2016 FINRA/SIFMA Senior Investor Protection Conference

Washington, DC | October 20-21, 2016

Internal Policies, Procedures and Frameworks
Thursday, October 20
1:30 p.m. – 2:30 p.m.

This panel of experts addresses the current legal and compliance frameworks firms have developed to protect their senior investors from issues related to cognitive decline and financial exploitation. Panelists discuss how firms are developing senior investor protection procedures, and examine issues such as incident escalation, the importance of proper documentation and the need to stay current with a client's circumstances.

Moderator: Ira Hammerman
Executive Vice President and General Counsel
SIFMA

Panelists: Keith Grindstaff
Director and Corporate Counsel
Charles Schwab & Co., Inc.

Kim Perry
Vice President
Fidelity Investments

Daniel Woodring
Senior Vice President and Chief Compliance Officer
PFS Investments Inc. and Primerica Shareholder Services, Inc.

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Internal Policies, Procedures and Frameworks Panelist Bios:

Moderator:

Ira D. Hammerman is Executive Vice President and General Counsel of SIFMA. Since 2004, Mr. Hammerman has overseen SIFMA's legal advocacy efforts and outside counsel relationships. He has been intimately involved with SIFMA's response to the 2008 financial crisis, particularly SIFMA's advocacy efforts related to the Dodd-Frank Act. Prior to joining SIFMA, Mr. Hammerman was a partner of Clifford Chance, where over a 19-year period he represented the financial services industry on a wide variety of securities regulatory and enforcement matters before the SEC, FINRA and state regulatory authorities. His practice focused on U.S. securities regulation of U.S. and foreign financial institutions, including broker-dealers, investment advisers, banks and investment companies. A substantial part of his practice included representation of financial institutions with respect to trading, compliance and enforcement matters. Mr. Hammerman received his law degree from Georgetown University Law Center in 1985 and received a B.A. from Emory University in 1982. He is a member of the District of Columbia and New York Bars.

Panelists:

Keith E. Grindstaff is Director and Corporate Counsel in Charles Schwab & Co., Inc.'s Institutional and Retail Legal Group. He provides counsel on various securities law matters. Mr. Grindstaff began his career following law school with the Indiana Securities Division where he eventually became Chief Deputy Commissioner. He graduated from the Indiana University Maurer School of Law in 1994 and from Ball State University in 1991.

Kim E. Perry is vice president, risk management, for Fidelity Investments - Personal Investing. Fidelity Investments is a leading provider of investment management, retirement planning, portfolio guidance, brokerage, benefits outsourcing, and other financial products and services to more than 20 million individuals, institutions and financial intermediaries. Since 2009, Ms. Perry has been responsible for risk management for Personal Investing's distribution channels, including Personal Investing's mitigation of risk related to older investors. Ms. Perry joined Fidelity in 2001 as a director of risk operations for Fidelity's brokerage companies, and she has been responsible for various risk functions since then. Prior to joining Fidelity, Ms. Perry was a trial lawyer at various law firms in Boston, Massachusetts. Ms. Perry received a bachelor of arts degree in political science from the University of Pennsylvania and a juris doctor from Boston University School of Law. She has her Series 7 and 24 licenses.

Daniel Woodring is a Senior Vice President and Chief Compliance Officer of PFS Investments Inc. and Primerica Shareholder Services, Inc. Prior to joining Primerica, Mr. Woodring worked in numerous roles within the financial services industry, including at a life insurance company, a retail bank and a broker-dealer compliance consulting firm. He graduated from the University of Georgia earning a B.B.A. with dual majors in Finance and Risk Management. In 2000, Mr. Woodring received his J.D. from the Georgia State University College of Law. He is a member of the Georgia Bar and currently serves as the Vice-Chair of the Financial Services Institute's Compliance Council.

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2016 NASAA Broker-Dealer Coordinated Exam: **Summary of Preliminary Results**

September 2016

Introduction

NASAA is the voice of state, provincial, and territorial securities administrators in the 50 states, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, Canada, and Mexico. The role of NASAA members in securities regulation is crucial as they serve as the first line of defense for investors from every walk of life. As part of their role on the front lines of emerging issues in securities regulation, NASAA and its members consider protecting senior investors a core part of their mission. With 10,000 Americans projected to turn 65 every day between now and 2030,[1] and in excess of 77 percent of all financial assets in the United States concentrated in the hands of those individuals,[2] NASAA and its members believe that protecting senior investors is essential. Indeed, according to one study, seniors lose $2.9 billion to financial exploitation every year.[3] Furthermore, in an environment of low interest rates, yet increasingly lengthy retirements, senior investors are facing the challenge of searching for higher yielding investment products, which often come with increased risk.

In the last decade, NASAA and its members have developed a number of initiatives aimed at protecting senior investors, from policy matters, to advocacy, and even regulatory actions. Policy initiatives by NASAA and its members have included a 2008 joint report with the SEC and FINRA on issues related to senior investors;[4] the drafting of a model rule addressing so-called "senior designations" and a model act to address the financial exploitation of vulnerable adults; the development of the Senior$afe Training program for financial professionals as well as the Serve Our Seniors website; and strong support for the Senior$afe Act of 2016 in the United States Congress. These initiatives have been in addition to the day-to-day work of

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[1] *See* "Baby Boomers Retire," Pew Research Center, available at http://www.pewresearch.org/daily-number/baby-boomers-retire/.

[2] Securities Industry and Financial Markets Association, Senior Investor Protection White Paper: SIFMA and The Industry's Efforts to Protect Senior Investors, Apr. 27, 2016, available at http://www.sifma.org/issues/item.aspx?id=8589960115.

[3] The MetLife Study of Elder Financial Abuse, June 2011, available at www.metlife.com/assets/cao/mmi/publications/studies/2011/mmi-elder-financial-abuse.pdf.

[4] Protecting Senior Investors: Compliance, Supervisory and Other Practices Used by Financial Services Firms in Serving Senior Investors (2008 Joint Report) (Sept. 22, 2008), available at https://www.sec.gov/spotlight/seniors/seniorspracticesreport092208.pdf.

NASAA members conducting examinations and initiating enforcement actions related to the exploitation of seniors and other vulnerable investors.

In 2016, NASAA members conducted a coordinated exam of broker-dealers ("Coordinated Exam") on issues related to senior investors. The Coordinated Exam sought information from the examined firms on policies, procedures, and training related to seniors and other potentially vulnerable customers. Twenty states sought information in several categories, including, among others:

- Proactive assessment efforts by the firms related to senior investors;
- Training provided by broker-dealers to employees regarding senior investors, the identification of elder abuse, and diminished capacity;
- Supervisory policies, procedures and other controls potentially relevant to senior investors; and
- Potential suitability concerns identified by member jurisdictions.

This report summarizes the preliminary findings as part of the ongoing dialogue between broker-dealers and NASAA members on the important issue of protecting senior investors.

COORDINATED EXAM HIGHLIGHTS:

- Approximately 20 percent of the exams involved a broker-dealer that has not established written supervisory procedures on **any** of the key senior issues focused on during the Coordinated Exam.
- The Coordinated Exam focused on three key senior investor related training topics. More than 62 percent of the exams related to a firm that offers training on **all** of these topics.
- There appears to be limited development of "trusted contact forms" at firms, and very limited use of the forms even after they are developed.
- Only 24 percent of the exams related to a brokerage that requires verification of senior clients' profile information more frequently than every 36 months.

- Potentially unsuitable recommendations to senior investors were identified in 10 percent of the exams.
- Firms permitting the use of "senior designations" may need to improve related controls and procedures.
- At most offices where *any* complaint had been filed in the 24-month period, the majority had been filed by senior clients.

Overview

The 2016 NASAA Coordinated Exam included 62 exams of broker-dealer offices during which the examination teams reviewed activity in senior client accounts. The Coordinated Exam primarily utilized a module designed for purposes of the Coordinated Exam. In addition to highlighting states' observations about broker-dealer practices, the Coordinated Exam was designed to identify possible relationships between supervision/training practices and sales related issues with senior clients. To that end, the exams collected information about each examined firm's policies and supervision practices along with transactional data.

The exams covered various broker-dealer models and office types. There were no mandates established with respect to the firms examined for the Coordinated Exam. Instead, each jurisdiction was encouraged to select the firms and offices examined in accordance with the jurisdiction's normal practices. This allowed for the jurisdictions to better account for qualitative and quantitative data and to maximize their ability to conduct relevant examinations.

The vast majority of the exams were conducted at branch or non-branch locations of broker-dealers while only a handful were identified as having been conducted at the firm's home office. Therefore, the data collected provides insight on the extent to which firms' policies and procedures related to senior investors have been implemented at remote locations.

At least 39 unique firms were examined during the Coordinated Exam. Some jurisdictions did not identify the name of the firm examined in accordance with jurisdictional requirements and practices. Consequently, these preliminary findings are being presented in terms of the

number of exams conducted (i.e., X percent of the exams conducted indicated that the broker-dealer had a violation).

Committees or Personnel Dedicated to Senior Investor Issues

There are many complex and often sensitive issues that must be considered in order to better protect senior investors. Industry leaders have taken this charge very seriously, and many have created formal committees to develop useful practices and procedures. Some of the firms that have not created a senior investor-focused committee have at least designated one or more persons to address senior investor-related issues. Approximately 62 percent of the exams found that the broker-dealer had established a formal committee or designated at least one person to focus on senior investor issues.

Supervisory Procedures

Broker-dealers are required to establish and maintain supervisory systems and written procedures that are reasonably designed to ensure compliance with applicable securities laws.[5] Regulatory guidance has highlighted the importance of accounting for a firm's obligations to senior clients.[6] As a result, the Coordinated Exam assessed whether broker-dealers had developed written procedures specific to key concern areas and had incorporated enhanced controls into the firm's supervision of activity in senior client accounts.

The Coordinated Exam focused on whether the subject broker-dealer had implemented written procedures specific to four key issues:

(1) The suitability of recommendations to senior investors;
(2) Communications with seniors;
(3) Escalation protocols in the case of suspected elder abuse; and
(4) Escalation practices in response to signs of diminished capacity.

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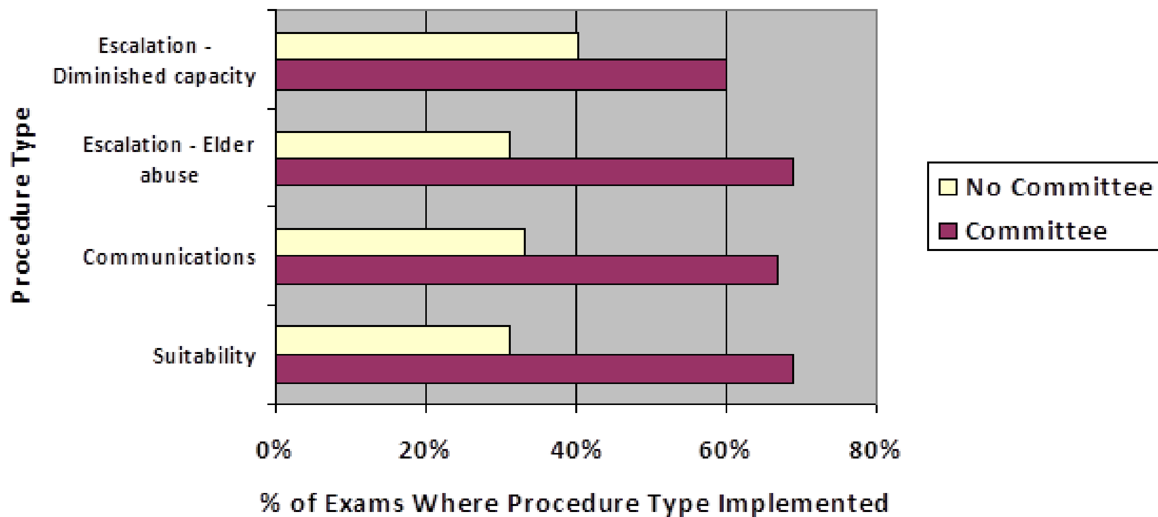
[5] *See, e.g.* Uniform Securities Act § 204(a)(2)(J); *see also* FINRA Rule 3110.

[6] *See, e.g.* FINRA Regulatory Notice 07-43, September 2007, available at http://www.finra.org/sites/default/files/NoticeDocument/p036816.pdf.

About 39 percent of the exams resulted in findings that the brokerage had established written procedures addressing all four of these areas. On the other hand, 20 percent of the exams found that the brokerage had not established written procedures addressing *any* of the four areas.

As the chart below indicates, a firm with developed procedures on key areas related to senior investors is more likely to have designated a committee or personnel to focus on senior investors.



Training

There is some complexity and a great deal of sensitivity involved in identifying signs of elder abuse and diminished capacity. Similarly, the steps necessary to protect vulnerable seniors from various forms of intended and unintended harm can be equally complex. There are entire government agencies across the country dedicated solely to assisting senior citizens. Financial service professionals are not expected to be experts in this realm. However, they are well-positioned to serve as front-line defenders against the harm that elder abuse and diminished capacity may cause. Mandating participation in well-developed training will assist

representatives and their firms in navigating those complexities and in protecting their senior clients.

The Coordinated Exam included an assessment as to whether examined firms currently provide training on communicating with seniors, escalating elder abuse and diminished capacity concerns, and suitability considerations for senior clients. Importantly, more than 62 percent of the exams found the firms offer training on all of these subjects. Moreover, virtually every firm that provides training on all three of the areas actually mandated that representatives take one or more of the trainings.

Communications with Senior Clients

Firms have recognized the need to take steps to improve their communications with senior clients. A 2008 report by NASAA, the SEC, and FINRA indicated that firms reported adopting practices such as increasing the frequency of contact with senior investors to stay on top of financial needs/life events and communicating in writing and documenting conversations with senior clients.[7] Such measures are essential to enhancing a firm's ability to prevent and mitigate the effects of elder abuse, but also toward recognizing signs of diminished capacity and supporting the recommendation of suitable investments by their representatives.

Trusted Contact Forms

One of the tools commonly discussed by financial service firms with respect to combatting the effects of elder abuse and diminished capacity is the "trusted contact form." Of course various names are used for this type of form, but the primary goal is the same. For purposes of the Coordinated Exam, a "trusted contact form" was defined as a form that captures the name and contact information of a trusted person that the firm may contact for purposes of administering

[7] 2008 Joint Report, *supra*, note 4 at 5.

the account or in the event of financial exploitation concerns.[8] Yet, only 39 percent of the exams indicated that the firm used some version of a trusted contact form.

To the extent this preliminary finding does not correspond with a broader impression of the use of trusted contact forms, this preliminary finding could indicate that awareness, and use, of trusted contact forms may be limited at certain branch locations.

In addition to asking if a firm has developed a form to collect trusted contact information, the Coordinated Exam also assessed how often the trusted contact information is actually collected. At firms where a trusted contact form was in use, less than 15 percent of all senior clients reviewed at those firms during the Coordinated Exam had a completed form.

There are various reasons why such information may not yet be on file. For example, a key factor could be whether or not the trusted contact form is only presented to a client at the time the account is opened or the client's profile is updated. The relatively recent implementation of trusted contact forms may also impact the current rate of use. More significant is the reality that many clients may hesitate to share such information, either out of concern about the privacy of the contact person or concern about allowing anyone else access to their own financial information. Financial service firms would be well advised to review their practices and communications related to trusted contact forms to maximize their ability to collect this information, especially from senior clients.

Frequency of Communications

There are many benefits to frequent communication with senior clients. In addition to serving client needs, frequent communications enhance the ability of representatives and brokerages to identify signs of diminished capacity or elder abuse. Moreover, frequent communications allow firms to update trusted contact information and key client profile information more

[8] Because such information may also be collected through other means, such as on new account opening forms, an affirmative response was required even is this type of information was collected on another form designed to collect additional information.

often. Some firms have long recognized the value of communicating more with senior clients.[9]

However, only 24 percent of the exams involved a firm that required verification of customer profiles of senior investors more often than the legal requirement of 36 months. Of course, it is possible that a firm verifies the profile information more often than every 36 months, but does not formally document more frequent verifications of senior clients' customer profile information. In any event, documentation of these verifications serves an important risk management purpose and may reflect the extent of a firm's investment in developing practices designed to protect its senior clients.

Other Communication Related Measures

The Coordinated Exam also sought to assess different ways that the brokerage industry has amended its communication methods with senior investors to account for common age-related changes in physical abilities, to identify/combat effects of elder abuse, and for general business risk management purposes. Firms examined during the Coordinated Exam have taken steps such as:

- Increasing the size of the font used in certain written communications;
- Documenting verbal communication more regularly; and
- Requiring meetings with senior clients to take place at the firm's office.

Suitability

An investor's age is obviously not the only factor to consider in a suitability analysis, but age can affect many of the other factors typically considered in a suitability analysis such as risk tolerance and investment objectives. Furthermore, senior investors who are retired face a greater challenge in overcoming the negative effects of an unsuitable recommendation that results in losses or a lack of sufficient liquidity.

[9] *See* 2008 Joint Report, *supra*, note 4 at 5-8.

Procedures and Controls

Broker-dealers are required to review trading activity in all client accounts. The Coordinated Exam sought insight into whether brokerages would take the position that they did not need to establish procedures *specific* to suitability for senior investors. That is, do firms feel there is no need for specific procedures because age and life circumstances should be considered in connection with securities recommendations to most, if not all, individual clients.

However, more than 72 percent of the exams found that firms had developed specific written procedures associated with suitability of recommendations to senior clients. Some firm responses suggested a view that suitability procedures specific to seniors were not necessary because of general suitability considerations. However, such a view appears to be in the minority.

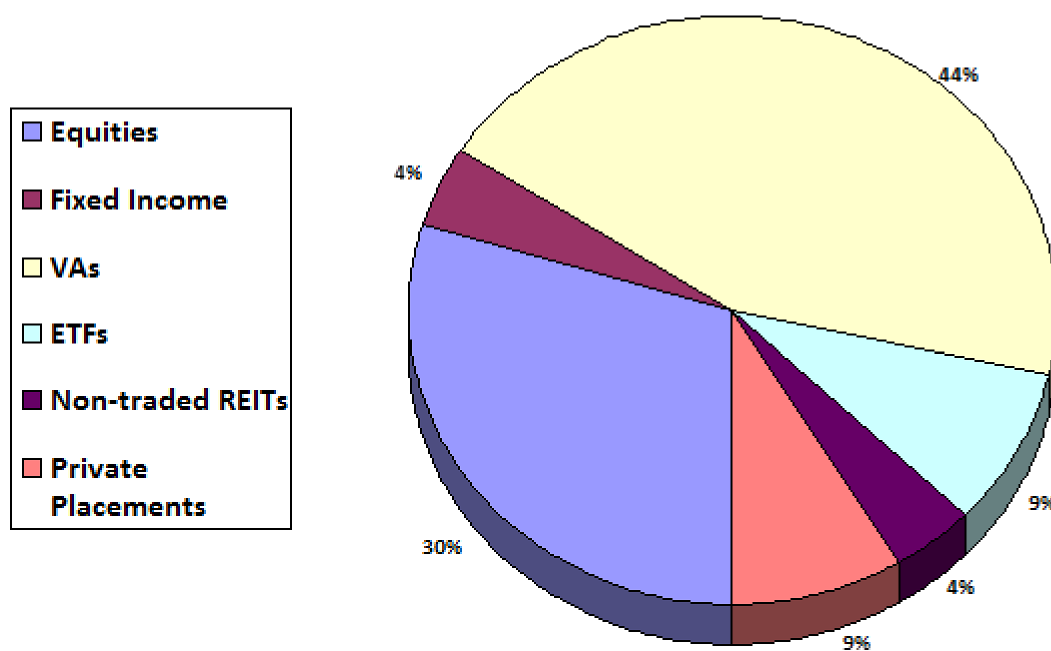
Of the 45 exams where senior specific suitability procedures had been implemented, 21 involved a firm that mandated heightened reviews for the sale of certain investment products to seniors. Variable annuities and "alternative investments" were the primary product types for which firms mandated heightened reviews based on a specific age. Examples of alternative investments include, among others, investments in non-traded real estate investment trusts (REITs) and business development companies (BDCs). Examined firms utilize ages ranging from 55-80 as triggers for mandating heightened review before approving sales of selected products. One of the examined firms required heightened review before approving options activity for clients over the age of 70.

Broker-dealers are required to review trading activity in client accounts even in the absence of red flags. Interestingly, only 39 percent of all exams found that broker-dealers include clients' ages on the trade records used in connection with regular trade reviews. The inclusion of the age on trade review records could greatly improve a supervisor's ability to identify potentially unsuitable recommendations generally and specifically with respect to senior investors. Moreover, including the age on records reviewed by a supervisor would increase the number

of firm personnel that might note suspect activity in an account that might indicate age-related diminished capacity or elder abuse.

Potentially Unsuitable Recommendations

Approximately 10 percent of the exams included in the Coordinated Exam identified potentially unsuitable recommendations to senior investors. The graph below is a breakdown of the frequency with which various products types were associated with the potentially unsuitable recommendations made to 41 senior clients included in the Coordinated Exam.



That variable annuities were the product most frequently associated with potentially unsuitable recommendations reinforces the importance placed on serving senior clients by state and federal securities regulators. In recent years, regulators have expressed concern about sales

practices associated with variable annuities sales to senior investors.[10] In particular, there is a general concern with the sale of variable annuities to senior clients or those approaching retirement because of the penalty rates associated with early withdrawals.

Potential suitability issues were also identified with exchange-traded funds (ETFs) sold to seniors. The suitability concerns with ETFs primarily relate to non-traditional ETFs, such as leveraged and inverse ETFs. The “reset” periods associated with these products, which are often daily, can affect the suitability determination because the products are designed to achieve their objective within the reset period. Firms should closely monitor any sales of these products to senior investors given that these products are designed to be used as part of short-term trading strategies.

While traditional equities are not regularly discussed as priority concerns, regulators and the industry should note that 30 percent of suitability concerns identified during the Coordinated Exam involved equities. In fact, potential suitability issues related to equities far outweighed any identified concerns with other products that have received increased regulatory attention over the last few years such as non-traded REITs.

In the exams that evinced suitability concerns, there was no correlation with lack of training as the suitability concerns almost all occurred in exams of firms that actually *required* training on both senior investor suitability and communicating with seniors. Whether the potentially unsuitable recommendation was in fact unsuitable as well as whether the potentially unsuitable recommendations took place after the representatives participated in the mandatory training is beyond the scope of this report. Nonetheless, this finding should serve as a reminder to the industry that the mere existence of a training program, even a mandatory one, may not be enough if the training program is not adequately designed to effectively train representatives, if supervisors rely too heavily on the training, or if a firm ineffectively screens candidates at the hiring stage.

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[10] *See, e.g.* NASAA Informed Investor Alert: Annuities, available at http://www.nasaa.org/2692/informed-investor-alert-annuities/; *see also* FINRA Investor Alert: Variable Annuities Beyond the Hard Sell, available at https://www.finra.org/sites/default/files/InvestorDocument/p125846.pdf.

Marketing to Senior Investors

Through rulemaking and the issuance of industry-oriented guidance, financial service regulators have consistently stressed concern over potentially misleading marketing efforts related to senior investors.[11] Therefore, the Coordinated Exam reviewed common areas of concern to assess the prevalence of certain practices.

Seminars

Seminars targeting seniors, and especially "free lunch seminars," have been the subject of many investor alerts by state and federal regulators.[12] A report issued in 2007 by NASAA, the SEC, and FINRA concluded these seminars are designed to sell investments even though they are often touted as "educational;" attendees may not understand that the seminar is sponsored by a company tied to investments discussed at the seminar; and there were apparent weaknesses in firms' supervision of seminars.[13]

Thirteen of the offices examined had offered one or more investor-oriented seminars within the prior 12 months. Approximately 50 percent of these offices had offered seminars focused on senior investors or those approaching retirement. Importantly, these six exams resulted in no findings of concern by the examining jurisdiction. So, while concerns related to senior seminars still exist, the industry appears to have implemented improvements related to senior seminars.

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[11] *See, e.g.* NASAA Model Rule on the Use of Senior-Specific Certifications and Professional Designations, available at http://www.nasaa.org/wp-content/uploads/2011/07/3-Senior_Model_Rule_Adopted.pdf.

[12] *See, e.g.* NASAA Investor Alert: Free Meal Seminars, available at, http://www.nasaa.org/1950/senior-investor-alert-free-meal-seminars/; *see also* FINRA Investor Alert: "Free Lunch" Investment Seminars—Avoiding the Heartburn of a Hard Sell, available at http://www.finra.org/investors/alerts/free-lunch-investment-seminars.

[13] Protecting Senior Investors: Report of Examinations of Securities Firms Providing "Free Lunch" Sales Seminars, (Sept. 2007), available at https://www.sec.gov/spotlight/seniors/freelunchreport.pdf.

Senior Designations

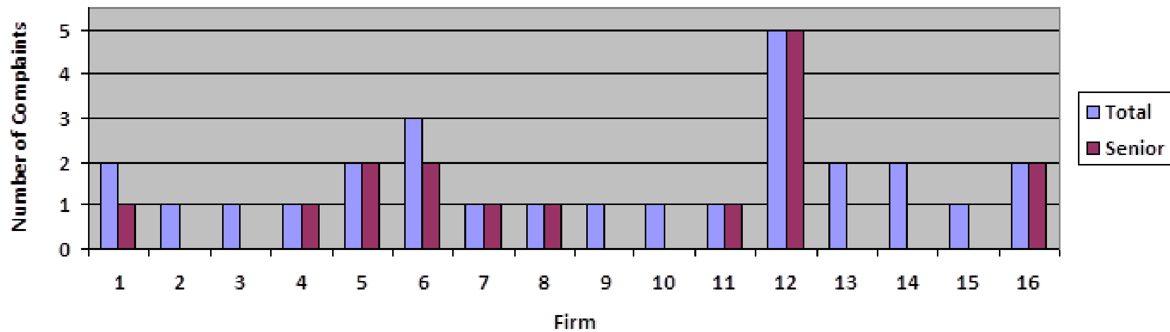
Approximately one-third of all exams involved a firm that permits representatives to use a "senior designation." For purposes of the Coordinated Exam, a senior designation was defined as any title or designation that conveys or suggests an expertise in senior investments or retirement planning. Of the firms that permit the use of senior designations, almost 48 percent of the exams were of firms that do not maintain a list of approved senior designations. Moreover, 25 percent of the exams where the broker-dealer allows the use of senior designations without a list of approved designations found that the firm did not even have procedures related to the approval of senior designations.

Thirty-two states have enacted rules designed to curb the use of designations that may mislead senior investors into believing that an individual has relevant expertise. These rules only permit the use of such designations when issued by a properly accredited entity to professionals who have completed an established training program and who are subject to reasonable monitoring and discipline for engaging in unethical conduct.

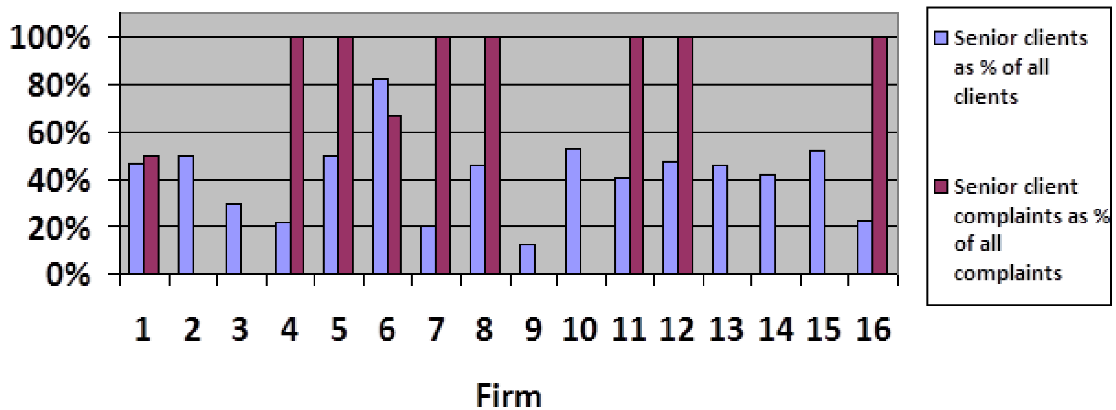
There are numerous designations used by financial service professionals that do not require sufficient, if any, demonstrated expertise or training on senior investor matters. Broker-dealers allowing the use of senior designations without appropriate controls and procedures are placing themselves and their senior clients at significant risk.

