior on the stock market will become more conscious. A novice investor could also understand that his knowledge is not yet enough to buy, for example, a futures on a stock index, and perhaps this will be a good signal to buy a simpler and more understandable instrument. Alternatively it encourage him to seek help from a professional investment adviser⁴⁸.

Many Russian brokers who objected before 2021 to the widespread introduction of investor testing based on the law, did not understand that testing protects them too, not

⁴⁷ Bank Rossii. Bank Rossii Podvel Itogi Pervogo Goda Testirovaniia Nekvalifitsirovannykh Investirov. Moscow, 2022. Available at: <https://www.cbr.ru/press/event/?id=14428> https://cbr.ru/analytics/rcb/port_inv/ (accessed: 10.04.2023).

⁴⁸ Mamuta M. Glava Sluzhby TsB Rasskazal, Kak ne Poteriat Dengi v Banke // Rossiiskaia gazeta. 2020. October 24. Available at: <https://www.rg.ru/2020/10/20/glava-sluzhby-cb-rf-rasskazal-kak-ne-poteriat-dengi-v-banke.html> (accessed: 10.04.2023).

just investors. We believe that the Russian courts will soon start assessing compliance with suitability when selling complex financial products. In this regard, passing a test by a client protects the financial product seller from future litigation risks of retail investors claiming they have been sold something they do not understand at all.

In December 2022, the Bank of Russia announced its readiness to discuss with universities the introducing a special qualification exam for retail investors. We support that as far as brokers have the right to educate clients. But we are sure that in order to eliminate conflicts of interest, then the tests should be accepted not by brokers, but by independent organizations, namely the universities.

Conclusion

We have shown in the article that jurisdictions such as the US and the UK have a lot of work going on to protect older investors. Unfortunately, testing in the US is aimed at investment advisors, brokers-dealers but not at the elderly. We believe that the admission of retail investors to complex products, especially older investors, should be based on their testing. There are no special tests for the elderly in Russia, but the first Russian experience of testing all retail investors for admission to products of medium complexity and margin loans deserves attention. We believe that older 63+ investors, given that they can develop dementia at any time, should be tested for financial literacy by independent from the brokers universities annually. Depending on the result of the test and the personal desire of the elderly investor, the dynamic restrictions for his investment activity may be introduced.

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Аккредитация пожилых инвесторов и потребителей путем их тестирования на финансовую грамотность

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В США и Великобритании большое внимание уделяется защите прав пожилых инвесторов и потребителей финансовых услуг. В частности, часть брокеров, инвестиционных консультантов проходят тестирование в США на понимание специфики работы с инвесторами старшего возраста. Однако сами пожилые инвесторы на практике тестируются только в научных целях, и результаты таких тестов не имеют регуляторных последствий. В некоторых юрисдикциях брокеры отклонили предложения регуляторов включить в квалификацию инвесторов элементы тестирования. В России в 2021 г. введены тесты для неквалифицированных инвесторов на доступ к приобретению активов со средней степенью риска и маржинальным кредитам, однако без отдельного теста для пожилых инвесторов. Мы считаем, что пожилые инвесторы в возрасте 63+, учитывая высокую вероятность развития деменции, должны ежегодно проходить тестирование на финансовую грамотность независимо от брокеров университетами. Тестирование должно проводиться отдельно для традиционных продуктов и криптоактивов соответственно. В зависимости от результата проверки и личного желания пожилого инвестора могут вводиться такие динамические ограничения, как, например, запреты на покупку определенных товаров, маржинальные кредиты, покупки товаров дистанционно, а также видеозапись приобретения финансовых услуг в офисе и «вторая рука», то есть подтверждение всех

или крупных транзакций другим членом семьи. Тестирование защитит не только пожилых инвесторов, но и брокеров, инвестиционных консультантов от обвинений в продаже этим клиентам неподходящих продуктов.

Ключевые слова: пожилые инвесторы, пожилые потребители, мисселинг, защита розничных инвесторов, финансовая грамотность, деменция.

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Молодыко Кирилл Юрьевич — канд. юрид. наук, магистр государственного управления (Гарвард), доц., гл. эксперт, НИУ «Высшая школа экономики», Российская Федерация, 101000, Москва, Мясницкая ул., 20; kmolodyko@hse.ru

Весельский Виктор Сергеевич — магистрант, Санкт-Петербургский государственный университет, Российская Федерация, 199034, Санкт-Петербург, Университетская наб., 7–9; vs.veselsky@yandex.ru

Анненкова Карина Алексеевна — студент, НИУ «Высшая школа экономики», Российская Федерация, 101000, Москва, Мясницкая ул., 20; karina.annenskova@yandex.ru