Complaints

While the focus of the Coordinated Exam was not enforcement-related, examiners observed an interesting trend in complaints that is worthy of mention. Examiners collected data on complaints related to the examined offices and filed within the prior 24 months. Overall, complaints filed by senior clients were found in approximately 15 percent of the offices examined.



More interesting is the fact that, over the relevant 24 month period at most offices where *any* complaint had been filed, the majority had been filed by senior clients.



Notably, in nearly 50 percent of offices with complaints, the relative frequency of senior client complaints was much higher than the percentage of the overall client base made up of senior clients. That is, the rate of complaints filed by senior clients is disproportionately high. Broker-dealers and regulators should continue their zealous efforts to effect change that will better educate financial service professionals and the investing public about suitability issues specific to senior investors.

Conclusion

NASAA and its members remain committed to advancing protections for senior investors. The Coordinated Exam is just one of the many efforts being undertaken currently by NASAA, the SEC, FINRA, and the industry. All of these efforts serve a shared objective—raising awareness of the issues affecting senior investors and fostering helpful changes in practices at firms and regulatory agencies.

The preliminary findings of the Coordinated Exam indicate that numerous broker-dealers are taking valuable steps such as designating personnel to focus on senior investor matters and developing procedures that are mindful of the common issues facing senior clients. Similarly, a majority of the exams involved a firm that has not only developed senior investor-specific training but has also mandated such training. It is also encouraging that examined broker-dealers are utilizing improved communication methods and are implementing age-related controls on certain investments.

However, these preliminary findings also identified areas where improvement appears needed. For example, it is concerning that 20 percent of the examinations involved firms that did not have written procedures on any of the areas previously highlighted by regulators. And while some firms are already using trusted contact forms, there is a need to enhance the methods and communications around collecting trusted contact information from senior clients to increase the rate at which such information is submitted. Senior investor complaints outpace the rate at which other clients filed complaints at the examined firms. In addition to the general relevance of this finding, it should serve to remind firms that improved communications with senior clients, and documentation of those communications, will not only serve these clients but will also serve an important risk-management purpose.

In sum, the preliminary findings from the Coordinated Exam indicate that past efforts to highlight senior investor matters have been successful at effecting change, but continued progress is necessary to best serve our aging population.

March 2016

Recommendations and report for financial institutions on preventing and responding to elder financial exploitation

cfpb Consumer Financial Protection Bureau

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Executive Summary

Elder financial exploitation has been called the crime of the 21st century and deploying effective interventions has never been more important. Older people are attractive targets because they often have assets and regular income. These consumers may be especially vulnerable due to isolation, cognitive decline, physical disability, health problems, or bereavement. Elder financial exploitation robs victims of their resources, dignity and quality of life—and they may never recover from it.

Financial institutions play a vital role in preventing and responding to this type of elder abuse. Banks and credit unions are uniquely positioned to detect that an elder account holder has been targeted or victimized, and to take action.

The Consumer Financial Protection Bureau's (CFPB or Bureau) Office for Older Americans has identified best practices to assist financial institutions with their efforts to prevent elder financial abuse and intervene effectively when it occurs. To help financial institutions, the CFPB provides recommendations for banks and credit unions to accompany the Advisory for Financial Institutions on Preventing and Responding to Elder Financial Exploitation, issued simultaneously.[1] The CFPB recognizes that financial institutions vary in size and that the

[1] The Advisory and the Recommendations and report are not intended to interpret federal consumer financial law or any other statute or rule. They are not designed to implement or prescribe any law or Bureau policy. They are not binding on the Bureau or on financial institutions.

protocol, policies and procedures that an institution adopts will likely vary based upon the institution's size and risks.

Key recommendations include:

- **Train management and staff to prevent, detect and respond.** Train personnel regularly and frequently, and tailor training to specific staff roles. Training should cover warning signs that may signal financial exploitation, including behavior and transactions that are red flags, and action steps to prevent exploitation and respond to suspicious events.

- **Use technology to monitor for signs of elder financial exploitation.** Because indicators of elder fraud risk may differ from conventionally accepted patterns of suspicious activity, financial institutions using predictive analytics should review their filtering criteria against individual account holders' patterns and explore additional risk factors that may be associated with elder financial exploitation.

- **Report all cases of suspected exploitation to relevant federal, state and local authorities.** Make timely reports whenever financial institutions spot activity that signals financial exploitation, regardless of whether reporting is mandatory or voluntary under state or federal law. Reporting does not, in general, violate the privacy provisions of the Gramm-Leach-Bliley Act.

- **File Suspicious Activity Reports (SARs).** The Financial Crimes Enforcement Network (FinCEN) issued an Advisory in 2011 noting that SARs are a valuable reporting avenue for these cases. FinCEN now designates "elder financial exploitation" as a category of suspicious activity and provides a checkbox for it on the electronic SAR form. File SARs for elder financial exploitation when mandatory under the Bank Secrecy Act and consider filing them voluntarily in other cases.

- **Expedite documentation request**s from Adult Protective Services (APS), law enforcement and other government entities investigating reports of financial exploitation. Provide documents at no charge.

- **Comply with the Electronic Fund Transfer Act (EFTA) and Regulation E.** Per Regulation E, extend time limits for consumer notification of an unauthorized transaction under extenuating circumstances such as hospitalization. Do not impose

greater consumer liability than Regulation E allows, even when an older consumer may appear to be negligent by, e.g., noting a PIN on or near a debit card.

- **Enable older account holders to consent to information sharing with trusted third parties.** Establish procedures so consumers can provide advance consent to sharing account information with a designated trusted third party when the financial institution reasonably believes that the consumer may be at risk of financial abuse.
- **Offer age-friendly services that can enhance protections against financial exploitation**. Provide consumers with information about planning for incapacity. Honor powers of attorney unless there is a basis in state law to refuse them. Offer opt-in account features such as cash withdrawal limits, geographic transaction limits, alerts for specified account activity, and view-only access for authorized third parties. Where appropriate, offer multi-party accounts without right of survivorship (convenience accounts or agency accounts) as good alternatives to traditional joint bank accounts.
- **Work with law enforcement and Adult Protective Services.** Develop relationships with law enforcement and APS personnel to facilitate timely response to reports. Provide expert consultation and document review to assist with case investigations, including through multidisciplinary teams engaging in case review.
- **Coordinate efforts to educate older account holders, caregivers and the public.** Work with an array of agencies and service organizations to offer educational programs and distribute materials. Participate in multidisciplinary network initiatives.

Financial institutions have a tremendous opportunity to serve older consumers by vigorously protecting them from financial exploitation. The CFPB looks forward to continuing to work with financial institutions and seeing a broad spectrum of financial institutions implement its recommendations so that a greater number of older Americans can enjoy later life economic security.

1. Introduction

1.1 Financial institutions are key actors in combatting elder financial exploitation

Elder financial exploitation has been called "the crime of the 21st century."[2] Deploying effective interventions has never been more important.[3]

Financial institutions play a vital role in preventing and responding to elder financial abuse. Banks and credit unions are uniquely positioned to do so because:

- They know their customers and members
- They often have the opportunity for face-to-face interaction with older consumers who make transactions[4]

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[2] MetLife Mature Markets Institute, *The MetLife Study of Elder Financial Abuse Crimes of Occasion, Desperation, and Predation Against America's Elders* (June 2011), *available at* https://www.metlife.com/assets/cao/mmi/publications/studies/2011/mmi-elder-financial-abuse.pdf.

[3] The population age 65 and over is expected to reach nearly 75 million, or one fifth of the total population, by 2030. CFPB analysis of Census Bureau, National Population Projections, Table 3. Projections of the Population by Sex and Selected Age Groups for the United States: 2015 to 2060 (2014), *at* http://www.census.gov/population/projections/data/national/2014/summarytables.html.

- They are uniquely positioned to detect that an elder account holder has been targeted or victimized
- They are mandated reporters of suspected elder financial exploitation under many states' laws,
- FinCEN states that Suspicious Activity Reports (SARs) are useful for spotting elder financial exploitation and are required when the dollar threshold and other Bank Secrecy Act requirements are met.[5]

The CFPB's Office for Older Americans has identified best practices to enable financial institutions to prevent elder financial abuse and intervene effectively when it occurs. Implementing standards of practice for addressing elder financial exploitation will assist financial institutions in protecting older account holders.

While some banks and credit unions have a comprehensive approach to protecting their older account holders, many still have room for improvement. The CFPB commends those financial institutions across the country that are already reporting elder financial exploitation to the appropriate authorities and making other efforts to protect older consumers.

The CFPB provides broad recommendations in this report to help banks and credit unions prevent and respond quickly to elder financial exploitation.[6] This report accompanies the

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[4] Older consumers, especially those over age 70, are much more likely than other age groups to rely on tellers as their primary form of banking. FDIC, *2013 FDIC National Survey of Unbanked and Underbanked Households* (Oct. 2014), *available at* https://www.fdic.gov/householdsurvey/2013report.pdf.

[5] FinCEN is a Bureau of the U.S. Department of the Treasury. FinCEN, FIN-2011-A003, *Advisory to Financial Institutions on Filing Suspicious Activity Reports on Elder Financial Exploitation* (Feb. 22, 2011), *available at* https://www.fincen.gov/statutes_regs/guidance/pdf/fin-2011-a003.pdf (hereinafter referred to as FIN-2011-A003, *Advisory to Financial Institutions*) (interpreting 31 CFR § 1020.320).

[6] Although this report emphasizes the importance of compliance with appropriate federal and state laws, it is not intended to provide legal advice or serve as a substitute for financial institutions' own legal counsel.

Bureau's Advisory for financial institutions on preventing and responding to elder financial exploitation, issued simultaneously. The CFPB invites institutions to consider the practices identified here as they assess their own current practices.

1.2 Methodology

To prepare its Advisory and this report, the CFPB conducted in-depth, unstructured interviews with a broad spectrum of stakeholders, including representatives of individual banks and credit unions of various sizes, trade associations, technology vendors, law enforcement, prosecutors, adult protective services, aging groups, other federal agencies, and state government entities, over the period of May 2014 to March 2016.

In addition to the interviews, the CFPB reviewed numerous elder financial exploitation training curricula (from individual financial institutions, state bankers associations, national trade associations, state agencies, inter-disciplinary networks, and non-profit organizations) and protocols.

The Bureau developed this set of recommendations by combining the knowledge gained through these activities with its expertise regarding elder financial exploitation.

2. Background

2.1 What is elder financial exploitation?

Elder financial exploitation is the illegal or improper use of an older person's funds, property or assets.[7] Studies suggest that financial exploitation is the most common form of elder abuse and yet only a small fraction of incidents are reported.[8] Estimates of annual losses range from $2.9 billion[9] to $36.48 billion.[10] Perpetrators who target older consumers include, among others,

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[7] HHS, Nat'l Ctr. on Elder Abuse, Admin. On Aging, *Types of Abuse*, *Financial or Material Exploitation,* http://www.ncea.aoa.gov/FAQ/Type_Abuse/index.aspx (last visited Feb. 2, 2016).

[8] Ron Acierno, et al., Prevalence and Correlates of Emotional, Physical, Sexual and Financial Abuse and Potential Neglect in the United States: The National Elder Mistreatment Study, 100 Am. J. Pub. Health 292–97 (Feb. 2010), available at http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2804623/; Lifespan of Greater Rochester, Inc., et al., Under the Radar: New York State Elder Abuse Prevention Study (May 2011), available at http://ocfs.ny.gov/main/reports/Under%20the%20Radar%2005%2012%2011%20final%20report.pdf.

[9] MetLife Mature Market Institute, The MetLife Study of Elder Financial Abuse: Crimes of Occasion, Desperation, and Predation Against America's Elders (June 2011), available at https://www.metlife.com/assets/cao/mmi/publications/studies/2011/mmi-elder-financial-abuse.pdf.

[10] True Link Financial, *The True Link Report on Elder Financial Abuse 2015* (Jan. 2015), *available at https://truelink-wordpress-assets.s3.amazonaws.com/wp-content/uploads/True-Link-Report-On-Elder-Financial-Abuse-012815.pdf.* For a discussion of the MetLife and True Link methodologies, *see* Tobie Stanger, *Financial Elder Abuse Costs $3 Billion a Year. Or is it 36 billion?*, Consumer Reports, Sept. 29, 2015,

family members, caregivers, scam artists, financial advisers, home repair contractors, and fiduciaries (such as agents under power of attorney and guardians of property).[11]

Older people are attractive targets because they may have accumulated assets or equity in their homes and usually have a regular source of income such as Social Security or a pension. In 2011, the net worth of households headed by a consumer age 65 and older was approximately $17.2 trillion, and the median net worth was $170,500.[12] These consumers may be especially vulnerable due to isolation, cognitive decline, physical disability, health problems, and/or the recent loss of a partner, family member, or friend.

Cognitive impairment is a key factor in why older adults are targeted and why perpetrators succeed in victimizing them. Even mild cognitive impairment (MCI) can significantly impact the capacity of older people to manage their finances and to judge whether something is a scam or a fraud. Mild cognitive impairment is an intermediate stage between the expected cognitive decline of normal aging and the more serious decline of dementia.[13] Studies indicate that 22 percent of Americans over age 70 have MCI and about one third of Americans age 85 and over have Alzheimer's disease.[14]

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http://www.consumerreports.org/cro/consumer-protection/financial-elder-abuse-costs--3-billion-----or-is-it--30-billion-.

[11] Tobie Stanger, *Lies, Secrets and Scams: How to Prevent Elder Abuse*, Consumer Reports, Oct. 5, 2015, http://www.consumerreports.org/cro/consumer-protection/preventing-elder-abuse.

[12] *See* US Census Bureau, Table 5, *Mean Value of Assets for Households by Type of Asset Owned and Selected Characteristics: 2011* (2011), http://www.census.gov/people/wealth/files/Wealth_Tables_2011.xlsx (last visited March 15, 2016).

[13] Mayo Clinic, *Mild cognitive impairment* (MCI), http://www.mayoclinic.org/diseases-conditions/mild-cognitive-impairment/basics/definition/con-20026392 (last visited Feb. 8, 2016).

[14] Brenda L. Plassman, et al., *Prevalence of Cognitive Impairment without Dementia in the United States*, 148 Annals Intern. Med. 427-34 (Mar. 2008), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2670458/;

Elder financial exploitation robs victims of their resources, dignity and quality of life. After being exploited, their physical and emotional health may be impacted; they may lose their independence and even have a shortened lifespan; and, they often are unable to replace stolen money or assets because of limited income and no way to rebuild their savings or home equity. Financial exploitation imposes societal costs as well since older victims are more likely to turn to government programs for health and long-term care services.[15]

Since elder financial exploitation takes many different forms, it can be hard to identify. An array of "red flags," however, may signal exploitation. Some of these warning signs are behavioral or interpersonal—for example, an older person appears to be submissive or fearful of a caregiver. Some signals are transactional, such as frequent large withdrawals from an account or uncharacteristic requests to wire money.[16]

Alzheimer's Ass'n, *2015 Alzheimer's Disease Facts and Figures, available at* https://www.alz.org/facts/downloads/facts_figures_2015.pdf.

[15] Janey C. Peterson, et al., *Financial Exploitation of Older Adults: A Population-Based Prevalence Study,* 29 J. Gen. Intern. Med. 1615, 1620-21 (2014), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC4242880/pdf/11606_2014_Article_2946.pdf; Jilenne Gunther, *The 2011 Utah Economic Cost of Financial Exploitation*(2011), *available at* http://victimsofcrime.org/docs/default-source/financial-fraud/2011-economic-cost-of-financial-exploitation.pdf?sfvrsn=2; Bryan J. Kemp & Laura A. Mosqueda, *Elder Financial Abuse: An Evaluation Framework and Supporting Evidence*, 53 J. Am. Geriatr. Soc. 1123, 1123 (July 2005), *available at* http://www.centeronelderabuse.org/docs/EldFinAbuse_KempMosqueda2005.pdf; Brian K. Payne, *Crime and Elder Abuse: An Integrated Perspective* (3 ed. 2011); Charles C. Thomas, World Health Organization, *European Report on Preventing Elder Maltreatment* (2011), *available at* http://www.euro.who.int/__data/assets/pdf_file/0010/144676/e95110.pdf; Ronan M. Factora, *Aging and Money: Reducing Risk of Financial Exploitation and Protecting Financial Resources* (2014).

[16] *See also*, FinCEN, *FinCEN Suspicious Activity Report (FinCEN SAR) Electronic Filing Instructions*, Version 1.2 (Oct. 2012), *available at* https://www.fincen.gov/forms/files/FinCEN%20SAR%20ElectronicFilingInstructions-%20Stand%20Alone%20doc.pdf (hereafter referred to as FinCEN *Suspicious Activity Report*); Fed. Reserve, CFTC, CFPB, FDIC, FTC, NCUA, OCC, *Interagency Guidance on Privacy Laws and Reporting Financial Abuse of Older Adults* (Sept. 23, 2013), *available at* http://files.consumerfinance.gov/f/201309_cfpb_elder-abuse-guidance.pdf (hereinafter *Interagency Guidance on Privacy Laws*).

2.2 Case Scenarios

The following are a few case examples from news reports to illustrate the ways that a variety of perpetrators exploit older consumers. In all of these cases, funds went from the victims' deposit accounts to the perpetrators.

- A Minnesota pastor persuaded a man suffering from Alzheimer's and Parkinson's diseases to allow him to manage his finances. The pastor made over 130 withdrawals from the older man's bank account and was later convicted of stealing about $25,000.[17]
- Prosecutors charged an Indiana home care worker with nine felonies after she took more than $150,000 from a 79-year-old woman with dementia. The caregiver stole the funds through transactions on multiple credit cards, checks drawn on a savings account and cashed certificates of deposit. A bank fraud analyst was the first to detect the unusually large credit card charges, and the analyst called Indiana Adult Protective Services.[18]
- An Oklahoma woman received mail and phone calls telling her that she had won a sweepstakes and would get prizes if she sent money to collect her winnings. She sent as many as 90 checks a month, in response to requests for payments of $50 to $2,000. A bank employee discovered the losses when the victim asked how she could send a large amount of cash through the mail.[19]

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[17] *St. Paul pastor sentenced for stealing from parishioner*, StarTribune, Sept. 14, 2012, *available at* http://www.startribune.com/local/east/169851546.html.

[18] Marisa Kwiatkowski, *Financial exploitation cases burden seniors, Indiana,* Indianapolis Star, Jan. 17, 2016, *available a* http://www.indystar.com/story/news/investigations/2016/01/17/financial-exploitation-cases-burden-seniors-indiana/78810678/.

[19] US Postal Inspection Serv., *US Postal Inspectors warn seniors against sweepstakes scams: You're a Guaranteed Loser!*, https://postalinspectors.uspis.gov/radDocs/victim.htm (last visited Feb. 8, 2016).

3. Recommendations

3.1 Develop, implement, and maintain internal protocols and procedures for protecting account holders from elder financial exploitation

The CFPB recommends that financial institutions develop a protocol for management and staff to follow to prevent and respond to suspected cases of elder financial exploitation.

The protocol should include key policies and procedures regarding the following topics:

- Training requirements and resources
- Reporting to appropriate federal, state and local entities, including
  - Process for frontline or other staff to flag suspicion to relevant management and other personnel
  - Responsibilities of management and staff for communication with the account holder and investigating suspicious activity
  - Designation of responsibilities for reporting to Adult Protective Services (APS), law enforcement and other entities
  - Information on what to include in reports, and
  - Responding to records requests from external entities performing investigations
- Regulation E compliance

- Procedures for sharing account information with third parties
- Ongoing collaboration with external stakeholders.

The CFPB recognizes that financial institutions vary in size and that the protocol, policies and procedures that an institution adopts will likely vary based upon the institution's size and risks.

3.2 Train employees

Training employees is critical in the effort to prevent, detect and respond to elder financial exploitation. Clear, efficient training protocols enhance financial institutions' capacity to detect elder financial exploitation. It is essential that training programs describe what actions to take when employees detect problems. Training should communicate the roles and responsibilities of management, frontline staff, and other employees to reduce ambiguity and promote efficient and timely action when staff suspect or observe elder financial exploitation.[20]

The CFPB recommends the following practices for all employee training programs:

3.2.1 Elder financial exploitation training curriculum components

Training curricula should build on existing fraud training programs and articulate characteristics of elder financial exploitation that make it unique and difficult to detect. The following elements comprise a minimum foundation in elder financial exploitation training:

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[20] *See*, e.g., The Maine Reporting Project for Financial Institutions, *Fighting Financial Exploitation, Trainer Reference Manual* 1-4, 3rd ed. (2014), *available at* http://www.maine.gov/dhhs/oads/trainings-resources/publications.html (follow link to Microsoft Word version of The Maine Reporting Project for Financial Institutions).

Definition of elder financial exploitation

The CFPB recommends that financial institutions adopt a comprehensive definition of elder financial exploitation. A multifaceted definition provides trainees with a sense of the varied and nuanced forms that exploitation can take.[21] For example, misappropriation of an older person's account funds and coercing a senior to co-sign on a loan are both forms of elder financial exploitation.[22]

The CFPB recommends that financial institutions incorporate relevant state-specific definitions into their training since definitions often vary by state. It is critical, for example, for staff to know the definition of elder financial exploitation in their state's APS laws.[23] If the state criminal code defines elder financial exploitation as a crime, knowing that definition can help staff as they prepare reports to law enforcement.

Indicators of potential elder financial exploitation

Signs of elder financial exploitation may differ from the indicators of other fraud types. Accordingly, it is important for training curricula to include categorical descriptions of how exploitation can occur and the red flags to watch for in each category.[24] This report includes a

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[21] For example, as defined in the Older Americans Act, exploitation is "the fraudulent or otherwise illegal, unauthorized, or improper act or process of an individual, including a caregiver or fiduciary, that uses the resources of an elder for monetary or personal benefit, profit, or gain, or that results in depriving an elder of rightful access to, or use of, benefits, resources, belongings, or assets." 42 U.S.C. § 1397j(8).

[22] Oregon Bankers Ass'n & Oregon Dep't Hum. Serv., *Preventing Elder Financial Exploitation: How Banks Can Help,* (4th ed. June 2013), *available at* http://www.oregonbankers.com/uploads/5/1/5/1/51510679/2013_elder_abuse_manual_-_web_version_-_final.pdf.

[23] *See infra* Report suspected activity, Adult Protective Services at 3.4.5.

[24] *See* App. A for additional red flags of elder financial exploitation. *See also* BITS Financial Services Roundtable, *Protecting the Elderly and Vulnerable from Financial Fraud and Exploitation* (Apr. 2010) 11-14, *available at*

list of warning signs that may indicate elder financial exploitation, at Appendix A. Examples of red flag categories include, but are not limited to:

- Transaction pattern changes:
  - Abrupt increases in withdrawals; new spending patterns following the addition of a new authorized user; atypical ATM withdrawals; unusual gaps in check numbers.
- Identity theft and coercion:
  - Address changes followed by account changes; new third party speaking for the older adult; older consumer is confused by or unaware of account changes; requests to send account statements to a third party's address.
- Behavioral changes:
  - Older consumer appears newly distressed, unkempt, or unhygienic; older consumer mentions lottery or sweepstakes opportunities or winnings; older adult inquires about international wire transfers.

Using vignettes or case studies to illustrate plausible scenarios may enable staff to understand and remember the red flags.[25]

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http://fsroundtable.org/wp-content/uploads/2015/05/BITSProtectingVulnerableAdults0410.pdf; Coalition for Elder Justice in Connecticut, *Preventing Elder Financial Exploitation* (Feb. 2015) 26-34, http://coa.cga.ct.gov/images/pdf/financialabuse/ElderJusiticeFinancialInstitutionsTraining2.12.15.pdf; Mark S. Lachs & Karl A. Pillemer, *Elder Abuse,* 373 N. Engl. J. Med. 1947 (2015), *available at* http://www.nejm.org/doi/full/10.1056/NEJMra1404688.

[25] CFBP and FDIC, *MoneySmart for Older Adults: Participant Resource Guide* (Jun. 2013), http://files.consumerfinance.gov/f/201306_cfpb_msoa-participant-guide.pdf.

Action steps for preventing elder financial exploitation

It is critical for financial institutions to train employees on how to take preventive measures against elder financial exploitation in addition to responsive or reactive processes. Training can articulate a spectrum of proactive steps to take depending on the situation encountered by the employee. Examples of preventive measures include, but are not limited to:

- Asking customers to explain and confirm transactions that raise red flags, e.g.:
  - With a large cash withdrawal ("This is an unusually large withdrawal, are you sure you want cash?")
  - With wire transfers, ("Have you taken steps to be sure the recipient is trustworthy?")
  - With large online transactions ("I'm calling to confirm your recent online banking activity because the transfer is a large amount.")
  - When a third party accompanies the account holder and other red flags are present ("Can we talk privately for a moment?")
- Instructions for recognizing signs of diminished capacity with action steps for frontline staff to follow when signs are observed in customers[26]
  - Examples such as memory loss, communication problems, calculation problems and disorientation may be signs of diminished capacity in a customer

[26] SEC, Office of Compliance Inspections and Examinations, North American Securities Administrators Ass'n & Financial Industry Regulatory Authority, *Protecting Senior Investors: Compliance, Supervisory and Other Practices Used By Financial Services Firms in Serving Senior Investors* 7-8 (2008), *available at* http://www.nasaa.org/wp-content/uploads/2010/08/SEC-NASAA_Senior_Report_092208.pdf; American Bar Association, Recognizing and dealing with diminished capacity in older clients, http://www.americanbar.org/news/abanews/aba-news-archives/2013/10/recognizing_and_deal.html (last visited Feb. 17, 2016).

- Educating older customers on common scams and fraud ("Have you read up on the latest telemarketing scams? Here's a flyer to take home and to share with friends and family.")

Action steps for responding to suspected elder financial exploitation

The CFPB recommends that financial institutions train staff to respond quickly when they suspect elder fraud and to follow clear, detailed action steps.[27] To enhance timely response and enable quick reporting, the CFPB recommends that training include:

- Tips on immediate steps for frontline staff, such as scripted questions to ask customers, calling 911 if the account holder appears to be in immediate danger, and instructions for effectively documenting details
- Internal response sequences for alerting appropriate staff throughout the organizational hierarchy, e.g.:
  - Alerting peer staff, supervisory staff, management, security and compliance staff, as appropriate and according to the financial institution's protocol
- Action steps for reporting to law enforcement, APS, and other external entities (*see infra* at 3.4). Financial institutions may wish to provide staff with quick reference guides with rules and tips for reporting to law enforcement and APS. Including state-specific information on APS and other agencies' jurisdiction and procedures could enhance understanding and efficiency.[28]

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[27] MO Dept. of Health & Senior Services, *MO$AFE: Missourians Stopping Adult Financial Exploitation* 12-22 (Aug. 2005), *available at* http://health.mo.gov/seniors/mosafe/pdf/MOSAFEResourceManual.pdf; CA Dept. of Justice, *A Citizen's Guide to Preventing and Reporting Elder Abuse 20-34* (2002), *available at* http://ag.ca.gov/bmfea/pdfs/citizens_guide.pdf.

[28] *See infra* Report suspicious activity at 3.4.

- Steps for filing detailed Suspicious Activity Reports (SARs) with detailed and relevant supporting documentation, and for maintaining relevant documentation in accordance with BSA requirements (*see infra* at 3.4.3).[29]
- Steps for alerting trusted third parties (*see infra* at 3.5.2).
- Tips for being an effective witness of suspicious behavior, e.g., keeping detailed contemporaneous notes on observations.

3.2.2 Tailor trainings for different staff roles

Financial institution employees have varying expertise, authority, and public-facing duties based on their positions within the organizational structure. Employees in some institutions may perform multiple roles or have overlapping job duties. For these institutions, a generalized approach to training may be the most efficient system. When applicable, large institutions—and other institutions that assign specific responsibility for investigation, reporting and other duties—should tailor training programs to fit staff roles and responsibilities. Customized training prepares employees to react to events they are most likely to encounter and act on in their respective positions. For example, frontline staff directly observe and engage customers. Training for these employees could emphasize red flag detection and the alerting of key personnel. Tailored training for supervisory employees could, by contrast, focus on external reporting protocols and requirements.

[29] FinCEN *Suspicious Activity Report*, *supra*; FinCEN Guidance on Preparing a Complete and Sufficient Suspicious Activity Report Narrative 13-21, https://www.fincen.gov/news_room/rp/files/sar_guidance_narrative.pdf (hereafter referred to as FinCEN Guidance on Preparing SARs); FIN-2011-A003, *Advisory to Financial Institutions*, *supra*.

3.2.3 Repeat training periodically

Studies show that repetitive training deepens the learning process and improves memory retention.[30] Cyclical, repetitive training can reinforce individual knowledge and increase collective expertise within institutions.[31]

The CFPB recommends that financial institutions incorporate elder financial exploitation training and retraining cycles into their institutional culture. In addition to enhanceing knowledge retention, cyclical retraining may help to integrate elder financial issues into the daily language and awareness of staff. Frequent training cycles may also help new employees learn this subject matter.[32]

3.3 Detect elder financial exploitation by harnessing technology

There are two main avenues for detecting signs that may indicate elder financial exploitation. Tellers and other public-facing staff are essential for spotting signs of financial exploitation, particularly behavioral signs they notice when interacting with older account holders and third

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[30] Jurgen Kornmeir, Manfred Spitzer& Zrinka Sosic-Vasic, *Very Similar Spacing-Effect Patterns in Very Different Learning/Practice Domains* 1, Plos One, Vol 9, Issue 3 (Mar. 2014), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3946552/pdf/pone.0090656.pdf.

[31] Jeffrey D. Karpicke & Althea Bauernschmidt, *Spaced Retrieval: Absolute spacing enhances learning regardless of relative spacing*, 37 J. Exp. Psychology: Learning, Memory, and Cognition 1250 (2011), *available at* http://learninglab.psych.purdue.edu/downloads/2011_Karpicke_Bauernschmidt_JEPLMC.pdf.

[32] For example, BITS Financial Services Roundtable recommends: initial training for all new employees; thorough annual training; and, quarterly communications to reinforce messages, such as one-page tip documents. BITS Financial Services Roundtable, *At-Risk Adult Training Curriculum* (2013), *available at* http://fsroundtable.org/wp-content/uploads/2015/09/BITS-Roundtable-At-Risk-Adult-Training-Curriculum-Jan-2013.pdf.

parties. (*See supra* at 3.2.1 and *infra* at Appendix A.) The other key approach to detection is utilizing technology to flag transactions or account activity that may signal financial abuse.

Financial institutions can utilize existing suspicious activity monitoring technology to detect elder financial exploitation. The CFPB encourages financial institutions to ensure that their systems include analyses of the types of products and account activity that may be associated with elder financial exploitation risk.

Financial institutions perform transaction monitoring, tracking, reporting, and recordkeeping on customer account data. These actions support Bank Secrecy Act and Anti-Money Laundering (BSA/AML) compliance, and can also help to prevent fraud. The internal controls that financial institutions have implemented in furtherance of the BSA/AML obligations include effective detection capabilities that can recognize distinct risk indicators for elder fraud.

Suspicious activity monitoring programs typically include a combination of both manual and automated systems to detect unusual activity. Manual fraud detection systems operate by programming rules that flag specific events identified in account activity for further review by staff. For example, the program may flag cash withdrawals over a set limit or international transactions as suspicious. These are valuable techniques, but they use static, predetermined rules that may miss specific transactions that are unusual for a particular account holder.

In the last two decades, financial institutions have increasingly adopted sophisticated automated fraud detection systems using machine learning technology. Machine learning analyzes transactions in relation to historical account activity and programmed parameters.[33] The programs are said to "learn" statistical patterns in account data and can recognize real-time

[33] Fed. Fin. Inst. Examination Council, *Bank Secrecy Act/Anti-Money Laundering Examination Manual* 61-67(2014), https://www.ffiec.gov/bsa_aml_infobase/documents/BSA_AML_Man_2014_v2.pdf; Jesus Mena, *Machine Learning Forensics for Law Enforcement, Security, and Intelligence* 1-24 (CRC Press, 2011); telephone interview with Dale Smith, Data Scientist, Nexidia Inc. (Oct. 14, 2015) and telephone interview with Steven Vallejo, Corporate Security Director, Bank of the West (Oct. 28, 2015).

deviations in these patterns on individual accounts.[34] As the system detects anomalies, it measures their risk potential according to its programmed tolerances or filtering criteria. The filtering criteria determine whether the system flags the activity for review.[35]

Some indicators of elder fraud risk may not match conventionally accepted patterns of suspicious activity, but nevertheless may be unusual in light of a particular account holder's regular pattern of behavior. Financial institutions can ensure that their systems consider the type of account-related activity that may be associated with elder fraud risk. The following is a sample of the types of account activity that may be associated with elder financial exploitation:[36]

- Atypical ATM card use
- Uncharacteristic non-sufficient funds activity or overdraft fees
- Activity in previously inactive accounts
- Change of address on account
- Opening new joint checking account or adding joint owner to existing account
- Increase in total monthly cash withdrawals compared to historical patterns

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[34] Ethem Alpaydin, Introduction to Machine Learning (3rd edition, 2014); Jesus Mena, Machine Learning Forensics for Law Enforcement, Security, and Intelligence 7 (2011).

[35] In some cases automated systems are able to alert financial institution employees to a transaction before it is completed. Mena, *supra* note 34, at 10-14.

[36] BITS Financial Services Roundtable, *Protecting the Elderly and Vulnerable from Financial Exploitation* 11-13 (2010), *available at* http://fsroundtable.org/wp-content/uploads/2015/05/BITSProtectingVulnerableAdults0410.pdf; E-mail from Howard L. Tischler, C.E.O., and E. Elizabeth Loewy, General Counsel & Sr. V.P. of Industry Relations, Eversafe, to the CFPB (Sept. 21, 2015) (on file with the CFPB).

- Automated Clearing House (ACH) payment to a recipient with no history of ACH transactions with the customer
- Missing recurring deposits
- Electronic bill payments to new vendors
- Atypical use of online banking
- Atypical use of wire transfers
- Unusual gaps in check numbers.

The CFPB encourages financial institutions using predictive analytics to review their filtering criteria against individual account holders' patterns and to explore additional risk factors that may be associated with elder financial exploitation.

3.4 Report suspicious activity

3.4.1 Report all cases of suspected elder financial exploitation

The CFPB recommends that financial institutions report suspected financial exploitation of older adults to all appropriate local, state or federal responders,[37] regardless of whether reporting is mandatory or voluntary under state or federal law.[38]

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[37] Federal responders might include the US Postal Inspection Service and the Federal Bureau of Investigation.

[38] *See infra* at 3.4.4. regarding privacy law considerations related to reporting financial exploitation.

Typically, the institution should file reports with the appropriate APS agency and law enforcement. In addition, financial institutions should file SARs with FinCEN.[39] When the account holder resides in a nursing facility, assisted living facility or similar adult care facility, the financial institution could also consider reporting suspected financial exploitation to the regional or local long-term care ombudsman. See descriptions of these agencies and entities below.

Some financial institutions—including some of the nation's largest banks—have blanket policies treating all cases of suspected financial abuse (regardless of jurisdiction) as if subject to state mandatory reporting laws (*see infra* at 3.4.2). In addition, these policies can enhance consistency in reporting, expedite action and eliminate the extra step of determining whether reporting is mandatory in a given location and situation.

3.4.2 Understand reporting requirements

While the CFPB recommends that everyone in every state report suspected financial exploitation to Adult Protective Services, as of February 2016 only about half the states mandate that financial institutions or a subset of financial professionals report suspected elder financial exploitation to APS, law enforcement or both.[40] Those states include states in which "any person" must report elder financial exploitation.[41] In the remaining states with mandatory

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[39] FIN-2011-A003, Advisory to Financial Institutions, supra; See *infra* at 3.4.3.

[40] Arizona, Arkansas, California, Colorado, Delaware, District of Columbia, Florida, Georgia, Hawaii, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, New Hampshire, New Mexico, North Carolina, Oklahoma, Rhode Island, South Carolina, Tennessee, Texas, Utah, Washington and Wyoming. *See infra* footnotes 41 and 42 for statutory citations. Although this report emphasizes the importance of compliance with appropriate state laws, it is not intended to provide legal advice or serve as a substitute for financial institutions' own legal counsel.

[41] Ind. Code Ann. § 12-10-3-9(a); Ky. Rev. Stat. Ann. § 209.030(2); La. Rev. Stat. Ann. § 1504(A); N.H. Rev. Stat. Ann. § 161-F:46; N.C. Gen Stat. § 108A-102(a); Okla. Stat. Ann. Tit. 43A §10-104(A); R.I. Gen. Laws Ann. § 42-66-8; S.C. Code Ann. § 43-35-25(A); Tenn. Code Ann. § 71-6-103(b)(1); Tex. Hum. Res. Code Ann. § 48.051(b); Utah Code Ann. § 62A-3-305(1); Wyo. Stat. Ann. § 35-20-103(a).

reporting by financial institutions,[42] a statute specifically names financial institutions or certain members of their staff as mandatory reporters. For example, in California a mandated reporter of financial abuse of an elder or dependent adult "includes all officers and employees of financial institutions" and the statute defines financial institutions to include depository institutions and credit unions.[43] A few state statutes are narrower. For example, a "bank manager" and a "financial manager" are mandated reporters in the District of Columbia.[44]

The CFPB recommends that financial institutions determine whether and when state law mandates reporting by the institution. In addition, states may require that oral and/or written reports to APS are made within a certain time period.[45]

Some states mandate that financial institution personnel report suspected elder financial exploitation to law enforcement in addition to APS.[46] Financial institutions should determine whether they have reporting obligations to law enforcement or other agencies (other than APS) under relevant state laws.

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[42] Ark. Code Ann. § 12-12-1708(a)(1); Cal. Welf. & Inst. Code § 15630.1; Colo. Rev. Stat. § 18-6.5-108(1); Del. Code Ann. Tit.31 § 3910(c); D.C. Code §7-1903(a)(1); Fla. Stat. § 415.1034(1)(a); Ga. Code Ann. § 30-5-4(a)(1)(B); Haw. Rev. Stat. § 412L3-114.5; Kan. Stat. Ann. §39-1431(a); Md. Code Ann. Fin. Inst. § 1-306(d)(1); Miss. Code Ann.§ 43-47-7(1)(a); N.M. Stat. Ann. § 27-7-30(A). In Washington, financial institution employees are only mandated to report financial exploitation when the institution is refusing to disburse funds based on a reasonable belief that financial exploitation of a vulnerable adult may have occurred, may have been attempted or is being attempted. Rev. Code Wash. § 74.34.215(4). In Illinois, a bank employee is required to report if the employee is a trustee or a licensed public accountant. 320 Ill. Comp. Stat. 20/4. In Arizona reporting is required by "a person who has responsibility for any other action concerning the use or preservation of the vulnerable adult's property" who discovers the exploitation while fulfilling that responsibility. Ariz. Rev. Stat. Ann. § 46-454(B).

[43] Cal. Welf. and Inst. Code § 15630.1.

[44] D.C. Code § 7-1903(a)(1).

[45] *See*, e.g., MD. Code Ann. Fin. Inst. § 1-306.

[46] *See*, e.g., D.C. Code § 7-1903.

Financial exploitation may violate an array of criminal laws. Familiarity with state criminal code provisions will help ensure that financial institutions report suspected criminal acts.

Almost all states have provisions providing immunity for good faith reporting of suspected elder financial exploitation. These "safe harbor" provisions provide immunity even when the activity observed wasn't financial exploitation, as long as the reporter acted in good faith (or a similar standard spelled out in state law). In most states, this immunity extends to civil, criminal, or administrative actions.

Under state laws, a financial institution normally does not need proof that elder financial exploitation is occurring. Reasonable suspicion is adequate.[47] It is the job of Adult Protective Services and/or law enforcement to determine if exploitation is occurring. (*See infra* at 3.4.5.) If the elder appears to be in imminent danger of abuse, staff should call 911 for an immediate police response.

3.4.3 File Suspicious Activity Reports when the financial institution suspects abuse

In February, 2011 FinCEN issued an Advisory to financial institutions on filing suspicious activity reports regarding elder financial exploitation. FinCEN noted that SARs are a valuable avenue for financial institutions to report elder financial exploitation.

> Consistent with the standard for reporting suspicious activity as provided for in 31 CFR Part 103… [now codified at 31 CFR § 1020.320], if a financial institution knows, suspects, or has reason to suspect that a transaction has no business or apparent lawful purpose or is not the sort in which the particular customer would normally be expected to engage, and the financial institution knows of no reasonable explanation for the transaction after

[47] *See*, e.g., Fla. Stat. § 415.1034(1)(a), which provides "Bank, savings and loan, or credit union officer, trustee, or employee…knows, or has reasonable cause to suspect;" Ga. Code Ann. § 30-5-4(a)(1)(B) provides "any employee of a financial institution…having reasonable cause to believe…."

examining the available facts, including the background and possible purpose of the transaction, the financial institution should then file a Suspicious Activity Report.[48]

SAR filing is mandatory for banks (defined in FinCEN rules to include credit unions) when certain thresholds are met.[49] If the transaction amounts are below the mandatory filing threshold, consider filing SARs anyway. As FinCEN stated in its 2011 Advisory on Elder Financial Exploitation, "[a] financial institution may also file with FinCEN a Suspicious Activity Report with respect to any suspicious transaction that it believes is relevant to the possible violation of any law or regulation but whose reporting is not required by FinCEN regulations."[50] Voluntary reporting may help deter continued financial abuse by the same perpetrator, and may help law enforcement with ongoing investigations and prosecution.

With the introduction of electronic SAR filing, FinCEN provided a designated category of suspicious activity entitled "elder financial exploitation" for financial institutions to check (option d in field 35 of the form).[51] Prior to the checkbox, FinCEN had requested that financial institutions use the key terms "elder financial exploitation" and "elder financial abuse" in the SAR narrative.[52]

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[48] FIN-2011-A003, Advisory to Financial Institutions, supra.

[49] 31 CFR § 1020.320(a)(2); 12 CFR §§ 21.11(c)(3), 163.180(d)(3)(iii), 208.62(c)(3), 353.3(a)(3) and 748.1(c)(1)(iii).

[50] FIN-2011-A003, Advisory to Financial Institutions, supra.

[51] FinCEN, FinCEN Suspicious Activity Report (FinCEN SAR) Electronic Filing Instructions, supra at 98.

[52] FIN-2011-A003, *Advisory to Financial Institutions*, *supra*. Although the FinCEN advisory did not specifically instruct filers to use the latter term, FinCEN wanted to ensure identification of all relevant SARs and thus included the additional phrase in the search.

While financial institutions now note by checkbox that the suspicious activity is elder financial exploitation, the narrative remains extremely important. As FinCEN says in its instructions for filers,

> The narrative section of the report is critical to understanding the nature and circumstances of the suspicious activity. The care with which the narrative is completed may determine whether the described activity and its possible criminal nature are clearly understood by investigators. Filers must provide a clear, complete, and concise description of the activity, including what was unusual or irregular that caused suspicion.[53]

In addition, it is important to note that the potential victim of elder financial exploitation should not be reported as the subject of the SAR. Rather, all available information on the victim should be included in the narrative portion of the SAR.[54]

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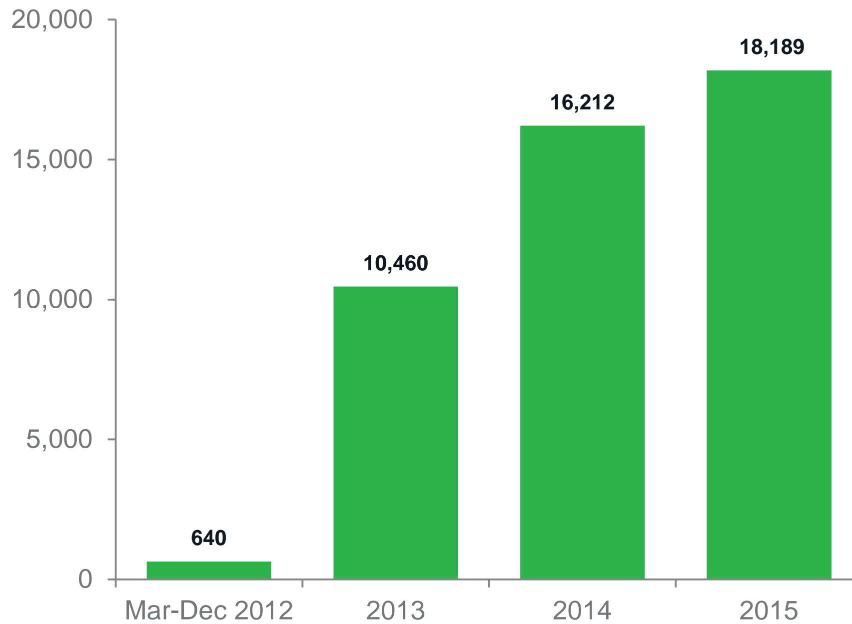
[53] FinCEN, *FinCEN Suspicious Activity Report (FinCEN SAR) Electronic Filing Instructions*, Version 1.2 (2012) at 110, *available at* https://www.fincen.gov/forms/files/FinCEN%20SAR%20ElectronicFilingInstructions-%20Stand%20Alone%20doc.pdf.

[54] FIN-2011-A003, Advisory to Financial Institutions, supra.

FIGURE 1: TREND IN SARS FILED BY DEPOSITORY INSTITUTIONS ABOUT ELDER FINANCIAL EXPLOITATION [55]



[55] FinCEN, *SAR Stats, Technical Bulletin* (Oct. 2015), *available at* https://www.fincen.gov/news_room/rp/files/SAR02/SAR_Stats_2_FINAL.pdf (follow "SAR Stats - Issue 2 – Depository Institutions" on Table of Contents page for 2012-2014 data; use "Interactive SAR Stats" hyperlink on page 2 for 2015 data)(last visited Feb. 17, 2016). This figure utilizes data collected on the current FinCEN Suspicious Activity Report form (Form 111), which FinCEN made available for filing on March 1, 2012. *SAR Stats* and the *SAR Stats Interactive Module* do not include legacy form data. Therefore the figure does not include data for January and February of 2012. (However, depository institutions do submit SARs continuously throughout the year.)

3.4.4 Understand that the Gramm-Leach-Bliley Act is not a barrier to reporting suspected elder financial exploitation

Financial institutions have expressed concern over whether reporting suspected elder financial exploitation violates the privacy provisions of the Gramm-Leach-Bliley Act (GLBA). Bank officials told the U.S. Government Accountability Office (GAO) in an engagement involving elder financial exploitation that clarification of bank roles and responsibilities related to privacy and financial exploitation of older account holders was needed.[56] Financial institutions repeatedly raised these concerns with CFPB officials in meetings.

To provide financial institutions more certainty about the legality of reporting abuse and to facilitate timely reporting and response, the eight federal regulatory agencies with authority to enforce the privacy provisions of GLBA issued Interagency Guidance on Privacy Laws and Reporting Financial Abuse of Older Adults on September 24, 2013 (the Guidance).[57] The Guidance clarifies that reporting financial abuse of older adults to appropriate authorities does not, in general, violate the privacy provisions of GLBA.

GLBA generally requires that a financial institution notify consumers and give them an opportunity to opt out before the institution can disclose nonpublic personal information to a nonaffiliated third party.[58] But there are specific exceptions to the notice and opt-out requirement that may permit information sharing with local, state, or federal agencies to report

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[56] GAO, Report to Congressional Requesters, *Elder Justice, National Strategy Needed to Effectively Combat Elder Financial Exploitation* (Nov. 2012), *available at* http://www.gao.gov/assets/660/650074.pdf (hereafter GAO, *Elder Justice, National Strategy Needed*).

[57] Fed. Reserve, CFTC, CFPB, FDIC, FTC, NCUA, OCC & SEC, *Interagency Guidance on Privacy Laws and Reporting Financial Abuse of Older Adults* (Sept. 23, 2013), *available at* http://files.consumerfinance.gov/f/201309_cfpb_elder-abuse-guidance.pdf (hereafter referred to as *Interagency Guidance on Privacy Laws*).

[58] 15 U.S.C. §§ 6802(a)-(b), 6803(a) and 6803(c); 12 CFR §§ 1016.4 and 1016.10.

suspected elder financial exploitation. At least one of these exceptions likely applies in every case of suspected elder financial exploitation. As stated in the Interagency Guidance,[59] those broad exceptions are:

- To comply with federal, state, or local laws, rules and applicable legal requirements (and these laws include state mandatory reporting laws)[60]
- To comply with a properly authorized civil, criminal, or regulatory investigation, or subpoena or summons by federal, state, or local authorities[61] or to respond to judicial process or government regulatory authorities having jurisdiction for examination, compliance or other purposes[62]
- To protect against or prevent actual or potential fraud, unauthorized transactions, claims, or other liability[63] (For example, this exception generally would allow a financial institution to disclose to appropriate authorities nonpublic personal information in order to report incidents that result in taking an older adult's funds without actual consent, or report incidents of obtaining an older adult's consent to sign over assets through misrepresentation of the intent of the transaction)
- To the extent specifically permitted or required under other provisions of law and in accordance with the Right to Financial Privacy Act of 1978, disclosure to law

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[59] See Interagency Guidance on Privacy Laws, supra.

[60] 15 U.S.C. § 6802(e)(3)(B); 12 CFR §1016.15(a)(7)(i).

[61] 15 U.S.C. § 6802(e)(8); 12 CFR §1016.15(a)(7)(ii).

[62] 15 U.S.C. § 6802(e)(8); 12 CFR § 1016.15(a)(7)(iii).

[63] 15 U.S.C. § 6802(e)(3)(B); 12 CFR § 1016.15(a)(2)(ii).

enforcement agencies, self-regulatory agencies, or for an investigation on a matter related to public safety.[64]

In addition to these exceptions, financial institutions may disclose nonpublic personal information with the consumer's consent or to the consumer's legal representative or fiduciary.[65]

Financial institutions also should be aware of any state regulatory guidance on privacy laws and reporting financial exploitation. State banking or financial services regulators in several states have issued similar guidance. For example, on April 22, 2014, the Minnesota Department of Commerce issued guidance for Minnesota banks on privacy laws and reporting financial abuse of older adults.[66] The New York State Department of Financial Services issued guidance on February 26, 2015, stating that, in addition to the GLBA exceptions, "New York State law allows financial institutions in New York to report suspected elder financial exploitation to APS or law enforcement."[67]

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64 15 U.S.C. § 6802(e)(5); 12 CFR § 1016.15(a)(4).

65 12 CFR § 1016.15(a)(1), 1016.15(a)(2)(v).

66 MN Dept. of Comm., Guidance on Privacy Laws and the Reporting of Financial Abuse of Older Adults, https://mn.gov/commerce/industries/financial-institutions/privacy-laws-and-reporting-financial-abuse.jsp (last visited Feb. 8, 2016).

67 Letter from Benjamin M. Lawsky, Superintendent Fin. Serv. N.Y., to Financial Institutions Doing Business in the State of New York (Feb. 26, 2016), http://www.dfs.ny.gov/about/letters/ltr150226_elder_exploit_prevent.pdf.

3.4.5 Understand the roles of first responders and what cases/actions they will and will not take

Adult Protective Services

Adult Protective Services are social services programs provided by states nationwide, serving older adults and adults with disabilities who are in need of assistance.[68] APS is a generic term, not necessarily the name of the agency in each state.[69] The National Adult Protective Services Association website provides contact information for reporting suspected abuse to APS in every state.[70]

APS workers evaluate two things before opening an investigation:

- Whether the alleged victim is eligible for protective services, and
- Whether the information reported meets the legal definition of abuse, neglect or exploitation in their state or locality.

Eligibility. State law specifies which adults are eligible for protective services. In some states, APS will investigate alleged abuse of adults aged 18 or older who are vulnerable due to a physical or mental impairment. In other states, the alleged victim must be over a certain age, e.g., 60 or 65, to qualify, regardless of disability. Most states have both an age criterion and a condition criterion (e.g., physical or mental impairment, dementia, etc.) and an individual must meet both criteria to be eligible for services.

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[68] For a description of what APS is and how it works, *see* HHS, Nat'l Center on Elder Abuse, http://www.ncea.acl.gov/Stop_Abuse/Partners/APS/How_APS_Works.aspx (last visited Feb. 17, 2016).

[69] A few states (e.g., MA and IL) have two separate agencies, one for people over age 60 or 65 and another for people from age 18 to age 60 or 65. *See* NAPSA, Get Help, http://www.napsa-now.org/get-help/help-in-your-area/ (last visited Feb. 8, 2016).

[70] NAPSA, Get Help, http://www.napsa-now.org/get-help/help-in-your-area/ (last visited Feb. 8, 2016).

Definition of mistreatment. APS workers look at whether the allegations in a given case meet the state's definition of financial exploitation, which is generally found in the state's APS statute.

Generally, if the allegations meet both the eligibility test and the definition of mistreatment test, APS may open an investigation. If APS then finds that the person has experienced or is at risk of experiencing financial exploitation, APS can decide what services, if any, are necessary for the vulnerable adult's safety or well-being and recommend a service plan. APS can also cross-report to law enforcement for criminal investigation and possible prosecution.

Law Enforcement

Financial exploitation may violate an array of criminal laws. Some states have enacted laws making elder financial exploitation a crime. But generally law enforcement personnel investigate and prosecutors charge people with other crimes such as theft, larceny, embezzlement, forgery, fraud and money laundering.[71]

Increasingly, across the country, law enforcement officers, financial crimes investigators, and prosecutors are trained on elder abuse and how to use criminal and civil laws to prosecute abusers and obtain restitution for victims.[72] Some localities have specialized units within local law enforcement agencies or prosecutors' offices with particular expertise in handling elder abuse cases.

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[71] CFPB, *Protecting residents from financial exploitation: A manual for assisted living and nursing facilities* (May 2014), *available at* http://files.consumerfinance.gov/f/201406_cfpb_guide_protecting-residents-from-financial-exploitation.pdf; Lori Stiegel, *An Overview of Elder Financial Exploitation*, Generations: J. Am. Soc. Aging 77, 73-80 (2012).

[72] HHS, Nat'l Center on Elder Abuse, Frequently Asked Questions, http://www.ncea.acl.gov/faq/index.aspx (last visited Feb. 8. 2016).

Long-term Care Ombudsmen

Ombudsmen are advocates for residents of nursing facilities, board and care homes, assisted living facilities and similar adult care facilities, in programs administered by the Administration on Aging/Administration for Community Living. Ombudsman staff and volunteers work to resolve problems and concerns of individual residents. Every state has an Office of the State Long-Term Care Ombudsman headed by a full-time state ombudsman.[73]

Reports to state and local authorities should include core components that support the allegation and assist the responder in initiating an investigation. Reports should include facts that support and illustrate the suspicious activity in question. State law may list the things to include in the report.[74] Here are some basic components that should be included in a report to any of the authorities described above (at 3.4.5):

- The time and date of the report
- The name, address, email address and telephone number of the person reporting
- The financial institution's name and the reporter's name, title, and contact information
- the time, date, and location of the incident(s)

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73 CFPB, *Protecting residents from financial exploitation, A manual for assisted living and nursing facilities* (May 2014), *available at* http://files.consumerfinance.gov/f/201406_cfpb_guide_protecting-residents-from-financial-exploitation.pdf.

74 Some states have reporting forms on their APS websites specifically for financial institution reports, e.g., CA Health and Human Services, SOC 342 at http://www.cdss.ca.gov/cdssweb/entres/forms/English/soc342.pdf. Some jurisdictions have model reporting forms. *See*, e.g., MD's Project Safe, *Model Reference Manual for Financial Institution Employees*, 2nd ed. (Rev. Sept. 10, 2013), *available at* http://www.oag.state.md.us/Consumer/ModelEmployeeReferenceManual.pdf. Many states have APS reporting forms that financial institutions may use but that are not specifically designed for financial institutions, e.g., ME Aging & Disability Servs., *Report Abuse, Neglect or Exploitation in Maine*, http://www.maine.gov/dhhs/oads/aps-guardianship/report.html (last visited Feb. 12, 2016).

- The name(s) of the persons involved, including but not limited to the alleged victim, alleged perpetrator(s) and witness(es)
- Whether the financial institution believes there is a risk of imminent danger to the alleged victim and/or to investigators/responders
- A description of the suspected financial exploitation and signs of any other type of abuse or neglect
- Statements made by the alleged victim or suspect
- Targeted deposit or other financial account(s)
- The alleged victim's disability and/or health condition including any information on cognitive status
- The relationship of the alleged perpetrator to the alleged victim, if known
- Whether a report has been made to any other public agency, and
- Whether the financial institution has conducted an internal investigation and the contact information for the individual(s) responsible for the investigation.

The CFPB recommends ascertaining the state requirements and procedures for taking oral and written reports. Consider making an oral report as soon as possible, followed by submission of a written report.

3.4.6 Expedite responses when APS, law enforcement, and other government entities investigate reports of financial exploitation and request documentation, in accordance with relevant laws

Once APS or law enforcement open an investigation, they are likely to seek records and documentation from financial institutions. It is critically important to provide information in a timely manner while complying with privacy laws.

In interviews conducted for a 2012 GAO report, APS officials in four states—California, Illinois, New York and Pennsylvania—reported that "they are often denied access on the basis of federal privacy laws or the bank's policies."[75] A 2014 survey of APS workers found that over half frequently had difficulty obtaining records necessary for an investigation from financial institutions. Almost 70 percent reported that banks required a subpoena before providing the records.[76]

The CFPB recommends that financial institutions work with their legal counsel to timely provide information when requested by APS, law enforcement or other agencies while also complying with privacy laws. The Interagency Guidance on Privacy Laws and Reporting Financial Abuse of Older Adults noted that one of the exceptions to the GLBA notice and opt-out requirement is to "comply with a properly authorized civil, criminal, or regulatory investigation, or subpoena or summons by federal, state, or local authorities."[77]

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[75] GAO, Elder Justice, National Strategy Needed, supra at 34.

[76] A summary of the survey results can be found at NAPSA, *APS Professionals Speak Out About Working With Banks*, http://victimsofcrime.org/docs/default-source/financial-fraud/bank-survey-and-research-overviews-nov-2014.pdf?sfvrsn=2 (last visited Feb. 8, 2016).

[77] *Interagency Guidance on Privacy Laws*, *supra*; 12 CFR § 1016.15(a)(7)(ii). A state's privacy laws may be relevant to reporting elder financial exploitation to state and local authorities if the state law provision affords a consumer

Providing records in a timely manner is essential. Frequently perpetrators of elder financial abuse engage in ongoing financial exploitation, so delays may cause greater loss to older adults while an investigation is in process.

FinCEN Guidance dated June 13, 2007 clarifies that financial institutions must provide SAR supporting documentation when requested by appropriate law enforcement or supervisory agencies.[78] Service of legal process (such as a subpoena or court order) is not required when appropriate supervisory agencies and appropriate law enforcement request a copy of a SAR or supporting documentation underlying a SAR.[79] The Guidance also states that "[d]isclosure of SARs to appropriate law enforcement and supervisory agencies is protected by the safe harbor provisions applicable to both voluntary and mandatory suspicious activity reporting by financial institutions."[80]

For records requests not involving SAR supporting documentation, the CFPB recommends that financial institutions provide documents to investigatory agencies at no charge. (According to the APS survey mentioned above, many financial institutions already do so).

3.4.7 Understand constraints of first responders

Reporting suspected financial exploitation and providing supporting documentation are critical. However, financial institutions should be aware that not all reports will result in concrete action

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greater protection than the Gramm-Leach-Bliley Act's privacy provisions and those of its implementing regulations.

[78] FinCen, FIN-2007-G003, Suspicious Activity Report Supporting Documentation (June 13, 2007), *available at* https://www.fincen.gov/statutes_regs/guidance/pdf/Supporting_Documentation_Guidance.pdf. The guidance sets forth what constitutes "supporting documentation" under SAR regulations, and that financial institutions should have procedures in place for verifying that the requester is, in fact, a representative of FinCEN or an appropriate law enforcement or supervisory agency.

[79] Id.

[80] Id.

by APS, law enforcement, and other entities. Responders may not have the capacity to respond to all reports; GAO found that APS agencies lack financial resources and that these financing challenges impede APS's ability to respond to elder abuse.[81] Account holders may turn out to be ineligible for services or may refuse services. Law enforcement may prioritize other crimes.

In addition, in some cases, agencies will not be able to provide follow-up information to financial institutions due to confidentiality laws or rules. It may appear that APS or another agency did not respond or offer services when in fact the agency did act, but is not free to reveal the nature of its action.

3.5 Protect older account holders from financial exploitation

3.5.1 Comply with the Electronic Fund Transfer Act (EFTA) and Regulation E

Sometimes older account holders experience financial exploitation involving unauthorized electronic fund transfers (EFTs) from their account. Older consumers have submitted complaints to the Bureau about discovering unauthorized EFTs, such as the use of a debit card

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[81] GAO, Report to the Chairman, Senate Special Comm. On Aging, *Elder Justice, Stronger Federal Leadership Could Enhance National Response to Elder Abuse* (Mar. 2011), *available at* http://www.gao.gov/assets/320/316224.pdf.

by a trusted person.[82] EFTA, implemented by Regulation E, offers important protections to these consumers.[83]

EFTA and Regulation E provide consumers with important rights when, among other things, unauthorized EFTs are made from covered accounts. This subsection summarizes some of the requirements of EFTA and Regulation E that are most relevant to unauthorized EFTs and highlights complaints that the CFPB has received.

EFTA and Regulation E provide a basic framework that establishes the rights, liabilities, and responsibilities of participants in EFT systems.[84] EFTs are defined broadly and generally include any transfer of funds initiated through an electronic terminal, telephone, computer, or magnetic tape for the purpose of ordering, instructing, or authorizing a financial institution to debit, or credit a consumer's account.[85]

An EFT generally is considered unauthorized if it is initiated by a person other than the consumer who has no actual authority to initiate it and if the consumer receives no benefit from it.[86] However, a transfer may be authorized if a consumer gives another person an access device such as a debit card or PIN. If a consumer gives another person a card, PIN, or other access device and authorizes that person to make transfers, the consumer is fully liable for the transfers made by that person, even if that person makes more or different transfers than the consumer

[82] Consumer complaints are submissions that express dissatisfaction with, or communicate suspicion of wrongful conduct by, an identifiable entity related to a consumer's personal experience with a financial product or service.

[83] Regulation E also provides protections to consumers who send remittance transfers to other consumers or businesses in a foreign country. 12 CFR § 1005.33(a).

[84] *See* 15 U.S.C. § 1693 *et seq.*, and 12 CFR Part 1005.

[85] *See* 15 U.S.C. § 1693a(7); 12 CFR § 1005.3(b).

[86] 15 U.S.C. § 1693a(12); 12 CFR § 1005.2(m).

authorized, unless the consumer has notified the financial institution that transfers by that person are no longer authorized.[87]

Generally, under EFTA and Regulation E, the consumer has no liability for a timely reported unauthorized transfer and limited liability when the unauthorized transfer involves a lost or stolen access device.[88]

Follow rules for extending time limits for consumers for extenuating circumstances

Regulation E specifies that if a consumer's delay in notifying a financial institution with respect to an unauthorized EFT was due to extenuating circumstances, such as extended travel or hospitalization, the time periods for notification (as specified in the Regulation) must be extended to a reasonable time.[89] The necessity for extending time may occur with greater frequency for older consumers than for younger consumers due to the increased incidence of hospitalization among the older population. The older population (65 and over) has the highest hospitalization rate in the United States.[90]

Follow rules for accepting notices of unauthorized EFTs

Older consumers have submitted complaints to the Bureau stating that they encountered difficulties when they tried to report unauthorized transactions. For instance, older consumers submitted complaints stating that their financial institution required them to submit a police report or file a legal action as a condition of the financial institution investigating the claim.

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[87] 15 U.S.C. § 1693a(12); 12 CFR § 1005.2(m) and comment 1005.2(m)-2.

[88] 12 CFR §§ 1005.6 and 1005.11.

[89] 12 CFR § 1005.6(b)(4) and comment 1005.6(b)(4)-1.

[90] CDC, FastStats, *National Hospital Discharge Survey: 2010 table, Number and rate of hospital discharges, available at* http://www.cdc.gov/nchs/fastats/hospital.htm.

METHOD OF GIVING NOTICE

Regulation E provides that a consumer may notify a financial institution of an unauthorized transaction in person, by telephone, or in writing.[91] Notice is given to a financial institution when a consumer takes steps reasonably necessary to provide the institution with the pertinent information, whether or not a particular employee or agent of the institution actually receives the information.[92]

WHO PROVIDES NOTICE

Regulation E provides that a person acting on the consumer's behalf may give the required notice to the financial institution. As explained in the Official Interpretation, "For example, if a consumer is hospitalized and unable to report the loss or theft of an access device, notice is considered given when someone acting on the consumer's behalf notifies the bank of the loss or theft."[93] For reasons explained above, older consumers, more than their younger counterparts, may use a surrogate to notify their financial institution.

SPECIFICITY OF NOTICE

Regulation E provides that notice of an unauthorized EFT is given even when the consumer is unable to provide the account number or the card number in reporting an unauthorized transfer, as long as the consumer otherwise identifies sufficiently the account in question.[94] "For example,

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[91] 12 CFR § 1005.6(b)(5)(ii).

[92] 12 CFR § 1005.6(b)(5)(i).

[93] 12 CFR § 1005.6(b)(5) and comment 1005.6(b)(5)-2.

[94] 12 CFR § 1005.6(b)(5) and comment 1005.6(b)(5)-3.

the consumer may identify the account by the name on the account and the type of account in question."[95]

Separately, Regulation E's proceedures for resolving errors, which include, among other things, unauthorized electronic fund transfers, provide that financial institutions may require consumers to give notice of an error only at a specified telephone number or address, but must have reasonable procedures to refer a consumer to that number or address if the consumer attempts to give notice of an error in a different manner.[96]

Once a consumer provides notice of an error, financial institutions should bear in mind their obligations under Regulation E to commence investigations, provide provisional credits, report results of investigations to consumers, and correct errors within specified timeframes.[97] A financial institution may request that a consumer provide a written, signed statement related to an error within 10 business days of an oral notice and may refrain from provisionally crediting a consumer's account if such confirmation is not received.[98] However, financial institutions may not delay beginning or completing an investigation because the consumer fails to provide the requested written confirmation.[99] Likewise, a financial institution must conduct a timely investigation whether or not a consumer provides any additional information or evidence (for example, a police report) that the financial institution has requested.[100] Financial institutions should bear in mind that EFTA provides that, in any action which involves a consumer's liability for an unauthorized EFT, the burden of proof is on the financial institution to show that the EFT

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[95] Id.

[96] 12 CFR part 1005, comment 1005.11(b)(1)-6.

[97] 15 U.S.C. § 1693f; 12 CFR § 1005.11.

[98] 15 U.S.C. § 1693f (a); 12 CFR § 1005.11(b)(2).

[99] 12 CFR § 1005.11(c) and comment 1005.11(c)-2.

[100] *See* 15 U.S.C. § 1693f(1); 12 CFR § 1005.11(b)(1).

was authorized or, if the EFT was unauthorized, that the institution has satisfied the conditions for imposing liability on the consumer.[101]

A consumer's negligence cannot be used as the basis for imposing greater liability than is permissible under Regulation E

Older consumers may experience cognitive challenges that make remembering PINs and passwords difficult, and these challenges may prompt them to note PINs on or near a debit card. Regulation E does not permit consideration of these facts in determining the extent of the consumer's liability for an unauthorized EFT.

According to Regulation E, consumer behavior that may constitute negligence under state law, "such as writing the PIN on a debit card or on a piece of paper kept with the card," cannot be used as the basis for imposing greater liability for an unauthorized EFT than allowed by Regulation E.[102]

Similarly, "no agreement between the consumer and an institution may impose greater liability on the consumer."[103]

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[101] 15 U.S.C. § 1693g(b).

[102] 12 CFR § 1005.6(b) and comment 1005.6(b)-2.

[103] 12 CFR § 1005.6(b) and comment 1005.6(b)-3.

3.5.2 Offer account holders the opportunity to consent to disclosure of account information to trusted third parties when the financial institution suspects financial exploitation

In addition to reporting suspected financial exploitation to law enforcement and other relevant agencies, financial institutions can protect account holders from financial exploitation by obtaining advance consent from them to inform a trusted third party that the financial institution suspects that financial exploitation has occurred, is occurring, has been attempted or will be attempted. Notifying a relative, friend or other trusted person designated by the consumer can trigger helpful protective actions and interactions.

For example, an older person might seek to withdraw a large sum of money and tell the financial institution employee that she has won the lottery and needs to pay taxes and fees up front to collect her winnings. If notified, the older person's daughter might:

- Be successful at convincing the older person that a scammer has targeted her and she should not withdraw and send the funds
- Bring together family members to develop response strategies to protect the older person from predators, and/or
- Take protective action such as filing for guardianship if the older person has diminished capacity to handle finances.

Similarly, a financial institution might detect ATM withdrawals late at night. The financial institution might be aware that an account holder resides in an assisted living facility and has limited mobility. The financial institution might contact the account holder and, depending on the response, the trusted contact person who might:

- Investigate whether home health aides or others have access to the account holder's ATM card and limit that access
- Ascertain and notify the financial institution that the transaction is unauthorized.

The CFPB recommends that financial institutions consider establishing procedures for enabling consumers to provide advance consent to sharing nonpublic personal account information with a designated trusted third party when the financial institution reasonably suspects that financial

exploitation has occurred, is occurring, has been attempted, or will be attempted. The financial institution should keep in mind factors described below that inform the design of these procedures.

GLBA generally provides that a financial institution may not disclose any nonpublic personal information about a consumer to any nonaffiliated third party unless the financial institution first provides the consumer with a notice that describes the disclosure and provides a reasonable opportunity to opt out of the disclosure, and the consumer does not opt out. GLBA permits disclosure of nonpublic personal information with the consent of the consumer, however.[104] The financial institution may obtain this consent in advance before the financial institution suspects that elder financial exploitation is occurring, has occurred, has been attempted or will be attempted.

In addition to ensuring compliance with GLBA, financial institutions may consider taking the following steps to provide consumers with the opportunity to consent to information sharing with trusted third parties.

- Establish a procedure for offering consumers the opportunity to consent—at account opening and periodically thereafter—to share account and account-related information with specified third parties under specified circumstances which may include when the financial institution reasonably suspects that financial exploitation has occurred, is occurring, has been attempted, or will be attempted.

  In determining when to communicate with account holders about providing consent to communicate with a trusted contact and identifying a trusted contact person, consider whether to designate a specific time interval (e.g., every year, every three years) or whether to tie the communication to particular events (e.g., the consumer adds an

[104] There are other exceptions to the notice and opt out provisions that permit financial institutions to report suspected financial exploitation. *See supra* at 3.4.4.

additional owner to the account, the consumer shares information about a power of attorney or a trust, the consumer has been the victim of financial exploitation) or both.

Consider which type of financial institution employee is best qualified to discuss the consent with the consumer (e.g., staff member who receives more intensive training on elder financial exploitation and/or communication skills). The CFPB recommends developing an explanatory script or talking points in plain language for staff members to use when offering consumers the opportunity to execute the consent and walking them through the consent form.

- Develop a consent form in plain language to enhance consumer understanding. Before implementing the consent form, consider testing the form to ensure consumer understanding. Financial institutions might include in this consent form:
  - A description of the triggers for sharing information with the trusted contact or multiple trusted contacts
  - A statement that, notwithstanding the consumer's consent, the financial institution will not disclose nonpublic personal information to a designated third party if the financial institution reasonably believes that the third party has engaged in, is engaging in, or will engage in financial exploitation of the consumer
  - An acknowledgment that the consumer has a right to revoke the consent and/or execute a new consent naming a different trusted third party.

Note that an account holder with a cognitive impairment may lack capacity to consent to information sharing with a trusted third party and/or to revoke a prior consent.

There may be relevant state privacy laws and other statutes that impact the consumer's ability to consent to sharing information with trusted third parties, the form of the consent or other aspects of this recommendation.

3.5.3 Consider sharing information with persons acting in a fiduciary or representative capacity when the financial institution suspects financial abuse, regardless of whether the consumer has consented to share information with that person

GLBA permits financial institutions to share nonpublic personal information with "persons acting in a fiduciary or representative capacity on behalf of the consumer" without providing the consumer with notice and an opportunity to opt out.[105] Financial institutions may share information with these third parties without obtaining the consumer's consent.

3.5.4 Offer age-friendly services to older consumers that can enhance protections against financial exploitation

Financial institutions can provide information and services to consumers, including older consumers, which can enhance protections against financial exploitation. These services include:

Provide information about planning for incapacity and disability

Advance planning for the possibility of diminished capacity, illness and disability can protect older adults from financial exploitation. For example, naming a trusted person to serve as an agent under a power of attorney or other fiduciary increases the odds that the person managing finances will act in the best interests of the account holder. Also, the fiduciary can protect the account holder from predators and can monitor transactions.

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[105] 12 CFR § 1016.15(a)(2)(v).

The CFPB offers two helpful free resources that relate to advance planning. A Consumer Advisory called **Planning for Diminished Capacity and Illness**, issued jointly by the CFPB and the Securities and Exchange Commission, can help both the older adult and trusted third parties who assist the older person with finances. *See* http://files.consumerfinance.gov/f/201505_cfpb_consumer-advisory-and-investor-bulletin-planning-for-diminished-capacity-and-illness.pdf. In addition, the CFPB's **Managing Someone Else's Money** guides are for family members and friends serving as fiduciaries for an adult who cannot manage money and property. These guides can also be useful for older account holders who are doing advance planning, because they explain the duties of fiduciaries and also raise awareness about financial exploitation and scams. Older account holders can share them with the person they name as a fiduciary. A number of banks and credit unions have ordered these guides in bulk, have distributed them to employees, or have shared them on their websites. *See* www.consumerfinance.gov/managing-someone-elses-money.

Honor powers of attorney

A financial power of attorney (POA) is an important advance-planning tool because it enables consumers to designate a fiduciary who can act on the consumer's behalf if the consumer is cognitively impaired or otherwise unable to handle financial matters independently. Generally POAs created to plan for the future are durable and remain in effect even if the maker loses capacity.[106]

[106] By 1984, all states and the District of Columbia had enacted provisions of the Uniform Durable Power of Attorney Act enabling people to create durable powers of attorney. Karen E. Boxx, *The Durable Power of Attorney's Place in the Family of Fiduciary Relationships*, 36 Ga. L. Rev. 1, 9 (2001). The Uniform Power of Attorney Act, adopted by

While the POA is an important tool, it provides opportunities for the agent to financially exploit an incapacitated individual.[107] Financial institution employees should be aware that older account holders may be targets of power of attorney abuse.

Consumers and elder law attorneys report that financial institutions sometimes refuse to accept a POA for reasons unsupported by state law, such as the POA was not on the financial institution's preferred form[108] or was not executed within a given period of time.[109] In 2002 the Uniform Law Commission found that sixty-three percent of surveyed attorneys indicated that they had experienced difficulty obtaining third party acceptance of an agent's authority and seventeen percent indicated that it was a frequent problem.[110]

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the Uniform Law Commission in 2006, defines a power of attorney as durable unless otherwise indicated by the maker. Uniform Power of Attorney Act § 104 (2006), http://www.uniformlaws.org/shared/docs/power%20of%20attorney/UPOAA_2011_Final%20Act_2014sep9.pdf.

[107] Lori A. Stiegel & Ellen V. Klem, AARP, *Power of Attorney Abuse: What States Can Do About It* 5 (2008). *See also* Linda S. Whitton, National Conference of Commissioners on Uniform State Laws, *National Durable Power of Attorney Survey Results and Analysis* (2002), *available at* http://www.uniformlaws.org/shared/docs/power%20of%20attorney/dpasurveyreport_102902.pdf.

[108] Under Florida law, "[a] third person may not require an additional or different form of power of attorney for authority granted in the power of attorney presented." Fla. Stat. § 709.2120(2).

[109] *See*, e.g., *When Third Parties Refuse to Honor a Power of Attorney*, http://dennisfordhamlaw.com/when-third-parties-refuse-to-honor-a-power-of-attorney/ (last visited Feb. 17, 2016); Can banks legally refuse to accept a durable power of attorney?, https://www.caring.com/questions/can-banks-refuse-power-of-attorney (last visited Feb.17, 2016); Both Attorneys and Courts are Tired of Financial Institutions' Refusal to Accept Powers of Attorney (Mar. 2013), http://www.lexisnexis.com/legalnewsroom/estate-elder/b/estate-elder-blog/archive/2013/03/12/both-attorneys-and-courts-are-tired-of-financial-institutions-refusal-to-accept-powers-of-attorney.aspx (last visited Feb. 17, 2016).

[110] Linda S. Whitton, National Conference of Commissioners on Uniform State Laws, *National Durable Power of Attorney Survey Results and Analysis* (2002), *available at* http://www.uniformlaws.org/shared/docs/power%20of%20attorney/dpasurveyreport_102902.pdf; *See* also Linda S. Whitton, *The Uniform Power of Attorney Act: Striking a Balance Between Autonomy and Protection*, 1 Phoenix L. Rev. 343, 352 (2008), *available at* http://www.cobar.org/repository/Inside_Bar/Elder/2.19.09/Whitton-Phoenix_Law_Review_art_.pdf.

A financial institution's refusal to honor a valid POA can create hardships for consumers who need designated surrogates to act on their behalf. For example, a financial institution may fail to honor a POA because it is not on the bank's preferred form, but the maker of the power of attorney may now lack capacity to make a new instrument, leaving the account holder without a surrogate and thwarting his or her original plan.

Many state laws provide broad protection for financial institutions that accept powers of attorney in good faith.[111] The Uniform Power of Attorney Act (UPOAA), for example, provides protection for good faith acceptance of an "acknowledged" (e.g., notarized) power of attorney.[112]

In addition, the UPOAA provides a safe harbor for a financial institution that refuses to accept a power of attorney when, among other reasons, the third party believes that the agent lacks authority and when the third party believes that the account holder may be the victim of financial abuse by the agent.[113] If none of the safe harbor provisions apply, the UPOAA provides that a person that refuses to accept a power of attorney is subject to a court order mandating acceptance of the power of attorney and liability for attorney's fees and costs in a court proceeding.[114]

The CFPB recommends that financial institutions consider establishing procedures that will

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[111] *See*, e.g., Cal. Prob. Code § 4303; Fla. Stat. § 709.2119(5); N.M. Stat. Ann. § 45-5B-119(C).

[112] Uniform Power of Attorney Act § 104 (2006). Seventeen states had adopted the UPOAA by February, 2016. *See* http://www.uniformlaws.org/Act.aspx?title=Power%20of%20Attorney. States have adopted the full UPOAA or parts of it.

[113] Uniform Power of Attorney Act § 120(b), Alternative A and § 120(c) Alternative B (2006). In the latter situation, either the third party or someone else must make a report to the local APS office in order for the safe harbor to take effect.

[114] Uniform Power of Attorney Act § 120(c), Alternative A and § 120(d), Alternative B. *See* also similar state law provisions, e.g., Alaska Stat. § 13.26.353(c); Minn. Stat. Ann. § 523.20; N.Y. Gen. Oblig. Law § 5-1504.

- Enable the institution to make prompt decisions on whether to accept a power of attorney when presented
- Ensure that decisions are made by staff qualified to assess the document based only on state law and other appropriate considerations, and
- Enable frontline staff to recognize red flags for power of attorney abuse and alert qualified staff who may determine whether the institution should refuse to honor the document and make a report to relevant authorities.

Offer protective opt-in account features

Financial institutions can provide enhanced protection against the risk of elder financial exploitation by offering consumers selective account options. Opt-in account restrictions and alerts allow account holders to take preventive measures against exploitation risk. Financial institutions can offer restrictions, alerts, and other features responsive to account holder concerns and preferences.

Examples of account opt-in features that could reduce the risk of elder financial exploitation include, but are not limited to:

- Cash withdrawal limits
- Geographic transaction limits
- Transaction restrictions for specified merchants or merchant categories
- Alerts for specified account activity
- Alerts to authorized third parties, and
- Read-only access to accounts for authorized third parties.

Opt-in features may benefit financial institutions through increased public association with account security and their demonstrated commitment to the protection of vulnerable customers.

Financial institutions can offer view-only access to trusted third parties designated by the account holder. For example, a third-party monitoring feature can enable a designated family member or friend to monitor an account for irregularities without having access to funds or the

ability to make transactions. The third party monitors the account through online banking or duplicate monthly statements.[115]

Offer convenience accounts as an alternative to traditional joint accounts

Some older adults need help with financial accounts and often open traditional joint bank accounts to enable a family member or other helper to pay bills and assist with other transactions. There are several risks or unintended consequences associated with joint accounts:

- The joint owner can withdraw money for his or her own use or mismanage the older account holder's money
- Creditors of the joint owner may use legal processes to try to satisfy their debts from the money in the account
- When the older person dies, depending on the terms of the account and state law, money in the joint account may be distributed by the bank to the friend or family member whose name is on the account, possibly subverting the intended estate plan when there are multiple heirs.

The CFPB recommends that financial institutions routinely provide educational information to consumers about the consequences of opening traditional joint accounts.[116] Financial

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[115] Jilenne Gunther, AARP, *Bank Safe: A Comprehensive Approach to Better Serving and Protecting Consumers*, (2016), *available at* http://www.aarp.org/content/dam/aarp/ppi/2016-02/banksafe-initiative-aarp-ppi.pdf; Jilenne Gunther & Robert Neill, *Innovative Case Examples of: Banking Safe* (2016), *available at* http://www.aarp.org/content/dam/aarp/ppi/2016-02/innovative-case-examples-of-banking-safe-ppi.pdf.

[116] The CFPB's *Ask CFPB* online consumer education tool provides plain-language information on this topic. *See* Ask CFPB, http://www.consumerfinance.gov/askcfpb/1145/i-would-be-able-have-my-friend-or-family-member-help-my-bill-paying-and-banking-what-are-my-options.html (last updated on Oct. 11, 2013). The American Bankers Association Foundation and AARP have created an infographic about whether a joint bank account is right for a consumer. *See* AARP & ABA Foundation, *Look Before You Leap*, https://www.aba.com/Engagement/Documents/ABAAARPJointAccounts.pdf (last visited Feb. 8, 2016).

institutions also should provide this education when an older consumer requests changing an existing account to a joint account.

Multi-party accounts without right of survivorship, also known as convenience accounts or agency accounts, may be good alternatives to traditional joint bank accounts.[117] When set up properly under applicable state law, the helper added to the account can make deposits and withdrawals on the account and legally must use the account only for the benefit of the owner in accordance with the owner's wishes.[118] When the owner dies, the account is conveyed according to the individual's will. The CFPB recommends that financial institutions routinely offer such convenience accounts as an alternative to traditional joint bank accounts. Financial institutions should train employees on how to explain the different types of accounts to consumers and ensure that convenience accounts are properly opened.

Consider educating consumers about avoiding fraudulent transfers

Specific information or warnings about electronic fund transfers may help older account holders avoid fraudulent transactions. For example, if consumers are adding authorized users or providing another person with an access device, consider alerting them at the time of the request to potential pitfalls of allowing another person to have access to their account, particularly regarding their liability for unauthorized transactions by someone who was given an access device or PIN. In addition, consider alerting them to the dangers of writing a PIN on or near a debit card.

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[117] Charles P. Sabatino, *Damage Prevention and Control for Financial Incapacity*, 305 JAMA (Feb. 16, 2011), *available at* http://jama.jamanetwork.com/article.aspx?articleid=645586&resultclick=1.

[118] Id.

3.6 Collaborate with other stakeholders

Numerous organizations on the local, regional and state level often play a critical role in preventing, detecting, and responding to elder financial exploitation.[119] These organizations may also provide support to victims, and work on broad-based strategies to combat elder financial exploitation.

Across the U.S., organizations are collaborating in an effort to improve coordination among the entities working with and protecting elders.[120] These collaborations take on a variety of forms. In some communities, groups of professionals meet regularly to review cases of financial exploitation. Some groups conduct community education activities and trainings for professionals, older adults, family members, aging service providers, and the community at large.

In many communities, financial institutions participate in these efforts and the CFPB recommends that they do so.

3.6.1 Work with law enforcement and APS

Financial institutions should take specific steps to develop collaborative relationships with law enforcement and adult protective service responders, such as:

- Coordinating with law enforcement and APS to share information about each organization's policies and procedures for detecting, assessing, and reporting cases.

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[119] These entities include, among others, APS, law enforcement, legal services programs, aging network organizations, aging services providers and other non-profits.

[120] Shelly L. Jackson & Thomas L. Hafemeister, Pure Financial Exploitation vs. Hybrid Financial Exploitation Co-Occurring With Physical Abuse and/or Neglect of Elderly Persons, 2 Psychol. of Violence 285 (2012), *available at* http://psycnet.apa.org/psycinfo/2012-04350-001/ (available with subscription).

- Working with law enforcement and APS to identify training needs and develop strategies and protocols for sharing information, and responding to suspicious activities. For example, developing local and regional relationships with relevant personnel at law enforcement and protective service agencies can facilitate timely response to reports and ensure that staff has appropriate points of contact when questions or roadblocks arise.

- Providing expert consultation on banking and finance documents, processes and procedures to assist law enforcement and adult protective services with their case investigations, when requested.

3.6.2 Participate in and support coordinated efforts to educate older account holders, caregivers and the general public about elder financial exploitation

The CFPB recommends that financial institutions collaborate with state and local agencies and senior service organizations by offering educational programs and distributing resource materials to older account holders, family members, caregivers, and the community at large. Many local aging departments, state regulators, councils on aging, senior centers, and faith-based organizations are already engaged in these efforts.[121]

[121] The CFPB provides resources and materials for consumer education. Money Smart for Older Adults-Prevent Elder Financial Exploitation (MSOA) is an awareness program, produced by the CFPB and the Federal Deposit Insurance Corporation (FDIC), that utilizes a train-the-trainer model. Financial institutions can collaborate with local stakeholders to offer community education and awareness seminars and workshops. Also, financial institutions may consider hosting a train-the-trainer session to initiate the development of a local or regional MSOA speaker's bureau. The program is available in English and Spanish. Financial institutions can download the training module at www.fdic.gov/moneysmart and order the participant/resource guide at www.promotions.usa.gov/cfpbpubs.html. The Managing Someone Else's Money guides, discussed above *supra* at 3.5.4, are useful for distribution by financial institutions at educational events, as family members of older consumers often manage money and property for them as they age. Financial institutions can order the guides for free and in bulk at www.promotions.usa.gov/cfpbpubs.html#someone.

3.6.3 Participate in and support local or regional multidisciplinary network initiatives

In various locations around the country, key stakeholders convene as multidisciplinary networks to address the problem of elder abuse including financial exploitation. Members of these groups can include APS agencies, aging service agencies, law enforcement representatives, legal services organizations, non-profit senior service providers and financial services providers. These networks engage in activities such as education, training and individual case review. For example, Triads are community groups in which local law enforcement, aging service providers, and the community work together to prevent crime against older adults. Financial institutions may identify opportunities to engage in local multidisciplinary networks focusing on elder financial exploitation.

Some of these networks work together to provide expert advice to APS and law enforcement to support the investigation or processing of complex cases. These case review groups are often referred to as multi-disciplinary teams (MDTs) or financial abuse specialist teams (FASTs) but they may adopt another name that reflects their geographic location or the unique organizational structure of their group. Across the nation, there are a limited number of multidisciplinary teams with a case consultation function. Those teams most often work in metropolitan areas.

Financial institution personnel can be valuable members and contributors to "networks" as they engage in both educational and case review functions. They can provide expertise as speakers for community groups and as experts in finance who can assist investigators by identifying and analyzing documents that are important to the investigation. Financial institution representatives also can educate responders and investigators on the nuances of banking policy and procedures to enhance mutual understanding and cooperation in the investigative process. Conversely, adult protective services and law enforcement can be good sources of information, resources for training financial institution staff, and co-presenters at consumer and industry events. Some multidisciplinary teams limit discussions of specific cases to government agencies working on the case, but even in those situations financial institution personnel can offer and provide valuable ad-hoc support.

Financial institutions may be able to identify multidisciplinary networks in their area by contacting the local Area Agency on Aging (AAA), APS agency, or senior information and referral hotline. The Eldercare Locator, supported by the US Department of Health and Human

Services, enables users to search for their local AAA and APS agency and is accessible at www.eldercare.gov.

4. Conclusion

Financial institutions have a tremendous opportunity to serve older consumers by vigorously protecting them from financial exploitation. The CFPB offers the above recommendations to assist financial institutions in their efforts to protect older account holders from financial exploitation. Interviews with many individual financial institutions, trade associations, prosecutors, aging services providers and other stakeholders informed the CFPB's recommendations. The CFPB found that numerous financial institutions nationwide already have implemented many of the recommendations included in the Advisory, or are considering ways to best serve their older account holders. The Bureau looks forward to continuing to work with financial institutions and seeing a broad spectrum of financial institutions implement its recommendations so that a greater number of older Americans can enjoy later life economic security.

APPENDIX A:

Warning signs that may indicate elder financial exploitation

A variety of behaviors and account activities may signal that a consumer is at risk of or is the victim of elder financial exploitation. These warning signs are not proof of financial exploitation; rather, they are signs that should trigger investigation and other proactive activities described in this report. Proactive steps are especially important if staff members detect more than one red flag. Due to the evolving nature of fraud and the methods by which exploitation is perpetrated, the CFPB encourages financial institutions to maintain an up-to-date list of behaviors and activities that indicate fraud risk for older consumers. The CFPB compiled the following list of risk indicators from several sources.[122]

[122] *See* BITS Financial Services Roundtable, *Protecting the Elderly and Vulnerable from Financial Fraud and Exploitation* at 11-13 (Apr. 2010), *available at* http://fsroundtable.org/wp-content/uploads/2015/05/BITSProtectingVulnerableAdults0410.pdf; BITS Financial Services Roundtable, At-Risk Adult Training Curriculum (Feb. 2013), *available at* http://fsroundtable.org/wp-content/uploads/2015/09/BITS-Roundtable-At-Risk-Adult-Training-Curriculum-Jan-2013.pdf; Presentation, Coalition for Elder Justice in Connecticut, *Preventing Elder Financial Exploitation: The Role of Financial Institutions in Connecticut* (2015), *available at* http://coa.cga.ct.gov/images/pdf/financialabuse/ElderJusiticeFinancialInstitutionsTraining2.12.15.pdf; FIN-2011-A003, *Advisory to Financial Institutions*, *supra.*

Interactions with older consumers, caregivers and other third parties

1. A previously uninvolved relative, caregiver or friend begins conducting financial transactions on behalf of an older consumer—or claims access or privileges to the consumer's private information—without proper documentation

2. An older consumer associates with new "friends" or strangers

3. A caregiver or other third party shows excessive interest in the older consumer's finances or accounts, does not allow the consumer to speak for him or herself, or is reluctant to leave the older consumer's side during interactions with the financial institution

4. An older consumer exhibits an unusual degree of fear, anxiety, submissiveness or deference to a caregiver or other third party

5. An older person expresses excitement over a financial opportunity, prize, or windfall

6. An older consumer lacks knowledge about his or her personal financial status or accounts, or is reluctant to discuss financial matters

7. An older consumer appears to neglect or experience a decline in appearance, grooming, or hygiene

Account activity

1. Large increases in account activity, such as daily maximum currency withdrawals from an ATM

2. Large gaps in check numbers, or "out of sync" check numbers

3. Uncharacteristic non-sufficient funds activity or overdrafts

4. Uncharacteristic debit transactions (including unusual ATM use)

5. Uncharacteristic lapses in payments for services

6. Disregard for penalties when closing accounts or certificates of deposit

7. Abrupt changes to financial documents, such as a new power of attorney, a change to a joint account or a change in account beneficiary

8. Excessive numbers of payments or payments of large sums to a caregiver or third party

9. New account use soon after adding an authorized user

10. Statements mailed to an address separate from customer's residence

11. New activity on an inactive account or joint account

12. Signatures that do not match or appear suspicious

13. Uncharacteristic requests to wire money

Protecting Vulnerable Adults from Financial Exploitation:

A Guide for Alabama Broker-Dealer and Investment Adviser Firms

Introduction

Demographers predict that in sixteen years, the United States will be home to 72 million older persons, more than twice the number in 2000.[1] Not only will the older population in the United States increase, but accompanying this increase in number will also be an increase in the amount of wealth concentrated in this group. Statistics show that baby boomers today control more than $13 trillion in household investable assets.[2] For many people, aging comes with diminished capabilities including the inability to adequately manage financial resources and a heightened susceptibility to financial exploitation. Protecting older investors has been a long-standing priority for NASAA and its members, making senior investor protection, in light of the trend of diminishing capacity and senior financial exploitation, of keen importance.[3] As part of its ongoing effort to address the aging of America, NASAA formed the Senior Issues and Diminished Capacity Committee[4] (Seniors Committee) to undertake certain initiatives aimed at addressing these issues. Information about the activities and initiatives of NASAA and the Seniors Committee can be found on the NASAA website at www.nasaa.org or at serveourseniors.org.

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[1] *Dealing With Clients Facing Diminished Capacity: Financial Judgments Can Be the First To Go*, IA WATCH (March 17, 2014).

[2] *Protecting Senior Investors: Compliance, Supervisory and Other Practices Used By Financial Services Firms in Serving Senior Investors*, SEC (Sept 22, 2008); *see also* Sue Asci, *Retirement of Boomers Will Create Market for Advisers* ,INVESTMENT NEWS (Nov. 5, 2007, 10:47 AM), http://www.investmentnews.com/apps/pbcs.dll/article?AID=/20071105/FREE/711050311/-1/INIssueAlert.

[3] *See* ASC Rule 830-x-3-.28, *The Use of Senior-Specific Certifications and Professional Designations*, located on our website at www.asc.alabama.gov.

[4] In 2014, NASAA formed the Committee on Senior Issues and Diminished Capacity to address a wide range of challenges confronting senior investors, regulators and securities industry professionals.

One of the initiatives underway by NASAA's Seniors Committee is the development of guidelines for industry participants. In a similar vein, this particular guide has been prepared to provide broker-dealers and investment advisers doing business in Alabama with useful information related to the detection, reporting, and mitigation of senior financial exploitation. This guide has been adapted by the Alabama Securities Commission (ASC) and the Department of Human Resources (DHR) to complement Alabama's recently enacted Protection of Vulnerable Adults from Financial Exploitation Act, *Ala. Code* § 8-6-170 to 179 (1975) (collectively 'the Act"). The Act generally requires that broker-dealers, investment advisers, and other "qualified individuals" as defined in Section 8-6-171[5], who reasonably believe that financial exploitation of a "vulnerable adult" may have occurred, been attempted, or is being attempted, report the incident to the Alabama Securities Commission (ASC) and the Department of Human Resources (DHR). The new law also authorizes firms to delay a disbursement from an account when the requested disbursement may result in financial exploitation of a vulnerable adult, and allows notification of certain third parties. Firms that take these steps in good faith will be immune from state civil and administrative liability. Where appropriate, the guide references sections of the Act in an effort to assist in implementing its requirements and includes suggestions on how firms should develop policies and procedures.[6]

This guide, however, does not create or modify existing regulatory obligations with respect to senior investors, and it does not catalog the full range of compliance practices applicable to senior investors. Rather, it focuses on steps that firms can take to identify and respond to issues

[5] Ala. Code § 8-6-170 to 179 applies to qualified individuals. Section 8-6-171(8) defines the term "qualified individual" as any "agent, investment adviser representative, or person who serves in a supervisory, compliance, legal, or associated member capacity of a broker-dealer or investment adviser."

[6] This document is intended only as a guide for use by firms in developing policies and procedures addressing financial exploitation. It is not intended to convey or constitute legal advice.

that are common in working with senior investors and hopefully assist firms with utilizing new statutory tools available to address issues related to senior financial exploitation and diminished capacity. Firms are encouraged to continue to identify and implement additional practices which address particular needs of senior investors.

I. Who is Covered as a Vulnerable Adult?

Identifying which of a firm's clients qualify for protection under statutes designed to combat financial exploitation or otherwise protect seniors is critically important. The Alabama law uses the term "vulnerable adult," which has a two-part definition and serves as a trigger for the law's other provisions.

Section 8-6-171(10) defines a "Vulnerable Adult" to include both a person 65 years of age or older and a "protected person", as defined in § 38-9-2 of the Code of Alabama, which includes "[a]ny person over 18 years of age subject to protection under this chapter or any person, including, but not limited to, persons who are senile, persons with intellectual disabilities and developmental disabilities, or any person over 18 years of age that is mentally or physically incapable of adequately caring for himself or herself and his or her interests without serious consequences to himself or herself or others."

A. Identification of Vulnerable Adult Investors

Under the Alabama statute, firms should develop policies and procedures to identify and flag the accounts of older adults for identification and monitoring in order to easily and accurately identify those clients and customers that may become victims of financial exploitation. Firms should also create internal systems that allow employees to quickly and easily identify the accounts of older clients and customers, such as watch lists or automated account tracking, as 10,000 individuals reach the age of 65 each day.

GUIDELINE: Establish policies that will assist in the identification of persons covered under applicable state laws and regulations designed to fight financial exploitation.

While the Alabama law contains a triggering age, the law also applies to adults—regardless of age—exhibiting certain mental or physical disabilities as defined in Ala. Code § 38-9-2.[7] In order to determine whether a client or customer meets these definitions, firms should develop training programs and procedures to better equip frontline employees to recognize the signs and red flags that may qualify a client or customer for protection. It is important to note, however, that the provisions of Alabama law such as delaying disbursements or notifying third-parties, are only applicable if financial exploitation of a *vulnerable adult* is suspected. Equipping employees with the tools necessary to recognize red flags and other warning signs that may leave a customer vulnerable to financial exploitation is critical.

B. Policies, Procedures, and Training to Recognize Vulnerable Adult Investors

Firms should develop policies and procedures and training programs designed to teach their employees how to detect signs of diminished capacity, cognitive decline, and financial impairment. Financial professionals are often uniquely positioned to see the red flags of cognitive decline or other potential impairments affecting their clients and customers, and their prompt actions may prevent a client or customer from becoming the victim of financial exploitation. Detecting and recognizing the signs of cognitive impairment or diminished capacity begins with developing strong relationships with customers and clients. As part of this relationship building, firms should increase the frequency and quality of communication with their clients, as many of the red flags signaling potential cognitive issues, such as memory lapses, disorganization, arithmetic mistakes,

[7] Title 38, Chapter 9 of the Code of Alabama governs the Protection of Aged Adults and Adults with a Disability.

conceptual confusion, and impaired judgment can be detected in routine discussions with clients and customers.[8]

Financial professionals, particularly those with an ongoing relationship with the client, are in the unique position of being able to identify early signs of diminished capacity and instances of financial exploitation. Financial professionals often notice, in their previously "sharp" clients, changes in comprehension or impairments to mathematical skills indicating diminished financial capacity that may, because of slow onset, be difficult for family members to recognize. Also, these professionals often can recognize changes in behavior or unusual financial activities that might indicate that the client is being exploited.

GUIDELINE: Develop and regularly review training programs designed to educate employees to recognize signs of diminished capacity and financial exploitation.

In an AARP survey of 160 compliance officers and 360 advisors from various financial sectors, respondents were provided with a list of behaviors that indicate a person may be experiencing cognitive decline. In the study, the AARP found that 63 percent of those surveyed indicated that they observed frequent repeating of orders or questions. Sixty-one percent indicated that they observed clients having difficulty with basic math and financial terms. Similarly, 61 percent also indicated that they observed other signs of cognitive impairment in senior investors such as memory loss, erratic behavior and difficulty processing information.

Capacity is a fluid concept that can change over time, and depends on the situation. In the context of having *financial* capacity, a good definition would be "the capacity to transact certain business, such as understanding personal financial needs and goals, understanding investment product choices, contracting for the purchase of a particular product, or giving a particular professional the discretion to manage an account." In fact, as cognitive decline advances, it is

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[8] ABA Annual Meeting Materials, *"The Epidemic of Elder Financial Exploitation"*, Summer 2012, Vol. 36, No. 2.

financial risk taking and management of resources which are the primary cognitive abilities to be affected.

GUIDELINE: Develop special tips and strategies on how to communicate with persons experiencing diminished capacity.

Clients may be reluctant to talk about cognitive decline, but may be willing to discuss what to do with their finances in the event of a medical or other emergency. Discussions in this context provide an avenue to discuss powers of attorney and other advanced directive options. Ideally, these types of discussions would take place upon account opening, at regular intervals thereafter, and as circumstances dictate. Ongoing communication with the client is critical both to establish a baseline from which to assess any changes in behavior or cognitive decline and to recognize when protective measures may become necessary.

GUIDELINE: Provide training to frontline employees on how to ask appropriate questions regarding potential cognitive decline while still maintaining a client's sense of autonomy and dignity.

Firms can assist their advisors and other personnel, such as supervisors and compliance staff with respect to an assessment of cognitive skills by providing them with ongoing training on how to communicate with clients. Some examples include:

- Specialized training to assist with recognizing signs of cognitive impairment. This training would include frontline employees, as well as supervisors and compliance personnel.
- Developing special tips and strategies on how to communicate with persons experiencing diminished capacity. This might include tips for approaching the sensitive subject of cognitive decline. Clients may be adverse to talking about cognitive decline, but are often willing to discuss what to do with their finances in the event of a medical or other emergency. Discussing the subject of cognitive decline in these contexts may be an avenue to discussing powers of attorney and other advanced directive options.
- Training the frontline employee how to ask appropriate questions while still maintaining the client's sense of autonomy and dignity is paramount.

In addition to implementing robust communication and training programs, firms should develop policies and procedures to assist their employees in responding to investors experiencing cognitive decline. Some examples may include policies and procedures that allow:

- Placing "watches" on an account where there is a suspicion that a client may be vulnerable.
- Documenting contact with senior investors in case they have problems with lack of recall or need assistance with resolving any misunderstanding.
- Developing escalation procedures. Broker-dealer agents and investment adviser representatives should document suspected diminished capacity and escalate immediately. Policies should indicate to whom the matter should be escalated and when. Employees should be trained to do this early – at the first sign.

C. Identifying Red Flags

An integral component of a firm's policies and procedures should be training on how to spot the signs of cognitive decline or a reduced capacity to handle financial decisions. While there is no definitive list of the signs of diminished capacity or cognitive decline, some examples of "red flags" included in prior reports and reported by various stakeholder groups include the following.

- The investor appears unable to process simple concepts, such as:
  - a decline in the ability to do simple math problems
  - difficulty in understanding important aspects of the account
  - difficulty with checkbook management
  - confusion and loss of general knowledge regarding basic financial terms and concepts such as mortgages, wills, annuities
- The investor's behavior is erratic, including:
  - memory loss
  - difficulty speaking or communicating
  - inability to appreciate the consequences of decisions
  - disorientation with surroundings or social settings
  - uncharacteristically unkempt appearance
- The investor exhibits impaired judgment about investments or the use of money, including:
  - expressing an interest in "get rich quick" schemes
  - anxiety about the nature and extent of personal wealth
  - making decisions that are inconsistent with his or her current long-term goals or commitments
  - refusing to follow appropriate investment advice
  - failure to fulfill financial obligations such as paying bills, or even paying the same bill twice.

In developing policies, procedures, and training programs, firms may want to review existing training materials developed by state agencies. These programs typically address the threshold issue of identification of impaired capacity and can be adapted to fit the financial services business model.[9] The materials also may provide an avenue to enhance relationships between the financial industry, state securities regulators, and local Adult Protective Services (APS) agencies—an important step in protecting the financial well-being of senior clients. In Alabama, the APS agency is the Department of Human Resources.

GUIDELINE: Review and consider adapting existing training materials from state securities and local APS agencies and others.

Having strong, cooperative relationships among the financial industry, DHR, ASC, and law enforcement is critical as each group brings a unique perspective, skill set, and ability to act in order to protect seniors. When such cooperative relationships are in place, open communication is fostered between key stakeholders who can work together to protect our aging population.

GUIDELINE: Training materials should include information on resources for addressing financial exploitation and other forms of elder abuse.

II. Detecting Senior Financial Exploitation

In addition to developing training programs, policies, and procedures designed to identify senior and other vulnerable investors, firms should also develop programs, policies, and procedures designed to detect potential financial exploitation. Section 8-6-171(5) of the Code of Alabama broadly defines the term "financial exploitation", which includes generally the wrongful or unauthorized taking of property, and any act or omission taken by a person, or through a power

[9] NASAA has developed a training program entitled Senior$afe, designed for broker-dealers and investment advisers. Further, the ASC and DHR are available to assist any firm, or association of broker-dealers or investment advisers, in developing training or educational programs as either a stand-alone event or as part of a firm's continuing or special training.

of attorney, guardianship, or conservatorship, with the intent to deprive a vulnerable adult of his or her property. It is important that firms are familiar with the acts that constitute financial exploitation and that employees are trained to identify the signs of financial exploitation. Signs that a senior investor could be the victim of financial exploitation include:

- Uncharacteristic and repeated cash withdrawals or wire transfers
- Appearing with new and unknown associates, friends, or relatives
- Uncharacteristic nervousness or anxiety when visiting the office or conducting telephonic transactions
- A lack of knowledge about his or her financial status
- Having difficulty speaking directly with the client or customer
- Unexplained or unusual excitement about a sudden windfall; reluctance to discuss details
- Sudden changes to financial documents such as powers of attorney, account beneficiaries, wills, or trusts
- Closing of accounts without regard to penalties

GUIDELINE: Provide employees with informational materials detailing the signs of diminished capacity and financial exploitation.

III. Reporting Senior Financial Exploitation

In Alabama, when there is a reasonable belief by the firm that a client has been the victim of financial exploitation, the firm must report this information to both ASC and DHR.[10] The Alabama Department of Human Resources is the State agency statutorily authorized to receive and investigate reports of suspected abuse, neglect, and exploitation of adults who are suspected of being physically or mentally unable to protect themselves, and to arrange protective services, including guardian and conservatorships, to the extent possible when protection is needed.[11] Likewise, the Alabama Securities Commission ("ASC") is responsible for investigating crimes in connection with the offer, sale, or purchase of securities. The ASC's enforcement authority extends to financial exploitation, as many exploitation cases involve the disposition of a senior's

[10] Ala. Code § 8-6-172 (1975).
[11] For a complete list of services, view the following link to the Division of Adult Protective Services at http://www.dhr.alabama.gov/services/Adult_Protective_Services/Adult_Protective_Services.aspx.

assets, life savings, retirement account, or other investments held in broker-dealer and/or financial advisor accounts. Reporting is accomplished by completing and emailing the "Alabama Securities Commission and Department of Human Resources Report of Adult Suspected to be Financially Exploited," located on both the ASC, www.asc.alabama.gov, and DHR, www.dhr.alabama.gov, websites.[12]

GUIDELINE: Where there is a reasonable belief (after researching and investigating a situation) by the firm that a client has been exploited financially, a firm should report the situation to the appropriate state agency or agencies.

A. Reporting Mechanics

Nearly every state has an elder abuse reporting framework on its books, making it imperative that firms understand their reporting obligations under the existing laws of the states in which they operate. In Alabama, section 8-6-172 requires "qualified individuals"[13] who "reasonably believe that financial exploitation of a vulnerable adult may have occurred, may have been attempted, or is being attempted," to "promptly" notify both DHR and ASC. In order to streamline the reporting process, DHR and ASC have developed **a single initial reporting form-** the "Alabama Securities Commission and Department of Human Resources Report of Adult Suspected to be Financially Exploited" form- for completion and transmission to both state agencies. Once completed, the firm must email a copy to both the ASC and DHR at the respective email addresses located at the bottom of the form. The ASC will also accept faxed reports. Note that while Ala. Code Section 8-6-172 requires **prompt** notification of suspected financial exploitation, there is a **2-day** maximum notification in the instance of a delayed disbursement. As

[12] The reporting form should be completed and sent by email to DHR and by email or fax to ASC along with any other additional information, investigative reports or documentation available at the time of reporting.

[13] Section 8-6-171(8) defines "Qualified Individuals" to include any "agent, investment adviser representative, or person who serves in a supervisory, compliance, legal, or associated member capacity of a broker-dealer or investment adviser.

discussed later in this guide, firms should be sure to include with the report any relevant documentation related to the incident.

Firms and their employees should remain particularly mindful of the applicable reporting standards, and should properly train their employees on their responsibilities. It is important for the firm to understand its reporting obligations and the reporting obligations of its employees, and to develop policies, procedures, and training programs accordingly. The duty or ability to report may fall on the individual or to the firm. While the Alabama statute references the reporting individual, DHR and ASC are aware that firms have various systems for escalating the incident and will accept existing firms' systems for reporting that fall within the statutorily designated timeframe. In actual practice, the report would be sent by the individual, the appropriate legal department designee, supervisor or other person at the firm charged with responsibility for timely reporting.

GUIDELINE: Understand reporting obligations and to whom the obligation runs, the firm or the individual.

Once firms understand their potential reporting obligation, they should develop policies and procedures designed to carry out those obligations. In developing policies and procedures, broker-dealers and investment advisers should include detailed criteria or "red flags" that would trigger reporting. These criteria must be designed to ensure compliance with the applicable reporting standards. For example, under Alabama law, a firm's reporting policies and procedures should outline facts and circumstances which could result in the development of a reasonable belief that financial exploitation has occurred, is occurring, or may occur.

Further, since the ASC accepts reports based on the firms' policies and procedures, the firm should develop clear and detailed escalation procedures which establish direct lines of communication to ensure proper reports are made. Training on escalation procedures is also

critical to ensure that when a potentially urgent situation involving a vulnerable adult arises, firm employees understand their responsibilities and the procedures they must follow. In today's world of immediate response transactions, time is of the essence and robust training is key to ensuring timely action is taken to prevent financial exploitation.

GUIDELINE: Develop clear, detailed escalation procedures, establishing direct lines of communication to ensure proper reporting.

A firm's policies and procedures should also be designed to promote internal communication and coordination regarding the reporting of financial exploitation. This is especially important for larger, more complex firms in which one division may not be aware that suspicious activity has been reported in a customer's account being managed in another division.[14] Such policies and procedures, of course, will depend on the size and nature of each individual broker-dealer or investment adviser.

Firms' policies and procedures also should mandate the use of the "Alabama Securities Commission and Department of Human Resources Report of Adult Suspected to be Financially Exploited" form, and the use of any specified internal reporting forms, to ensure that each report contains pre-determined categories of information. Firms should consider developing their own form to be used for internal information gathering. The information contained on the form should include:

- the name of the client
- the relevant dates
- a description of the events that led to the report
- a description of the steps the firm has taken or expects to take in response to the event
- any relevant documentation related to the potential financial exploitation to ensure that the internal stakeholders and any outside agency receiving the report has all of the necessary information to evaluate the report.

[14] For example, the banking division may not be aware that the securities division is monitoring a particular customer's account.

Comprehensive reports will help alleviate inconsistent reporting, which, in the course of developing this guide, was identified as an area of major concern among APS agencies in connection with financial firm reporting.

GUIDELINE: Mandate the use of specified internal reporting forms to ensure accurate and consistent reporting

IV. Notifying Third-Parties of Potential Financial Exploitation

In addition to reporting potential financial exploitation to DHR and ASC, notifying trusted third-parties about unusual or potentially exploitive activity occurring in a vulnerable adult's account can be an effective means of addressing any such harmful conduct. However, notifying third-parties about the financial activity of a senior investor presents many challenges and firms should implement clear policies in order to address these challenges. While the Alabama statute allows third-party notification of closely connected individuals, in addition to trusted third parties who have been designated or are on the account, it is the firm who determines the appropriate third-party contact based on the relationship of the financial professional with the client and knowledge of the clients' family, relatives, close contacts, etc. *Ala. Code* § 8-6-174 (1975). In Alabama, this provision was added, at the request of the industry, to be used in those limited or special occasions in which the firm determines is highly appropriate- under all facts and circumstances and considering the particular relationship with the account holder and the type of suspected financial exploitation.

A. Privacy Concerns

Sharing financial and other potentially sensitive information with someone other than a client or customer is a delicate subject and raises significant privacy concerns. Federal privacy laws generally prohibit the sharing of financial information unless a client or customer has

consented or another exception exists.[15] Further, sharing sensitive financial information with third-parties, including family members, presents additional challenges because firms may not know all of the details of the vulnerable adult's relationship with the third-party or family member. Before broker-dealers or investment advisers share information with third-parties, including a client's family member, firms need to carefully consider the legal and other potential ramifications. Firms, however, can address many of these challenges by taking proactive measures early in the relationship with the client.

GUIDELINE: Firms should be aware of the privacy concerns and implications of notifying third-parties as it relates to financial exploitation and diminished capacity

B. Strategies for Effective Third-Party Notification

Developing strong relationships with investors is one of the most important weapons in the detection of diminished capacity and in the fight against financial exploitation. Building strong client relationships and planning for more than simply the client's technical financial future before potential issues arise is critical, and particularly important as it relates to third-party notification and advanced directives that memorialize a client's chosen course of conduct when faced with diminished capacity or financial exploitation. Firms should implement policies and procedures and related training programs that require disclosure, discussion and decisions regarding plans for potential future issues, and develop communication tools that emphasize the importance of future planning. These tools should facilitate discussions to guide the customer toward memorializing advanced financial directives and a contingent power of attorney.

GUIDELINE: Develop communication strategies to engage customers and clients on issues related to advanced planning, including the implementation of advanced directives.

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[15] Many of the federal privacy law concerns stems from provisions in Title V of the Gramm-Leach-Bliley Act, 15 U.S.C. 6801 et seq., and its implementing regulations such as the SEC's Regulation S-P. 17 C.F.R. § 248.1 et seq.

One potential strategy reported to be successful by financial professionals is to engage clients and customers on the topic of planning for general medical emergencies. This approach could then grow into a discussion of other advanced safeguards, with clients more willing to commit to the designation of their "financial agent" or "in case of" contact should the need arise.

Firms should ensure that their employees are familiar with documents such as powers of attorney and advanced financial directives, including the features and limitations of each. Policies and procedures should allow clients and customers to utilize customized advanced directives or designate trusted contacts and direct what information can be shared and the conditions leading to the sharing. Because these measures are based on client consent, they can be tailored to fit the needs of specific clients and firms. Also, because clients consent to the sharing of otherwise confidential information under certain circumstances, firms that utilize advanced directives or trusted contact procedures can minimize many of the privacy concerns discussed previously.

GUIDELINE: Develop policies and procedures that allow clients and customers to utilize customized advanced directives or designate trusted contacts and direct what information can be shared and the conditions leading to the sharing.

It is important, however, that advanced directives or other forms of designation be affirmatively discussed and clearly designated, and not buried in new account forms or privacy policy statements. To assuage concerns about validity, it is critical that customers and clients know why they are designating a contact and for what reason that individual may be contacted. Firms' policies and procedures should provide clear guidance and processes for periodically reviewing and updating third party designations, at least annually.

C. Third-Party Notifications

The concept of designating **trusted** contacts is incorporated into the Alabama statute. In addition to third parties previously designated by the vulnerable adult, section 8-6-174 allows firms to

notify certain additional third-parties, without the client's consent, when a report is about to be or has been made to DHR and ASC. *Ala. Code* § 8-6-174 (1975). Specifically, it authorizes a firm to notify any of the following individuals: a legal guardian, conservator, co-trustee, successor trustee, agent under power of attorney, or other "reasonably associated individual." It is important to note that the decision to notify a third party lies within the sound discretion of the firm. Firms should be sure their policies and procedures are designed to ensure compliance with applicable state and federal laws, keeping in mind their limitations, including preventing the disclosure of information to third-parties that are suspected to be exploiting the senior investor.

GUIDELINE: Ensure policies and procedures related to third-party notification are designed to promote compliance with federal and state law.

V. Delaying Disbursements in Situations of Potential Financial Exploitation

Delaying or placing a temporary hold on a disbursement from a vulnerable adult's account in an effort to prevent losses from financial exploitation is an important and very effective tool provided to firms under the Alabama statute. However, given the potential and unintended consequences of delaying disbursements, firms should develop clear and robust policies and procedures designed to effectively utilize these delays and to ensure that such delays comply with Alabama law and used only in appropriate circumstances.

A. Mechanics and Considerations when Delaying a Disbursement

Pursuant to section 8-6-176 firms are required to complete or continue a review or investigation after delaying a disbursement. Training is an important step in ensuring firms can successfully utilize disbursement delays when appropriate. Firms' policies and procedures should describe the procedure, processes, and content of their required internal review following the delay of a disbursement, and firms should develop comprehensive training programs for their employees regarding these reviews and investigations.

GUIDELINE: Develop policies and procedures describing the procedure, processes, and content of internal reviews before, during, and following a disbursement delay.

Firms must also have clear procedures and processes to facilitate the notifications required when a firm, in compliance with section 8-6-176, delays a disbursement. Specifically, Ala. Code § 8-6-176 requires firms to immediately, **but in no event more than two** business days, notify <u>all parties authorized to transact business</u> on the account. In addition, and within the same time frame, firms must notify both DHR and ASC by filing the "Report of Adult Suspected to be Financially Exploited" form. Because these notifications are required when a firm delays a disbursement, firms should pay particular attention to developing processes for ensuring notification occurs in a timely fashion. For example, firms should designate a person who will be responsible for the notification, whether it be the account's primary representative or someone from the firm's legal or compliance department. Firms should also maintain systems that facilitate the identification of those authorized to transact business on the account, as each of these people is also required to receive notification of a delayed disbursement. It is incumbent on the firms, however, to devise a system for notifying account holders, and other third parties, where appropriate, and for its policies and procedures to clearly define the form and contents of these notifications to ensure accurate and consistent notification. Firms' must also ensure that notifications are not sent to the suspected perpetrators of the financial exploitation. This is of particular importance for firms that choose to develop some type of automated notification system.

GUIDELINE: Develop clear procedures and processes to facilitate the notifications required when a disbursement delay is utilized.

Firms' notification procedures must also provide for clear guidance on which regulators to notify- the ASC and DHR- and the time frames for such notification. It is important to note that the ASC and DHR must be notified of a delayed disbursement, in addition to the notice of

suspected financial exploitation. The "Report of Adult Suspected to be Financially Exploited" form may be used to satisfy both notice requirements[16] if the decision to delay a disbursement is an immediate one. Further, and following a disbursement delay, firms should maintain open communication with ASC and DHR to report their internal findings and fully cooperate with any concurrent agency investigation or action. Section 8-6-176(2)(c) requires firms to conduct and report any additional findings of its internal investigation within 7 business days. This will ensure that the investigating agencies have the critical and time-sensitive information they need to act on any potential exploitation.

B. Timing and Other Important Considerations when Delaying Disbursements

Firms must carefully monitor the timing of delayed disbursements to ensure that funds are not withheld longer than is permissible. Reasonable time is allotted, however, to allow firms and investigating agencies to conduct a review of the transaction. The authorized time limitations on delaying disbursements are codified in section 8-6-176(b), which states that a delay expires upon the sooner either a determination by a firm that the disbursement will not result in financial exploitation, or 15 business days after the date of the delay unless ASC or DHR requests that the firm extend delay. In no instance should the delay extend beyond 25 business days unless judicial intervention is sought by either the ASC, DHR, the firm or other interested party. *Ala. Code* § 8-6-176(b)-(c) (1975).

GUIDELINE: Carefully monitor the timing of delayed disbursements to ensure that funds are not withheld longer than is permissible.

Ensuring that a senior investor's funds are not unnecessarily delayed is critically important, as a delayed disbursement can have a significant impact on a senior investor. For example, if funds

[16] Under the Section VII, "Reporter."

are delayed, senior investors could fall behind on paying their bills or outstanding checks may bounce, which could result in additional fees. Firms' policies and procedures should be designed to minimize the time required to complete any required internal review or investigation and make the required notifications and reports. If these actions are completed in a timely manner and the proper authorities are involved, the consequences of a delay can be mitigated. The Alabama statute attempted to balance these concerns, by placing limitations on delaying disbursements, with the interest in preventing losses, knowing that once funds have left an account, they become very difficult to recover.

Finally, firms should develop communication tools to inform senior investors of the possibility of a delayed disbursement in situations of potential financial exploitation. As with the third-party designations, this should be communicated clearly and conspicuously and not exclusively in the fine print of a customer's account agreement or advisory contract.

VI. Other Considerations, Including Immunity from Potential Liability

To incentivize broker-dealers and investment advisers to further engage in combatting financial exploitation, the Alabama law contains immunity provisions that grant firms civil and administrative immunity if they fully comply with the statutory provisions. By providing immunity for certain actions, ASC and DHR envision that the firms will be more willing to utilize the available tools such as contacting designated third-parties, other third-parties in extraordinary circumstances, and delaying disbursements when necessary. The primary areas in which immunity is concerned relates to reporting, both to governmental entities and to third-parties, and when delaying disbursements.

For example, firms that file reports to ASC and DHR in good faith and using reasonable care are granted immunity from civil and administrative actions that could result from reporting and disclosing confidential information. The Alabama law also grants civil and administrative

immunity for disclosures made to third-parties and for delaying disbursements. Firms must fully comply with all relevant provisions of the law in order to qualify for immunity. To be sure that a firm's actions are covered, firms should design their policies and procedures with the law in mind, taking particular note of its dual good faith and reasonable care standard. This dual standard is designed to ensure that immunity is only available to firms or individuals that comply with the substantive provisions of the statute and do so with a desire to protect vulnerable adults from financial exploitation, and not as a result of a desire to prevent a client from taking an account to another firm.

VII. Access to Records

Maintaining records relating to the vulnerable adult's account is critical to detecting and combatting financial exploitation. In financial cases, the records are often the primary evidence of wrongdoing. Likewise, access to these records by investigating agencies is equally important as these documents are necessary to thoroughly investigate the case. Alabama law requires the disclosure of all records relating to the suspected activity. Ala. Code § 8-6-178 (1975).

GUIDELINE: Firms should develop strong working relationships with local regulatory agencies and cooperate in any investigation that may involve a firm's client or customer

With the goal of fostering cooperation and better communication, a firm's policies and procedures should include specific guidelines and requirements regarding how to respond to inquiries from ASC or DHR or law enforcement regarding the reports a firm may make regarding financial exploitation. Financial firms making an initial report regarding potential financial exploitation should not fail to respond to follow-ups or requests for additional information in a timely fashion. Given the often urgent nature of financial exploitation, maintaining clear, open communication channels is critical, and firms should develop policies that promote this communication. The records mandate is designed to facilitate this cooperation.

VII. Conclusion

Many firms have already begun to implement and utilize a number of the suggestions discussed above. While this is encouraging, and formed the basis for many of the recommendations, the Alabama Securities Commission encourages more broker-dealers and investment advisers to think critically about protecting their senior clients from financial exploitation. Implementing robust policies, procedures, and training programs that encourage firms to address these issues holistically, and that foster strong relationships among the industry, the ASC and DHR, and law enforcement, will be a significant step toward addressing the serious issues facing seniors and other vulnerable investors.

A GUIDE FOR DEVELOPING PRACTICES AND PROCEDURES FOR PROTECTING SENIOR INVESTORS AND VULNERABLE ADULTS FROM FINANCIAL EXPLOITATION

NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION

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Quick Reference Guide

WHO

- Identify which persons are covered under state laws designed to fight financial exploitation. (pp. 6-7)
- Identify types of clients who might warrant additional safeguards from financial exploitation, such as those nearing age 65 or exhibiting signs of cognitive decline. (p. 7)

WHAT

- Train frontline personnel (call center staff, financial advisors, branch office staff) to recognize red flags for diminished capacity and financial exploitation. (pp. 9-10)
- Develop training and/or use existing training materials, including asking a state securities regulator to present the NASAA version of the Senior$afe program.
- Train frontline personnel how to communicate with persons experiencing reduced cognition. (pp. 7-8)
- Ask appropriate questions when there are red flags in a manner that always strives to maintain the client's dignity and independence.
- Train frontline personnel on the legal definitions of financial exploitation applicable in their state. (pp. 6-7)
- Develop an internal escalation and reporting protocol. (pp. 13-14)

HOW

REPORTING

- Know the reporting obligations for your jurisdiction (s). (pp. 12)
  - Some states make every "person" in that state a mandated reporter.
- Know whether it is the individual's obligation or the firm's obligation to report financial exploitation.
  - Even if not required to report, protect your client by reporting whenever there is a reasonable belief that a client has been or is being financially exploited or abused.
- Learn what required information is necessary for a report—who, what, when and where. (pp. 14)
  - Use NASAA's ServeOurSeniors.org website to get reporting information for Adult Protective Services.

- Develop clear, detailed internal procedures for reporting, including escalation protocols or incorporate such procedures into existing written supervisory procedures. (pp. 13-14)
  - Develop standard internal reporting forms for accurate and consistent reporting.
  - Consider establishing a specialized unit to monitor activity in accounts of vulnerable customers and clients.

THIRD-PARTY NOTIFICATION (pp. 16-18)

- Develop procedures to encourage clients to utilize customized advance directives, joint accounts, or designation of trusted contacts.
  - Design procedures to achieve compliance with federal and state privacy laws.
  - Make sure designations direct what information can be shared, what authority is conferred, and under what conditions.
  - Consider including the authority to provide notification of suspected cognitive decline.

DELAY IN DISBURSEMENTS (pp. 19-20)

- Develop procedures for internal review and decision making before, during, and after a delay of disbursement of customer funds from an account.
  - Include process for the conduct of any internal review related to disbursement delays.
  - Do not withhold funds longer than is permissible under applicable laws or is reasonably required by the situation in the absence of legal provisions.

ACCESS TO RECORDS (pp. 22)

- Develop strong working relationships with local Adult Protective Services agencies and encourage communications between APS and state securities regulators.
- Provide records requested by APS and law enforcement in a timely and complete manner.

Introduction

Demographers predict that in 16 years, the United States will be home to 72 million older persons, more than twice the number in 2000,[1] and it is estimated that 10,000 people reach the age of 65 every day.[2] Statistics show that baby boomers control more than $13 trillion in household investable assets[3] and as the population ages, the amount of wealth concentrated in the hands of older investors will increase. Unfortunately, for many people, aging is accompanied by diminished capabilities, including a diminished ability to assess and manage financial assets and resources, as well as a heightened susceptibility to financial exploitation.

Protecting older investors has been a long-standing priority for NASAA and its members, making senior investor protection, in light of the trend of diminishing capacity and senior financial exploitation, of keen importance.[4] As part of its ongoing effort to address the aging of America, NASAA formed the Senior Issues and Diminished Capacity Committee (Seniors Committee) in 2014 to undertake certain initiatives aimed at addressing these issues.

Consistent with the Seniors Committee's work to develop informational guides for the securities industry, NASAA has prepared this document to provide broker-dealers and investment advisers with useful information for detecting, reporting, and mitigating senior financial exploitation. Included are suggested practices firms may implement that are designed to detect and address instances of diminished capacity in senior and other clients. This Guide is designed to complement the recently adopted NASAA Model Legislation or Regulation to Protect Vulnerable Adults from Financial Exploitation (NASAA Model Act).

With the promulgation of the NASAA Model Act and its ongoing adoption as state law, coupled with clients' aging and diminished capacity, firms should review their policies and procedures applicable to the issues that may arise in dealing with the accounts of seniors.

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[1] *Dealing With Clients Facing Diminished Capacity: Financial Judgments Can Be the First To Go*, IA WATCH (March 17, 2014).

[2] *See* http://www.pewresearch.org/daily-number/baby-boomers-retire/.

[3] *Protecting Senior Investors: Compliance, Supervisory and Other Practices Used By Financial Services Firms in Serving Senior Investors*, SEC (Sept 22, 2008); *see also* Sue Asci, *Retirement of Boomers Will Create Market for Advisers*, INVESTMENTNEWS (Nov. 5, 2007), *available at* http://www.investmentnews.com/apps/pbcs.dll/article?AID=/20071105/FREE/711050311/-1/INIssueAlert.

[4] *See* NASAA Model Rule on the Use of Senior-Specific Certifications and Professional Designations, *available at* http://www.nasaa.org/wp-content/uploads/2011/07/3-Senior_Model_Rule_Adopted.pdf; *see also* Protecting Senior Investors: Compliance, Supervisory and Other Practices Used by Financial Services Firms in Serving Senior Investors, *available at* http://www.nasaa.org/wp-content/uploads/2010/08/SEC-NASAA_Senior_Report_092208.pdf.

Having up-to-date policies and practices in place that address potential cases of diminished capacity and financial exploitation will better equip financial services professionals to: 1) recognize diminished capacity and financial exploitation; 2) understand when and how to escalate reporting of such issues within a firm; and 3) direct reports to governmental agencies that can conduct additional investigations and provide needed services.

This Guide highlights certain requirements and options available under existing state laws, NASAA's Model Act, and voluntary practices, coupled with suggestions on how firms should develop policies and procedures to mitigate potential damage caused by senior exploitation and issues related to cognitive decline or diminished capacity. The Guide is structured around five key concepts: 1) identifying vulnerable individuals; 2) governmental reporting; 3) third-party reporting; 4) delaying disbursements from client accounts; and 5) continuing regulatory cooperation following reports or disbursement delays.

This Guide was compiled after substantial research, including interviews with securities industry associations representing broker-dealers and investment advisers, advocacy organizations for seniors, and other organizations representing agencies on the front lines of addressing senior financial exploitation and diminished capacity issues. NASAA also reviewed and analyzed existing reports and information on this important topic. Where appropriate, this Guide references NASAA Model Act provisions in an effort to assist in implementing its requirements or other similar state laws.

This Guide, however, does not create or modify existing regulatory obligations with respect to senior investors, and does not catalog the full range of compliance practices applicable to senior investors. Rather, this Guide focuses on steps that firms can take to identify and respond to issues that are common in working with senior investors and are likely to assist firms in utilizing the new statutory tools available to address issues related to senior financial exploitation and diminished capacity. We hope this Guide encourages financial services firms to continue to identify and implement additional practices that address the particular needs of senior investors.

Who is a "Senior" or "Vulnerable" Investor?

An initial step in determining how best to protect senior investors or vulnerable adults is identifying who is covered under applicable laws. Therefore, identifying which of a firm's clients may qualify for protection under statutes designed to combat financial exploitation or otherwise protect seniors is the likely starting place when developing policies, procedures, and practices meant to accomplish this goal. Existing laws and the NASAA Model Act often have explicit definitions of which individuals fall under the purview of these statutes. For example, the NASAA Model Act uses the term "eligible adult," and sets out a two-part definition that triggers the Model's other provisions, including reporting requirements. Firms also should consider how they will identify investors who may be targets of abuse, exploitation, or be more likely to suffer from some form of diminished capacity.

Guideline

ESTABLISH POLICIES THAT WILL ASSIST IN THE IDENTIFICATION OF PERSONS COVERED UNDER APPLICABLE STATE LAWS OR REGULATIONS DESIGNED TO FIGHT FINANCIAL EXPLOITATION.

Definitions for Seniors and Vulnerable Adults

Seven states, for instance, have adopted statutes or regulations that set forth a legal framework applicable to broker-dealers and/or investment advisers—or other financial institutions—that are designed to assist these entities in fighting the growing problem of financial exploitation of older adults. The number of state jurisdictions with statutes or regulations on point is increasing quickly. Vermont enacted a regulation that tracks the NASAA Model Act. Other states, including Alabama, Louisiana, and Indiana, have adopted laws with provisions that can be found in the NASAA model. Three states, Delaware, Washington, and Missouri, had laws in place before the approval by NASAA of its model act in January 2016.

As noted above, the NASAA Model Act is applicable to "eligible adults." This term is defined as any individual age 65 or older, and also includes any adult who would be subject to the adopting state's existing adult protective services laws. Although the NASAA Model Act and many other related state laws contain a triggering age, such laws may also apply to adults—regardless of age—exhibiting certain mental or physical disabilities. NASAA's Model Act expressly incorporates the adopting state's adult protective services' definitions.

Firms should develop training programs and procedures to better educate client-facing employees and their supervisors to recognize the signs and red flags that may indicate that a client or customer is in need of APS protections, whether financial or otherwise, or that raise concerns about diminished capacity. It is important to note, however, that certain provisions of state laws and the NASAA Model Act, such as delaying disbursements or notifying third parties, are only applicable if *financial* exploitation of an eligible adult is suspected. Other practices, such as obtaining trusted third-party contact information, may be used to provide similar protections when a client triggers concerns about diminished capacity. Equipping employees with the tools necessary to recognize red flags and other warning signs is critical to mitigating the damage so easily suffered in these situations.

Policies, Procedures, and Training to Recognize Potentially Vulnerable Investors

As noted above, firms should develop policies, procedures, and training programs to teach their employees how to recognize signs of diminished capacity, cognitive decline, financial impairment, or financial exploitation.

Financial professionals, particularly those with an ongoing relationship with the client, are in the unique position of being able to identify early signs of diminished capacity and red flags indicating financial exploitation. Financial professionals often notice, in their previously "sharp" clients, changes in comprehension or impairments to mathematical skills indicating diminished financial capacity that may, because of slow onset, be difficult for family members to recognize. Also, these professionals often can recognize changes in behavior or unusual financial activities that might indicate that the client is being exploited.

Guideline

DEVELOP AND REGULARLY REVIEW TRAINING PROGRAMS DESIGNED TO EDUCATE EMPLOYEES TO RECOGNIZE SIGNS OF DIMINISHED CAPACITY AND FINANCIAL EXPLOITATION.

Early identification of these issues may prevent a client or customer from becoming the victim of financial exploitation. Detecting and recognizing the signs of cognitive impairment or diminished capacity begin with developing strong relationships with the individual customer or client. As part of this relationship building, firms should increase the frequency and quality of communication with their clients, as many of the red flags signaling potential cognitive issues, such as memory lapses, disorganization, arithmetic mistakes, conceptual confusion, and

Guideline

DEVELOP SPECIAL TIPS AND STRATEGIES ON HOW TO COMMUNICATE WITH PERSONS EXPERIENCING DIMINISHED CAPACITY.

impaired judgment, can be detected in routine discussions with clients and customers. Firms should consider providing client-facing and other personnel, such as supervisors and compliance staff, an assessment tool for cognitive skills that can be incorporated into ongoing training on how to communicate with clients.

In discussions with stakeholders, several indicated that many people may be reluctant to talk about cognitive decline, but may be willing to discuss what to do with their finances in the event of a medical or other emergency. Discussions in this context provide an avenue to discuss powers of attorney and other advance directive options. Ideally, these types of discussions between a financial services professional and a client would take place upon account opening, at regular intervals thereafter, and as circumstances dictate. Ongoing communication with a client is critical both to establish a baseline from which to assess any behavioral changes or cognitive decline and to recognize when protective measures may become necessary.

Firms should develop policies and procedures to assist their employees in dealing with clients experiencing cognitive decline. Some examples may include policies and procedures:

- Enhancing supervisory oversight for an account where there is a suspicion that a client may be vulnerable.
- Documenting contact with seniors in case they have problems with lack of recall or need assistance with resolving any misunderstanding.
- Developing escalation procedures. Broker-dealer agents and investment adviser representatives should document suspected diminished capacity and escalate immediately. Policies should indicate to whom the matter should be escalated and when, though employees should be trained to do this early – at the first sign.

Guideline

PROVIDE TRAINING TO FRONTLINE EMPLOYEES ON HOW TO ASK APPROPRIATE QUESTIONS REGARDING POTENTIAL COGNITIVE DECLINE WHILE STILL MAINTAINING A CLIENT'S SENSE OF AUTONOMY AND DIGNITY.

Identifying Red Flags

Guideline
TRAINING PERSONNEL TO ASSIST WITH RECOGNIZING SIGNS OF COGNITIVE IMPAIRMENT DESPITE THE FACT THAT STANDARDS FOR QUALITATIVE ASSESSMENTS ARE UNCLEAR.

An integral component of a firm's policies and procedures should be training to spot the signs of cognitive decline or a reduced capacity to handle financial decisions. While there is no definitive list of the signs of diminished capacity or cognitive decline, in discussions with the various stakeholder groups and a review of prior reports on the subject, the following examples of "red flags" were cited.

- The investor appears unable to process simple concepts, such as:
  - a decline in the ability to do simple math problems;
  - difficulty in understanding important aspects of the account;
  - difficulty with checkbook management; and
  - confusion and loss of general knowledge regarding basic financial terms and concepts such as mortgages, wills, and annuities.
- The investor's behavior is erratic, including:
  - memory loss;
  - difficulty speaking or communicating;
  - inability to appreciate the consequences of decisions;
  - disorientation with surroundings or social settings; and
  - uncharacteristically unkempt appearance.
- The investor exhibits impaired judgment about investments or the use of money, including:
  - interest in get rich quick schemes;
  - extreme anxiety about the nature and extent of personal wealth;

- making decisions that are inconsistent with his or her current long-term goals or commitments; and
- failure to fulfill financial obligations such as paying bills, or paying the same bill multiple times.

Guideline

REVIEW AND CONSIDER ADAPTING EXISTING TRAINING MATERIALS FROM STATE APS AGENCIES AND OTHERS.

In developing policies and procedures and training programs, firms may want to review existing training materials developed by state agencies. These programs typically address the threshold issue of identification of impaired capacity and can be adapted to fit financial services models.[5] The materials also may provide an avenue to enhance relationships between the financial industry and local APS agencies—an important step in protecting the financial well-being of senior clients.

Guideline

TRAINING MATERIALS SHOULD INCLUDE INFORMATION ON RESOURCES FOR ADDRESSING FINANCIAL EXPLOITATION AND OTHER FORMS OF ELDER ABUSE.

Having strong, cooperative relationships among the financial industry, APS agencies, state regulators, and law enforcement is critical, as each group brings a unique perspective, skill set, and ability to act in order to protect seniors. When such cooperative relationships are in place, open communication is fostered between key stakeholders who can work together to protect our aging population.[6]

[5] NASAA has developed a training program entitled Senior$afe, designed for broker-dealers and investment advisers. For more information, please contact your state securities regulator.

[6] Information on how to contact the local APS agency or state securities regulator can be found at www.serveourseniors.org.

Detecting Senior Financial Exploitation

In addition to developing training programs and policies and procedures designed to identify senior and other vulnerable customers and clients, firms should also develop training programs, policies, and procedures designed to detect potential financial exploitation. Existing state law and the NASAA Model Act define financial exploitation and provide broker-dealers and investment advisers with certain obligations and tools that can be deployed to help prevent losses resulting from exploitation. It is important that firms are familiar with these definitions and that their employees are trained to identify the signs that indicate the possibility of financial exploitation. In discussions with securities industry stakeholders, elder advocates, and adult protectives service professionals, the signs and red flags that a senior customer or client could be the victim of financial exploitation include:

- Uncharacteristic and repeated cash withdrawals or wire transfers.
- Appearing with new and unknown associates, friends, or relatives.
- Uncharacteristic nervousness or anxiety when visiting the office or conducting. telephonic transactions.
- Lacking knowledge about his or her financial status.
- Having difficulty speaking directly with the client or customer without interference by others.
- Unexplained or unusual excitement about an unexplained or unusual windfall; reluctance to discuss details.
- Sudden changes to financial documents such as powers of attorney, account beneficiaries, wills, or trusts.
- Large, atypical withdrawals or closing of accounts without regard to penalties.

Guideline

PROVIDE EMPLOYEES WITH INFORMATIONAL MATERIALS DETAILING THE SIGNS OF DIMINISHED CAPACITY AND FINANCIAL EXPLOITATION.

Reporting Senior Financial Exploitation

Together with a program designed to assist firm employees to identify at-risk clients, firms also should clearly set forth the steps that must be taken in instances where financial exploitation of the client is suspected.

Mandatory vs. Voluntary Reporting

Nearly all states have existing state laws contain mandatory reporting requirements when there is a suspicion of elder abuse, whether physical, mental, or financial. Some of these laws specifically mandate reporting by broker-dealers and/or investment advisers.[7] Others, while not explicitly designed for broker-dealers or investment advisers, apply broadly to financial institutions, which may include broker-dealers and investment advisers.[8] Other state reporting laws could apply to broker dealers and/or investment advisers (or their employees) because the reporting requirement applies to all persons.[9] The NASAA Model Act contains a mandatory obligation to report potential financial exploitation when there is a reasonable belief that such exploitation may be occurring. Other states have adopted a voluntary reporting scheme under which broker-dealers and/or investment advisers may report their suspicions regarding the potential financial exploitation of their senior clients, but are not *required* to report.[10]

Broker-dealers and investment advisers, however, should adopt as a firm policy to report suspected financial exploitation *whether or not the firm has a legal obligation to report*. Reporting suspected financial exploitation to the appropriate law enforcement or regulatory or social services agency is a critical step necessary to protect vulnerable investors that firms should voluntarily take.

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[7] *See* Mississippi. MISS. CODE ANN. §43-47-7(1)(a).

[8] *See, e.g.*, Arkansas, ARK. CODE ANN. § 12-12-1708(a)(1); Colorado, COLO. REV. STAT. §18-6.5-108(1)(a)-(1)(b); District of Columbia, D.C. CODE § 7-1903(a)(1); Kansas, KAN. STAT. ANN. § 39-1402(a).

[9] *See, e.g.,* Oklahoma, OKLA. STAT. ANN. tit. 43A §10-104v1; Rhode Island, R.I. GEN. LAWS ANN. § 42-66-8; Florida, FLA. STAT. §415.1034(1)(a).

[10] *See, e.g.*, Missouri, MO. STAT. ANN. § 409.610; Iowa, IOWA CODE ANN. § 235B.3(4).

Reporting Mechanics

The landscape of reporting obligations varies not only as to the mandatory or voluntary nature of the reporting requirement, but also the scope of the permitted or required reporting by individuals or entities. Firms should remain particularly mindful that they, or their employees, may already be subject to certain reporting requirements.[11] It is important for the firm to understand its own, as well as its employees' reporting obligations, and to develop policies, procedures, and training programs accordingly.

> **Guideline**
>
> WHERE THERE IS A REASONABLE BELIEF (AFTER RESEARCHING AND INVESTIGATING A SITUATION) BY THE FIRM THAT A CLIENT HAS BEEN EXPLOITED FINANCIALLY, OR THAT EXPLOITATION IS IMMINENT, A FIRM SHOULD REPORT THE SITUATION TO THE APPROPRIATE STATE AGENCY OR AGENCIES, REGARDLESS OF WHETHER REPORTING IS MANDATED BY LAW.

Policies and procedures should include detailed criteria or red flags that would trigger broker-dealer or investment adviser reporting in compliance with a jurisdiction's reporting triggers and standards. For example, under the NASAA Model Act, a firm's reporting policies and procedures should outline the facts and circumstances that could result in the development of a reasonable belief that financial exploitation has occurred, is occurring, or may occur. The presence or observation of the red flags identified could form the basis for this belief, and might serve as a good starting point for such policies. Further, firms should develop clear, detailed escalation procedures, establishing direct lines of communication to ensure proper reporting. Training on these escalation procedures is critical to ensure that employees understand the steps necessary to report a potentially urgent situation involving a senior investor.

> **Guideline**
>
> UNDERSTAND REPORTING OBLIGATIONS AND TRIGGERS; WHETHER MANDATORY OR VOLUNTARY; AND TO WHOM THE OBLIGATION RUNS, THE FIRM OR THE INDIVIDUAL.

A firm's policies and procedures also should promote internal communication and coordination regarding the reporting of financial exploitation. This is especially important for larger, more complex firms in which one division may not be aware that suspicious activity

[11] NASAA recognizes that under some elder abuse reporting statutes, as under the NASAA Model Act, the duty or ability to report falls on the individual, while in others the duty or ability to report runs to the firm.

has been reported in a customer's account being managed in another division.[12] Such policies and procedures, of course, will depend on the size and nature of each individual broker-dealer or investment adviser and may include the creation of a specified office or division to monitor the activity in designated accounts.

Guideline

DEVELOP CLEAR, DETAILED ESCALATION PROCEDURES, ESTABLISHING DIRECT LINES OF COMMUNICATION TO ENSURE PROPER REPORTING.

Firms' policies and procedures also should mandate the use of specified internal reporting forms to ensure that each report contains pre-determined categories of information. Each firm should develop its own forms, both for internal information gathering and for external reporting, that contain critical information including:

- the name of the client;
- the relevant dates;
- a description of the events that led to the report;
- a description of the steps the firm has taken or expects to take in response to the event; and
- any relevant documentation related to the potential financial exploitation to ensure that the internal stakeholders and any outside agency receiving the report has all of the necessary information to evaluate the report.

These kinds of comprehensive reports will help alleviate inconsistent reporting, which, in the course of developing this Guide, was identified by APS agencies' as a major concern with financial firm reporting.

Guideline

MANDATE THE USE OF SPECIFIED INTERNAL REPORTING FORMS TO ENSURE ACCURATE AND CONSISTENT REPORTING.

Leveraging Existing Policies and Procedures

In developing these policies and procedures, broker-dealers and investment advisers should be able to draw from the policies and procedures already in place

[12] For example, the banking division may not be aware that the securities division is monitoring a particular customer's account.

related to monitoring their client's accounts. For example, firms should be able to leverage and modify their existing compliance framework for detection and prevention of excessive, unsuitable, or unusual trading, for monitoring client correspondence, or for other reporting obligations like Suspicious Activity Reports ("SARs"). Firms should also review other areas of their existing policies and procedures for opportunities to identify and detect areas that may be adapted and modified to facilitate the identification of diminished capacity and the reporting of financial exploitation.

Notifying Third Parties of Potential Issues

Notifying trusted third parties about diminished capacity concerns or unusual or potentially exploitative activity occurring in a senior investor's account can be an additional effective tool to assist in addressing harmful conduct. However, notifying third parties about the financial activity of a senior investor presents many challenges, requiring broker-dealers and investment advisers to implement clear policies to ensure that the concerns of both financial services providers and customers are addressed well in advance of the situation arising.

Privacy Concerns

Sharing financial and other potentially sensitive information with a third party is a delicate subject that raises significant privacy concerns. Before broker-dealers or investment advisers share information with third parties, including a client's family members, firms need to carefully consider potential ramifications of doing so. For example, federal privacy laws generally prohibit the sharing of financial information unless a client or customer has consented or another exception exists.[13] Further, sharing sensitive financial information with third parties, including family members, presents challenges as firms may not know all of the details of the relationship with the third party or family member or family members may be the suspected abusers. Firms, however, can overcome some of these challenges by implementing proactive disclosure and contractual advance directive measures early in the relationships with clients and updating them as appropriate.

Strategies for Effective Third-Party Notification

Developing strong relationships with investors is one of the most important weapons in detecting diminished capacity and in the fight against financial exploitation. Building strong client relationships and planning for more than the client's financial future in isolation before potential issues arise is critical, and particularly important as it relates to third-party notification and advance directives that memorialize a client's chosen course of conduct when faced later with

Guideline

FIRMS SHOULD BE AWARE OF THE PRIVACY CONCERNS AND IMPLICATIONS OF NOTIFYING THIRD PARTIES AS IT RELATES TO FINANCIAL EXPLOITATION AND DIMINISHED CAPACITY.

[13] Many of the federal privacy law concerns stem from provisions in Title V of the Gramm-Leach-Bliley Act, 15 U.S.C. 6801 et seq., and its implementing regulations such as the SEC's Regulation S-P, 17 C.F.R. § 248.1 et seq.

diminished capacity or financial exploitation. Firms should implement policies and procedures and related training programs that require disclosure, discussion and decisions regarding plans for potential future issues, and develop communication tools that emphasize the importance of future planning. These tools should facilitate discussions to guide the customer toward memorializing advance financial directives and a contingent power of attorney, or other appropriate devices. However, clients can be very resistant to these discussions and, consequently, reluctant to commit to such recommendations. The firm's communication strategies should address this likelihood by developing internal escalation procedures to help further educate customers and clients about the importance of such advanced planning.

Guideline

DEVELOP COMMUNICATION STRATEGIES TO ENGAGE CUSTOMERS AND CLIENTS ON ISSUES RELATED TO ADVANCED PLANNING, INCLUDING THE IMPLEMENTATION OF ADVANCE DIRECTIVES.

One potential strategy reported to be successful by financial professionals is to engage clients and customers on the topic of planning for medical emergencies generally in lieu of a specific discussion focused only on cognitive decline or financial exploitation. This approach could then grow into a discussion of other advance safeguards, with clients more willing to commit to the designation of their "financial agent" or "in case of" contact should the need arise in the future.

Firms should ensure that their employees are familiar with documents such as powers of attorney and advance financial directives, including the features and limitations of each. Policies and procedures should allow clients and customers to utilize customized advance directives or designate trusted contacts and direct what information can be shared and the conditions leading to the sharing. Because these measures are based on client consent, they can be tailored to fit the needs of specific clients and firms. Also, because clients consent to the sharing of such information under certain circumstances, firms that utilize advance directives or trusted contact procedures can minimize many of the privacy concerns discussed previously.

Guideline

DEVELOP POLICIES AND PROCEDURES THAT ALLOW CLIENTS AND CUSTOMERS TO UTILIZE CUSTOMIZED ADVANCE DIRECTIVES OR DESIGNATE TRUSTED CONTACTS AND DIRECT WHAT INFORMATION CAN BE SHARED AND THE CONDITIONS LEADING TO THE SHARING.

It is important, however, that advance directives or other forms of designation be affirmatively discussed and clearly designated, and not be buried in new account forms or privacy policy statements. To assuage concerns about validity, it is critical that customers and clients know why they are designating a contact and for what reason that individual may be contacted. Firms' policies and procedures should also provide clear guidance and processes for reviewing and updating third-party designations on a regular and as needed basis.

Third-Party Notification Under the NASAA Model Act and Other State Laws

The concept of designating trusted contacts is incorporated into the NASAA Model Act. Broker-dealers and investment advisers may only contact previously designated third parties about potential financial exploitation of an eligible adult. The NASAA Model Act's third-party disclosure provision requires the client or customer's consent, while some existing state laws allow for the notification of certain third parties without consent after a report has been made to the proper governmental agencies.[14] Firms should be sure their policies and procedures are designed to ensure compliance with the applicable state and federal law.

Guideline

ENSURE POLICIES AND PROCEDURES RELATED TO THIRD-PARTY NOTIFICATION ARE DESIGNED TO PROMOTE COMPLIANCE WITH FEDERAL AND STATE LAW.

[14] *See, e.g.,* MO. STAT. ANN. § 409.610.

Delaying Disbursements in Situations of Potential Financial Exploitation

Delaying or placing a temporary hold on a disbursement from a client or customer account in an effort to prevent losses from financial exploitation is an important and potentially very effective tool provided to firms in the NASAA Model Act and other existing state laws, and potentially under advance financial directives. Given the potential unintended disruptive consequences of delaying disbursements, however, firms should develop clear and robust policies and procedures designed to effectively utilize these delays and to ensure that such delays comply with the NASAA Model Act and other applicable law, including federal law, any advance directive contractual provisions, and are used only in appropriate circumstances.

Mechanics and Considerations when Delaying a Disbursement

Under the NASAA Model Act and existing state laws, generally, firms are required to complete or to continue a review or investigation after delaying a disbursement. Firms' policies and procedures should describe the procedure, processes, and content of their required internal review before, during, and following the delay of a disbursement. Firms also should develop robust training programs for their employees regarding these reviews and investigations. Such training is an important step in ensuring firms can successfully utilize disbursement delays when appropriate. Similar standards should be applied when the firm relies on a contractual advance directive that provides for a similar delay or hold.

Guideline

DEVELOP POLICIES AND PROCEDURES DESCRIBING THE PROCEDURE, PROCESSES, AND CONTENT OF INTERNAL REVIEWS BEFORE, DURING, AND FOLLOWING A DISBURSEMENT DELAY.

Firms should also have clear procedures and processes to facilitate the notifications required by the NASAA Model Act—notification to account holders and the relevant regulatory agencies—or by other applicable law or contractual advance directive. Because these notifications are often required in order to delay a disbursement, firms should pay particular attention to developing processes for ensuring notification occurs in a timely fashion. For example, firms should clearly designate who is responsible for the notification, whether it be the account's primary representative or someone from the firm's legal or compliance department. Firms also should maintain systems that

facilitate the identification of those authorized to transact business on the account, as each of these people is also required to receive notification of a delayed disbursement under the NASAA Model Act. While no form of notification is specified in existing state laws or the NASAA Model Act, firms' policies and procedures should clearly define the form and contents of these notifications to ensure accurate and consistent notification. Firms also must ensure that such notifications are not sent to the suspected perpetrators of the financial exploitation. This is of particular importance for firms that may develop some type of automated notification system.

Guideline

DEVELOP CLEAR PROCEDURES AND PROCESSES TO FACILITATE THE NOTIFICATIONS REQUIRED WHEN A DISBURSEMENT DELAY IS UTILIZED.

Firms' notification procedures must also provide for clear guidance on which regulators to notify and the time frames for such notification. It is important to note that the state securities regulator and the local APS agency must be notified of a delayed disbursement under the NASAA Model Act, regardless of whether the agencies have already received notice of suspected financial exploitation. Further, the notification to the agencies should contain at least the same information as the notice to the account holders. Following a disbursement delay, firms should maintain open communication with state securities regulators and local APS agencies to report their internal findings, and they should fully cooperate with any concurrent agency investigation or action. This will ensure that the agencies have the information they need to act on any potential exploitation.

Communicating with Investors and Other Important Considerations when Delaying Disbursements

Firms also should develop communication tools to inform their customers and clients of the possibility of a delayed disbursement in situations of potential financial exploitation. As with third-party designations, the possibility of a delay in the disbursement of funds due to reasonably suspected fraud should be communicated clearly and conspicuously to customers and clients and not only appear in the fine print of a customer's account agreement or advisory contract.

Firms should carefully monitor the timing of delayed disbursements to ensure that funds are not withheld longer than is permissible. Firms should also closely monitor the timing of the delay as it relates to their internal investigation, as, under the NASAA Model Act, any delay

beyond 15 business days must be authorized by the state securities regulator or APS agency, and the firm may need to seek court authorization if a delay longer than 25 business days is necessary.

Further, ensuring that a senior investor's funds are not unnecessarily delayed is critically important, as a delayed disbursement can have a significant impact on a senior investor. For example, if funds are delayed, senior investors could fall behind on paying their bills or checks they have written may bounce, which could result in additional fees. Firms should be mindful of these concerns when determining whether or not to delay disbursements and for how long. Firms' policies and procedures should be designed to minimize the time required to complete any required internal review or investigation and make the required notifications and reports. If these actions are completed in a timely manner and the proper authorities are involved, the consequences of a delay can be mitigated.

Guideline

CAREFULLY MONITOR THE TIMING OF DELAYED DISBURSEMENTS TO ENSURE THAT FUNDS ARE NOT WITHHELD LONGER THAN IS PERMISSIBLE.

Access to Records

Combatting financial exploitation involves cooperation among the private sector, regulatory agencies, APS, and law enforcement. With that in mind, and in an effort to strengthen relationships between the securities industry and state APS offices, this Guide contemplates, and NASAA's Model Act requires, that firms provide APS and law enforcement the relevant documents related to suspected financial exploitation. Regardless of whether mandated in state law, firms should develop strong working relationships with their local APS agencies and cooperate in APS investigations that may involve a firm's client or customer.

With the goal of fostering cooperation and better communication, a firm's policies and procedures should include specific guidelines and requirements regarding how to respond to inquiries from APS agencies, securities regulators or law enforcement whether the inquiry is instigated by the filing of a report of suspected financial exploitation or otherwise. Such cooperation will address a major concern raised by APS agencies regarding the reports of financial firms and the firms' the lack of engagement following an initial report: particularly, in the experience of some APS agencies, financial firms report, but fail to respond to follow-ups or requests for additional information in a timely fashion. Given the often urgent nature of financial exploitation, maintaining clear, open communication channels is critical, and firms should develop policies that promote this communication.

Guideline

FIRMS SHOULD DEVELOP STRONG WORKING RELATIONSHIPS WITH THEIR LOCAL APS AGENCIES AND STATE SECURITIES REGULATOR AND COOPERATE IN APS OR OTHER INVESTIGATIONS THAT MAY INVOLVE A FIRM'S CLIENT OR CUSTOMER.

Conclusion

While developing this Guide, NASAA has learned that many firms already have begun to implement successfully many of the suggestions in this Guide. While this is encouraging and formed the basis for many of the suggestions, NASAA hopes that more broker-dealers and investment advisers will think critically about protecting their senior clients from the adverse consequences of financial exploitation and diminished capacity. Implementing robust policies and procedures and training programs that encourage firms to address these issues holistically, and that foster strong relationships amongst industry, state securities regulators, local APS agencies, and law enforcement, will be a significant step toward addressing the serious issues facing seniors and other vulnerable investors.

Regulatory Notice 07-43

Senior Investors

FINRA Reminds Firms of Their Obligations Relating to Senior Investors and Highlights Industry Practices to Serve these Customers

Executive Summary

One of FINRA's priorities is the protection of senior investors, as well as Baby Boomers who are at or approaching retirement.[1] FINRA's efforts in this area include investor education, member education and outreach, examinations and enforcement. The purpose of this *Notice* is to urge firms to review and, where warranted, enhance their policies and procedures for complying with FINRA sales practice rules, as well as other applicable laws, regulations and ethical principles, in light of the special issues that are common to many senior investors. The *Notice* also highlights, for the consideration of FINRA's member firms, a number of practices that some firms have adopted to better serve these customers.

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- Guidance

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- Advertising
- Compliance
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- Legal
- Registered Representatives
- Senior Management

Key Topic(s)

- Baby Boomers
- Communications with the Public
- Designations and Credentials
- Diminished Capacity
- Fraud
- Retirement
- Sales Practices
- Seniors
- Suitability

Referenced Rules & Notices

- NASD IM-2310-3
- NASD Rule 2110
- NASD Rule 2210
- NASD Rule 2310
- NTM 96-86
- NTM 99-35
- NTM 03-71
- NTM 04-30
- NTM 04-89
- NTM 05-26
- NTM 05-59
- NTM 06-38
- NYSE Information Memo 05-54
- NYSE Rule 472

Discussion

The number of Americans who are at or nearing retirement age is growing at an unprecedented pace. The United States population aged 65 years and older is expected to double in size within the next 25 years.[2] By 2030, almost 1 out of every 5 Americans—approximately 72 million people—will be 65 years old or older.[3] Those who are 85 years old and older are now in the fastest-growing segment of the U.S. population.[4] At the same time, Americans are living longer than ever, meaning that retirement assets have to last longer than ever, too. Moreover, fewer and fewer retirees and pre-retirees can rely on traditional corporate pension plans to provide for a meaningful portion of retirement needs. Therefore, the financial decisions made by those who are at or nearing retirement are more important than ever before.

FINRA understands that, as with other investors, levels of wealth, income and financial sophistication vary among older investors. FINRA does not have special rules for senior customers. Firms owe all their customers the same obligations and duties. However, in executing those duties, age and life stage (whether pre-retired, semi-retired or retired) can be important factors, and firms should make sure that the procedures they have in place take these considerations into account where appropriate. Two areas of particular concern to FINRA are the suitability of recommendations to, and communications aimed at, older investors.

Suitability

NASD Rule 2310 requires that in recommending "the purchase, sale or exchange of any security, a member shall have reasonable grounds for believing that the recommendation is suitable" for that customer, based on "the facts, if any, disclosed by such customer as to his other security holdings and as to his financial situation and needs." The rule also requires that, before executing a recommended transaction, a firm must make reasonable efforts to obtain information concerning the customer's financial status, tax status, investment objectives and "such other information used or considered to be reasonable by such member or registered representative in making recommendations to the customer."

Although the rule does not explicitly refer to a customer's age or life stage, both are important factors to consider in performing a suitability analysis. As investors age, their investment time horizons, goals, risk tolerance and tax status may change. Liquidity often takes on added importance. And, depending on their particular circumstances, seniors and retirees may have less tolerance for certain types of risk than other investors. For example, retirees living solely on fixed incomes may be more vulnerable to inflation risk than those who are still in the workforce, depending on the number of years those retirees are likely to rely on fixed incomes. Likewise, investors whose investment time horizons afford less time or opportunity to recover investment losses may be disproportionately affected by market fluctuations.

Therefore, firms cannot adequately assess the suitability of a product or transaction for a particular customer without making reasonable efforts to obtain information about the customer's age, life stage and liquidity needs. Other questions to consider include:

- Is the customer currently employed? If so, how much longer does he or she plan to work?
- What are the customer's primary expenses? For example, does the customer still have a mortgage?
- What are the customer's sources of income? Is the customer living on a fixed income or anticipate doing so in the future?
- How much income does the customer need to meet fixed or anticipated expenses?
- How much has the customer saved for retirement? How are those assets invested?
- How important is the liquidity of income-generating assets to the customer?
- What are the customer's financial and investment goals? For example, how important is generating income, preserving capital or accumulating assets for heirs?
- What health care insurance does the customer have? Will the customer be relying on investment assets for anticipated and unanticipated health costs?

Firms should carefully consider the risk of a product with the age and retirement status of the customer in mind, including its market, inflation and issuer credit risk. Investment involves varying degrees of risk and reward. For many investors who are at or nearing retirement, there can be a temptation to reach for yield to maximize retirement income without the appreciation of the concomitant risk. Moreover, it can be difficult for some investors to fully appreciate the risks of certain products or strategies, particularly if they are concerned about running out of money. Yet, especially when investments involve retirement accounts or lump-sum pension plan payments, taking undue risks with funds needed to last a lifetime can be financially disastrous.

Firms do not have an obligation to shield their customers from risks that customers want to take, but they are required to fully understand the products recommended by their registered representatives, to give their customers a fair and balanced picture of the risks, costs and benefits associated with the products or transactions they recommend and recommend only those products that are suitable in light of the customer's financial goals and needs.[5]

This does not mean that all seniors are, or should be, risk-averse, or that any particular product, per se, is unsuitable for older investors. However, certain products or strategies pose risks that may be unsuitable for many seniors, because of time horizon

considerations, liquidity, volatility or inflation risk. Therefore, FINRA's examiners are focusing on recommendations to seniors, particularly those that involve the following:

- Products that have withdrawal penalties or otherwise lack liquidity, such as deferred variable annuities, equity indexed annuities, some real estate investments and limited partnerships;
- Variable life settlements;
- Complex structured products, such as collateralized debt obligations (CDOs);
- Mortgaging home equity for investment purposes; and
- Using retirement savings, including early withdrawals from IRAs, to invest in high-risk investments.

Many of these have been the subject of separate rulemaking or other guidance from FINRA in the past. For example, FINRA has repeatedly stated that variable annuities are generally considered to be long-term investments and are therefore typically not suitable for investors who have short-term investment horizons. This is true even of some variable annuities that offer riders specifically designed for seniors, including those offering guaranteed life benefits.[6] We also have issued guidance on the suitability of variable life settlements, which are generally aimed at investors over the age of 70;[7] and the use of home equity for investment purposes.[8] FINRA also is concerned about recommendations that investors use retirement savings, in some cases by making early withdrawals from IRAs pursuant to Section 72(t) of the Internal Revenue Code, to make unsuitable alternative investments.[9]

As we have in the past, we also caution firms that a customer's net worth alone is not determinative of whether a particular product is suitable for that investor, even when the investor qualifies as an accredited investor under Regulation D of the Securities Act of 1933. Over-reliance on net worth is particularly problematic where an investor meets the accredited investor standard based largely on home values, which may represent the largest asset of many senior investors.[10] Simply put, eligibility does not equal suitability.[11]

Firms also are reminded that their suitability obligation applies to institutional customers, as well as retail customers, although the scope of that obligation varies depending on whether the institution is able to independently assess the risk associated with a particular recommendation and is in fact exercising independent judgment.[12] FINRA is concerned about the suitability of recommendations to some pension plans, particularly recommendations involving relatively new, complicated or high-risk asset classes, such as leveraged exchange-traded funds (ETFs) or the equity tranches of some collateralized mortgage obligations (CMOs). As NASD IM-2310-3 points out, even institutional customers that have the general capability to assess risk may not be able to understand a particular instrument, particularly a product that is new or that has significantly different risk and volatility characteristics than other investments made by the institution. Therefore, in making recommendations to institutional customers, including pension plans, firms should consider both the general ability of the institution to independently assess investment risk, and whether the customer understands the particular product well enough to exercise that ability with respect to the recommendation.

Communications with the Public

Senior Designations and Credentials

FINRA also is concerned about the proliferation of professional designations, particularly those that suggest an expertise in retirement planning or financial services for seniors, such as “certified senior adviser,” “senior specialist,” “retirement specialist” or “certified financial gerontologist.” The criteria used by organizations that grant professional designations for investment professionals vary greatly. Some designations require formal certification, with procedures that include completion of a detailed and rigorous curriculum focused on financial issues, culminating with one or more examinations, as well as mandatory continuing professional education. On the other end of the spectrum, some designations can be obtained simply by paying membership dues. Nonetheless, seniors may be led to believe that these individuals are particularly qualified to assist them based on such designations. A recent FINRA Investor Education Foundation-sponsored survey found that a quarter of senior investors surveyed were told by an investment professional that the investment professional was specially accredited to advise them on senior financial issues, and a half of those investors were more likely to listen to the professional’s advice because of it.

Firms that allow the use of any title or designation that conveys an expertise in senior investments or retirement planning where such expertise does not exist may violate NASD Rules 2110 and 2210, NYSE Rule 472, and possibly the antifraud provisions of the federal securities laws. In addition, some states prohibit or restrict the use of senior designations.[13]

NASD Rule 2210 and NYSE 472 prohibit firms and registered representatives from making false, exaggerated, unwarranted or misleading statements or claims in communications with the public. This prohibition includes referencing nonexistent or self-conferred degrees or designations or referencing legitimate degrees or designations in a misleading manner. Firms therefore must have adequate supervisory procedures in place to ensure that their registered representatives do not violate this requirement. As with all supervisory procedures, these procedures should be written, clearly communicated to employees, and effectively enforced. And, they should cover how approved designations may be used.

Some firms FINRA surveyed in connection with the preparation of this *Notice* ban the use of any designation that includes the word “senior” or “retirement.” Others maintain a list of approved designations, and a registered representative wishing to use a designation not on the list must submit it for review by a committee consisting of principals, compliance officers and/or legal department personnel. Criteria used by committees to review proposed designations include the curriculum, examinations and continuing education components. To help investors and firms understand professional designations, FINRA maintains a database of such designations and the qualifications, if any, that are needed to obtain them at *http://apps.finra.org/DataDirectory/1/prodesignations.aspx*. Please note, however, that FINRA does not approve or endorse any professional designation, and it maintains the list solely to assist in the evaluation of the listed designations.[14]

In addition to senior designations, FINRA notes that some third-party vendors are marketing ghostwritten books on senior investing to registered representatives as tools to establish credibility. Holding oneself out as the author of a book on senior investing, and therefore an expert, could violate a number of rules, including NASD Rules 2110, 2120 and 2210, and NYSE Rule 472.

High-Pressure Sales Seminars Aimed at Seniors

Another area of concern to FINRA and other regulators is the use of aggressive or misleading sales tactics aimed at seniors, particularly the use of "free lunch" seminars that use high-pressure sales tactics to promote products that may not be suitable for all persons in attendance. Such high-pressure tactics include attempts to create an artificial or inappropriate sense of urgency around major decisions or commitments (*e.g.*, the use of phases such as "limited time offer" or "you have to sign up today") or that heighten or exaggerate typical fears of older investors (*e.g.*, the return of double-digit inflation or becoming financially dependent on family members). In response to these concerns, in May 2006, FINRA conducted a series of on-site examinations of broker-dealers that offer so-called "free lunch" sales seminars aimed at seniors. Other regulators simultaneously conducted similar examinations of investment advisers and other firms that offer such seminars.

In the course of the coordinated examinations, regulators found troubling sales practices, including the use of false or misleading sales materials used in connection with high-pressure sales seminars aimed exclusively or primarily at seniors or those at or nearing retirement. Among the most common practices were inaccurate or exaggerated claims regarding the safety, liquidity or expected returns of the investment or strategy being touted; scare tactics; misrepresentations or material omissions about the product or strategy; conflicts of interest; or misleading credentials used by persons sponsoring or participating in the seminar. The examinations also detected instances in which advertisements failed to include the firm's name, or made improper use of testimonials, in violation of NASD Rule 2210(d). The full discussion of the regulators' findings is presented in *Protecting Senior Investors: Report of Examinations of Securities Firms Providing "Free Lunch" Sales Seminars* (Report), available at *www.finra.org/reports.*

FINRA will continue to follow up on the examination findings that relate to its members and will bring disciplinary actions where warranted. We also will continue to pay particular attention to the conduct of firms and their registered representatives in connection with sales seminars that are aimed primarily at seniors. We therefore urge firms to review their policies and procedures relating to sales seminars to make sure they are adequate. In doing so, firms should consult Appendix A of the Report, which contains detailed best practices for supervising sales seminar activities. These practices were identified by regulators in the course of the examinations as elements of effective supervisory procedures.

Diminished Capacity and Suspected Financial Abuse of Seniors

In addition to the regulatory concerns discussed above, there are other issues that firms sometimes encounter when dealing with senior investors. One of the most troubling to the firms we surveyed is that of investors who exhibit signs of diminished mental capacity. Unfortunately, this difficult and sensitive issue is likely to become more common as the ranks of older seniors grow: a recent study published by the National Institute on Aging reveals that impaired cognition affects approximately 20 percent of people aged 85 years or older.

Another troubling issue is suspected financial—and sometimes mental or physical—abuse of senior customers by their family members or caregivers. Financial abuse is difficult to define, and therefore, difficult to recognize. In general terms, it is the misuse of an older adult's money or belongings by a relative or a person in a position of trust. Red flags can include sudden, atypical or unexplained withdrawals; drastic shifts in investment style; inability to contact the senior customer; signs of intimidation or reluctance to speak in the presence of a caregiver; and isolation from friends and family.

These sensitive issues were raised repeatedly by the firms we surveyed for this *Notice*, and we include in this *Notice*, for the consideration of other FINRA members, some of the steps that firms, as a matter of sound business practice and as a way of serving their senior customers, are taking to address them. In doing so, we are not suggesting that firms are required to take these steps, including developing special written supervisory procedures for servicing senior customers. Firms and clients differ, and policies and procedures that work well for one firm may not be appropriate for another. The steps include:

- Designating a specific individual or department, such as the compliance or legal department, to serve as a central advisory contact for questions about senior issues, as well as a repository of available resources.
- Providing written guidance to employees on senior-related issues, such as how to identify and/or what to do if they suspect their customer is experiencing diminished capacity or is being abused, financially or otherwise, by a family member, caregiver or other third party.

  For example, one firm FINRA surveyed has very detailed procedures requiring its employees to immediately notify their branch manager, supervisor or another designated firm employee if they suspect abuse. Under the firm's procedures, that person in turn must notify the firm's legal department, which may decide to report the suspected abuse to the appropriate state agency; restrict activity in the account and/or take any action necessary to comply with appropriate court orders. In addition, the firm requires that the contact with the legal department be documented in the customer's file in accordance with the firm's record retention schedule. The supervisor or branch manager also is instructed to contact local emergency services if immediate physical abuse of a senior investor is suspected.
- Asking, either at account opening or at a later point, whether the customer has executed a durable power of attorney. (Some firms report that it is easier to have conversations with their customers about such sensitive issues as a matter of routine.)

- Asking, either at account opening or at a later time, whether the customer would like to designate a secondary or emergency contact for the account whom the firm could contact if it could not contact the customer or had concerns about the customer's whereabouts or health. (To avoid violating Regulation S-P, firms would have to clearly disclose to the customer the conditions under which the information would be used, and the customer would have the right to withdraw consent at any time.)
- Asking the customer if he or she would like to invite a friend or family member to accompany the customer to appointments at the firm.
- Informing the customer (where appropriate) that, in the firm's view, a particular unsolicited trade is not suitable for the customer.
- Reminding registered representatives that it is important when dealing with customers, particularly seniors, to base recommendations on current information.
- Offering training to help registered representatives understand and meet the needs of older investors, including proper asset allocation, liquidity demand and longevity needs, as well as the possible changes in their suitability profiles. Some relevant materials are available at *www.finra.org* and *www.saveandinvest.org*. Further, some firms have invited representatives from senior-related advocacy groups, the Alzheimer's Association, and state and local agencies that serve seniors to speak to their employees. Organizations that can help firms locate local experts on senior issues include the National Association of State Units on Aging (*www.nasua.org*), the National Association of Area Agencies on Aging (*www.n4a.org*) and AARP (*www.aarp.org*).

Investor Education

Finally, we urge firms to be proactive in helping to educate customers about how to avoid being victims of financial fraud, including making investor education materials, prepared by FINRA, the SEC, state regulators, the firm or another source, available to senior investors.[15] Registered representatives are often in a unique position to help customers learn about how to avoid fraudulent solicitations. We encourage our member firms and associated persons to talk with all of their customers, particularly seniors and others at high risk of being targeted, about how to spot scams and protect themselves and their families from financial fraud.[16]

Conclusion

Given the unprecedented number of investors who are at or nearing retirement age, protecting older investors is a priority for FINRA, and we urge firms to make it a priority, as well. We recognize that seniors are not all alike, and we stress that all investors are entitled to honesty and integrity from their broker-dealers. We remind firms to make sure that the policies and procedures that they do have, as well as relevant training materials, adequately take into account the special needs and concerns that are common to many investors as they age.

Endnotes

1 For ease of reference, this *Notice* refers to both categories as seniors unless the context requires a more specific reference.

2 *See* Wan He *et al*., U.S. Census Bureau, Current Population Reports, P23-209, *65+ in the United States: 2005,* U.S. Government Printing Office, Washington, D.C. (2005), available at *www.census.gov/prod/2006pubs/p23-209.pdf*.

3 *Id.*

4 *See* Wan He *et al*., U.S. Census Bureau, Current Population Reports, P23-209, *65+ in the United States: 2005,* U.S. Government Printing Office, Washington, D.C. (2005), available at *www.census.gov/prod/2006pubs/p23-209.pdf. See also* Frank B. Hobbs, U.S. Census Bureau, The Elderly Population, U.S. Government Printing Office, Washington, D.C. (2001), available at *www.census.gov/population/ www/pop-profile/elderpop.html*.

5 A broker must refrain from making an unsuitable recommendation even if the customer expressed an interest in engaging in the inappropriate trade or asked the broker to make the recommendation. *See, e.g., Dane S. Faber,* Exchange Act Release No. 49216, 2004 SEC LEXIS 277, at *23-24 (Feb. 10, 2004).

6 *See* NASD *Notice to Members (NTM) 96-86* (December 1996) and *NTM 99-35* (May 1999). In *NTM 99-35* and in NYSE *Information Memo 05-54* (August 11, 2005), we outlined a series of "best practices" and critical criteria relating to sales of variable annuities. While some members have voluntarily adopted many of those practices, others have not. Because some firms continue to engage in problematic sales practices in this area, and some investors continue to be confused by certain features of these products, we have adopted a rule (Rule 2821) that establishes suitability, disclosure, principal review, and supervisory and training requirements, all tailored specifically to transactions in deferred variable annuities. *See* Exchange Act Release No. 56375 (Sept. 7, 2007) (SR-NASD-2004-183). *See also www.finra.org/ RulesRegulation/RuleFilings/2004RuleFilings/ P012781.*

7 *See NTM 06-38* (August 2006).

8 *See NTM 04-89* (December 2004). Other relevant *Notices* include *NTM 03-71* (November 2003) (relating to non-conventional instruments); *NTM 04-30* (April 2004) (relating to bonds and bond funds); *NTM 05-26* (April 2005) (relating to vetting new products); and *NTM 05-59* (September 2005) (relating to structured products).

9 IRS Section 72(t) permits penalty-free withdrawals from IRAs before the age of 59½ pursuant to a series of substantially equal periodic payments. Some registered representatives tout Section 72(t) as a "loophole" that allows investors to retire early by withdrawing assets and investing them in products or strategies that offer higher rates of return. In some cases, the registered representative may promise that the investments will generate returns high enough to allow the investor to maintain a standard of living that is equal to or even higher than they did while working. However, the promised rate of return may be unrealistically high, and investors may not fully appreciate the potential downside to such strategies, including the potential loss of their home, or the depletion of their retirement assets.

10 On December 27, 2006, the SEC published for comment proposed changes to Regulation D that would establish a new "accredited natural person" requirement for investments in "private investment vehicles." The new standard would exclude the equity in a primary residence from the calculation of an accredited natural person's investment assets. The Commission has not yet adopted the proposal. *See* Securities Act Release No. 8766 (December 27, 2006) (SEC File No. S7-25-06).

11 *See* Securities Act Release No. 8766 (December 27, 2006) (SEC File No. S7-25-06). *See also* Securities Act Release No. 8828 (August 3, 2007) (SEC File No. S7-18-07).

Endnotes (cont'd)

12 *See* NASD IM-2310-3, which outlines certain factors that may be relevant when considering compliance with Rule 2310(a) in connection with recommendations to institutional customers. Two important considerations in determining the scope of a firm's suitability obligations to institutional customers are the customer's ability to evaluate investment risk independently, and the extent to which the customer is exercising that ability in connection with the recommendation.

13 For example, Nebraska prohibits the use of senior designations, while Massachusetts permits the use of designations only if they have been approved by an independent accreditation agency. *See Interpretative Opinion No. 26: Use of Certifications and Designations in Advertising by Investment Adviser Representatives and Broker-Dealer Agents,* Special Notice of the Nebraska Department of Banking and Finance (November 13, 2006), available at *www.ndbf.org/forms/bd-ia-special-notice.pdf.* The Massachusetts regulations became effective June 1, 2007. *See* 950 Mass. Code Regs. 12.204(2)(i) (2007) (*Registration of Broker-Dealer, Agents, Investment Adviser, Investment Adviser Representatives and Notice Filing Procedures*), and the Notice of Final Regulations, available at *www.sec.state.ma.us/sct/sctpropreg/propreg.htm.* Further, as of the date of this *Notice*, the North American Securities Administrators Association, Inc. (NASAA) is developing a model rule that would "mak[e] it a separate violation of law to use a designation or certification to mislead investors. Once the model rule has been released for public comment and ultimately approved by the NASAA membership, [NASAA] will urge its adoption in every jurisdiction." Testimony of Joseph P. Borg, Director, Alabama Securities Commission and NASAA President, Before the Special Committee on Aging, United States Senate (September 5, 2007).

14 Firms that are aware of designations that are not included in FINRA's database are invited to provide us with the relevant information so that we may include them.

15 For relevant materials, visit the FINRA Investor Education Foundation's Web site, *www.saveandinvest.org.*

Endnotes (cont'd)

16 To better understand why older investors fall prey to investment fraud, the FINRA Investor Education Foundation funded researchers that analyzed undercover tapes of fraud pitches and surveyed victims and non-victims to determine how they differ. Some of the key research findings include:

- Investment fraud victims are more financially literate than non-victims;
- Investment fraud criminals use a wide array of different influence tactics—from friendship to fear and intimidation tactics—to defraud the victim;
- Fraud pitches are tailored to match the psychological needs of the victim;
- Investment fraud victims are more likely to listen to sales pitches;
- Investment fraud victims are more likely to rely on their own experience and knowledge when making investment decisions;
- Investment fraud victims experience more difficulties from negative life events than non-victims;
- Investment fraud victims are more optimistic about the future; and
- Investment fraud victims dramatically under-report fraud.

See Off the Hook Again: Understanding Why the Elderly Are Victimized by Economic Fraud Crimes, survey results and analysis prepared for WISE Senior Services by The Consumer Fraud Research Group (2006), available at *www.finrafoundation.org/WISE_Investor_Fraud_Study_Final_Report.pdf.*

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NATIONAL SENIOR INVESTOR INITIATIVE

A Coordinated Series of Examinations

The SEC's Office of Compliance Inspections and Examinations and FINRA

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Executive Summary

One of the primary missions of the Securities and Exchange Commission ("SEC") and the Financial Industry Regulatory Authority ("FINRA") is the protection of investors, of which senior investors are an important and growing subset. As part of a collaborative effort, staff of the SEC's Office of Compliance Inspections and Examinations ("OCIE")[1] and FINRA (collectively, the "staff") conducted 44 examinations of broker-dealers in 2013 that focused on how firms conduct business with senior investors as they prepare for and enter into retirement. These examinations focused on investors aged 65 years old or older; this report refers to these investors as "senior investors."

This report highlights recent industry trends that have impacted the investment landscape and prior regulatory initiatives that have concentrated on senior investors and industry practices related to senior investors. Additionally, the report discusses key observations and practices identified during the recent series of examinations. These examinations focused on a broad range of topics, including the types of securities being 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, suitability of securities sold to senior investors, disclosures provided to senior investors, complaints filed by senior investors and the ways firms tracked those complaints, and supervision of registered representatives as they interact with senior investors. OCIE and FINRA staff are providing this information to broker-dealers to facilitate a thoughtful analysis with regard to their existing policies and procedures related to senior investors and senior-related topics and whether these policies and procedures need to be further developed or refined.

Questions concerning this report may be directed to:

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- Leonard Derus, Associate Director, Regulatory Programs, FINRA.

Background on the Senior Investor Initiative

Introduction

The "Baby Boomers," those born between 1946 and 1964, began turning 65 in 2011. According to the most recent U.S. Census Bureau data, over 41 million people living in the United States, or more than 13% of the population, were 65 or older in 2011.[2] Moreover, the number of seniors living in the United States will increase dramatically in the future. For example, the number of people aged 65 or older is projected to be more than 79 million in 2040, which is over twice as many as in the year 2000.[3]

Over the past quarter century, this demographic has made dramatic economic gains. Housing has been a key driver of this wealth trend as well as strong market performance during that time period.[4] The Dow Jones Industrial Average increased from 2,031 points on May 31, 1988 to 16,717 points on May 30, 2014, a gain of nearly 723%.[5] As the Baby Boomers have begun to retire, they have started to draw from Social Security, savings, retirement accounts, and established home equity. Similar to previous generations, they typically purchase conservative income-producing investments as a source of reliable income streams during retirement.

From 2007 to 2010, however, the U.S. economy experienced its most substantial downturn since the Great Depression.[6] In response, the Federal Reserve Board took extraordinary steps to help stabilize the U.S. economy and financial system, which included reducing interest rate levels. One result of this economic downturn and the subsequent dramatic fall in interest rates was the significant corresponding decrease in the rate of return on liquid deposits (savings accounts), time deposits (certificates of deposit or "CDs"), and bonds (treasury and municipal). As a result, many senior investors have seen a significant reduction in the income streams on which they traditionally have depended during retirement.

The combination of high levels of wealth and downward yield pressure on conservative income-producing investments may create an environment conducive to the recommendation of more complex, and possibly unsuitable, securities to senior investors as a means of replacing that income stream. Staff is concerned that, after a lifetime of accumulated savings, senior investors may meet the financial and risk threshold requirements to invest in more complex financial securities and that broker-dealers may be recommending unsuitable transactions to these senior investors or may not be providing proper and understandable disclosures regarding the terms and related risks of those recommended securities, particularly non-traditional investments.

Prior Regulatory Initiatives

In September 2007, OCIE and the North American Securities Administrators Association ("NASAA") worked together with the National Association of Securities Dealers ("NASD") and the New York Stock Exchange Member Regulation Inc. (now combined as FINRA) on a

collaborative initiative that included three components: active investor education and outreach to seniors and those nearing retirement age, targeted examinations to detect abusive sales tactics aimed at seniors, and aggressive enforcement of securities laws in cases of fraud against seniors.[7]

As a follow-up to the 2007 report, OCIE, FINRA, and NASAA collectively published a report in September of 2008[8] outlining practices that financial services firms can use to strengthen their policies and procedures for serving investors as they approach and enter retirement. The 2008 report describes new processes and procedures aimed at addressing common issues associated with interactions with senior investors that were implemented by some firms.

In August 2010, OCIE, FINRA, and NASAA published an addendum[9] to update the 2008 report on business practices regarding senior investors. The addendum includes feedback from firms that participated in the prior review and additional practices they may have implemented. The addendum focuses on specific, concrete steps that firms were taking or practices they had implemented since the prior review to identify and respond to issues that are common in working with senior investors. The addendum also includes other practices that staff identified in various industry publications. In addition, the addendum encourages financial services firms to strengthen their policies and procedures for serving senior investors as these investors approach and enter retirement.

Regulatory Guidance

In November 2011, FINRA issued Regulatory Notice 11-52,[10] which addresses the use of certifications and designations that imply expertise or specialty in advising senior investors ("senior designations"). Notice 11-52 outlines findings from a survey of firms that focused on the prevalence of senior designation usage, the extent to which particular senior designations were used or prohibited, and the supervisory systems in place regarding senior designations.

In September 2013, the SEC's Office of Investor Education and Advocacy and NASAA published an Investor Bulletin entitled "Making Sense of Financial Professional Titles."[11] The purpose was to help investors better understand the titles used by financial professionals, such as by noting that the requirements for obtaining and using certain titles vary widely. The Bulletin also warns investors against relying exclusively on a title in determining the expertise of any financial professional. It also encourages investors to evaluate the qualifications of a title held by a financial professional they are considering employing; provides a web-based resource for investors to research a financial professional's title; and stresses that neither the SEC nor state regulators grant, approve, or endorse any financial professional designations.

Also in 2013, eight government agencies issued joint guidance to financial institutions regarding reporting suspected financial exploitation of older adults.[12] This guidance discusses the obligations of firms relating to privacy protections for their investors and the variety of exceptions in cases of suspected financial abuse. In addition, the guidance enumerates possible signs of financial exploitation in older adults that might trigger the filing of a suspicious activity report ("SAR"). A SAR is a document that financial institutions must file with the Financial

Crimes Enforcement Network following, among other things, a suspected incident of money laundering or fraud.[13]

OCIE/FINRA National Senior Investor Initiative

Building on prior regulatory initiatives, OCIE's National Examination Program staff, in coordination with FINRA, initiated a series of 44 examinations of broker-dealers focused on the types of securities senior investors were purchasing and the methods firms were using when recommending securities. In an environment where traditional savings accounts and more conservative investments were earning historically low yields, OCIE and FINRA staff assessed whether broker-dealers were recommending riskier and possibly unsuitable securities to senior investors looking for higher returns or that such senior investors may be making financial decisions without fully appreciating the risks associated with those recommendations.

In connection with the examinations, staff met with representatives from the Consumer Financial Protection Bureau; the AARP Education and Outreach Group; and state regulators from Florida, Colorado, California, Texas, and North Carolina. The purpose of these discussions was to identify risks to senior investors that the industry groups and government agencies had observed, especially in geographic areas known to have large numbers of retirees. The majority of these groups expressed serious concerns about the unsuitable recommendation of high-risk securities, particularly the sale of complex investments, to senior investors.

This initiative was designed as a coordinated effort to protect senior investors, and staff worked collaboratively to ensure that the series of examinations conducted had common goals. Staff used a risk-based approach to identify examination candidates that conducted a retail business and that varied in business model and size. Some factors considered included the types of securities sold, the number of registered individuals, the number of associated independent contractors, and the number of branch offices. Staff also reviewed and considered other factors, such as previous sales practice and supervisory deficiencies, firm and registered individuals' disclosures, and customer complaints. Furthermore, staff received recommendations from SEC regional offices and FINRA district offices as these offices are familiar with the activities of the firms located in their geographic regions. In this initiative, staff reviewed how firms were marketing themselves to seniors; what information they were collecting from seniors relating to financial condition, risk tolerance, and investment objectives; what disclosures firms were providing to seniors; whether recommendations of securities were suitable for seniors; and how the firms were supervising their representatives when dealing with seniors. The examinations also reviewed how firms were training their representatives and supervisors on issues related to aging, such as diminished capacity and elder financial abuse.

In 2015, OCIE and FINRA examination staff will continue to review matters of importance to senior investors.[14]

Securities Purchased by Senior Investors

Examination Observations

The different types of securities being purchased by senior investors in the low interest rate environment present during the review period provide insight into how these investors are attempting to meet their financial goals and evolving needs. Staff asked firms to provide a list of the top revenue-generating securities purchased by their senior investors by dollar amount. The securities consisted of mutual funds, deferred variable annuities ("variable annuities"), equities, fixed income investments, and unit investment trusts ("UITs")/exchange-traded funds ("ETFs"). The examinations revealed that some senior investors purchased other securities such as non-traded real estate investment trusts ("REITs"), alternative investments, and structured products.

Staff observed that the following were among the top five revenue-generating securities at the examined firms based on sales to senior investors:

(1) Open-end mutual funds at 77% of the firms;

(2) Variable annuities at 68% of the firms;

(3) Equities at 66% of the firms;

(4) Fixed income investments at 25% of the firms;

(5) UITs and ETFs at 20% of the firms;

(6) Non-traded REITs at almost 20% of the firms;

(7) Alternative investments such as options, BDCs, and leveraged inverse ETFs at approximately 15% of the firms; and

(8) Structured products at 11% of the firms.

A description of the securities listed above, and potential benefits and risks related to these securities, is included in Appendix B.

Conclusion

Mutual funds, variable annuities, and equities were most often purchased by senior investors. More complex securities such as UITs, REITs, alternative investments, and structured products were also purchased by seniors, but such purchases were less frequent. Due to the wide-ranging

nature of these investment products, it is critical that senior investors are fully informed of the features of any security they are purchasing, including the potential return and associated risks.

Training

Discussion of Relevant Rules

Training is an important tool for firms to help ensure that their representatives understand the needs of senior investors. FINRA Rule 1250(b) requires all broker-dealers to provide continuing education for their representatives, and their training plans must be appropriate for all business activities associated with the firm. This rule requires training programs, at a minimum, to cover the following with respect to their securities recommendations, services, and strategies: general investment features and associated risk factors, suitability and sales practice concerns, and applicable regulatory requirements. There is no requirement that a firm's training address issues specific to senior investors.

Examination Observations

More than 77% of the firms incorporated training specific to senior investors and senior issues in their training plans, typically on an annual basis, to educate employees on the needs of this unique investor group. The training addressed topics such as:

- Ensuring that clients, specifically seniors, were fully informed of the risks involved with each product. For example, one firm trained its representatives on its requirements to evaluate the client's understanding of the recommended product and to confirm completeness of all mandatory acknowledgment forms and disclosures.

- How investment needs change as investors age. For example, one firm's training emphasized that not all products were suitable for the same type of investors. Another firm instructed representatives that they must consider various factors when making recommendations to senior investors, such as current employment, primary expenses, sources of income, fixed or anticipated expenses, liquidity, and investment goals.

- Escalation steps in the event that a representative notices signs of diminished capacity or elder financial abuse. Approximately 13% of the firms specifically told their representatives to notify compliance or supervisory personnel if they suspected diminished capacity or elder financial abuse. For example, training material instructed representatives to contact compliance with a problematic or suspicious situation and to document meetings, conversations, or other exchanges with relatives and others about the situation if the representative had noticed signs of diminished capacity. One firm provided a training module focused on reporting suspected senior financial abuse. The module, among other things, encouraged the firm's representatives to ask questions, confirm who had authorization on the account, contact the at-risk senior (separately from the suspected abuser), and escalate the matter to the appropriate supervisor. Some tips or

red flags which would trigger escalation included atypical or unexplained withdrawals, drastic shifts in investment style, and changes in beneficiaries listed in the IRA.

In addition, 64% of firms reported conducting general training classes and/or classes to educate firm representatives on sensitive matters relating to senior investors. For example, one firm provided a mandatory training class for all representatives focused on elder financial abuse and the exploitation of older adults as well as a new-hire training course on the recognition of senior financial abuse. This training described warning signs that may indicate possible elder financial abuse such as sudden changes in investment approach; changes in behavior of a senior client, which could stem from fear of a family member or guardian; problems reaching the senior in question; or a new family member or contact suddenly attempting to make transactions in the senior client's account without proper authorization. The training also detailed the representative's responsibilities related to those warning signs, in addition to reporting suspicious activity to management and attempting to converse with the elder investor outside the presence of the person influencing or acting on behalf of the elder investor.

Conclusion

FINRA Rule 1250(b) requires firms to have a training plan that is appropriate for all business activities. Senior investors represent a large percentage of the investing population, and training employees on sensitive senior matters is an important step in detecting elder financial abuse, detecting potential diminished capacity, and understanding the needs of senior investors. Staff found that most firms incorporate training specific to senior issues into their training plans.

Notable Practices: Training

- Requiring a series of mandatory continuing education training courses over a 12-month period. Some of the courses cover the stages of mental capacity (full or diminished) and solutions to handling an investor's potential diminished mental capacity (e.g., helping senior investors understand steps they will need to take to handle financial responsibilities, such as execution of a durable power of attorney; suggesting that a family member or third party attend meetings to protect the client's interests; escalating concerns with state agencies and regulators; and documenting all interactions).

- Training supervisory staff to assist personnel in handling an investor's potential diminished capacity and elder financial abuse concerns.

Use of Senior Designations

Discussion of Relevant Rules

Firms may allow their representatives to use senior-specific certifications and professional designations to imply expertise, certification, training, or specialty in advising senior investors.[15] The SEC and FINRA, consistent with other federal agencies, state securities regulators, and self-regulatory organizations ("SROs") do not grant, approve, or endorse any professional designation. FINRA's rule on supervision in effect at the time of the examinations (NASD Rule 3010)[16] required each firm to establish and maintain a system to supervise the activities of each registered person, including their use of designations. This rule was intended to safeguard against the use of designations by firm representatives to deceive investors or to act in an unscrupulous manner. FINRA Regulatory Notice 11-52 reminds firms of their supervisory responsibilities concerning the use of senior designations that suggest expertise, certification, training, or specialty in advising senior investors. Notice 11-52 also highlights sound practices while encouraging firms to bolster their own supervisory procedures.[17]

Examination Observations

State regulators, among others, have identified the use of senior designations in marketing and communications with the public as a possible risk to investors.[18] Firms and their representatives may use these designations to imply expertise or credentials that may be inaccurate or misleading. Some senior designations have requirements including training classes, testing requirements, continuing education, and recognition from an accredited institution. Other designations are less stringent, and some do not have any requirements. The meaning of what these designations entail or the experience they represent can be confusing to any investor who relies on financial professionals to assist them with their financial issues.

Almost 64% of the examined firms allowed their representatives to use senior designations in their sales efforts, and these firms collectively permitted the use of 25 different senior designations. The designations used entailed a wide range of qualifications, some of which included an approved curriculum, continuing education requirement, and recognition by an organization that is accredited by another institution. Some firms prohibited the use of senior designations that did not meet certain minimum curriculum and continuing education requirements. For example:

- 64% of the designations that firms allowed representatives to use required continuing education for the financial professional to maintain the title.

- 44% of the allowed designations were not recognized by any independent accrediting organization.

- Almost 30% of the firms prohibited titles or designations if the corresponding curriculum and continuing education requirement did not meet certain specified standards.

Of the 28 firms that allowed senior designations, 14% did not track which representatives had a senior designation, which may violate FINRA's rule on communications with the public (FINRA Rule 2210) and FINRA's rule on supervision in effect at the time of the examinations (NASD Rule 3010). As noted above, these rules require firms to know how their representatives hold themselves out to the public.

Conclusion

Senior designations have varying requirements, some more rigorous than others. For example, certain designations carry specific qualification requirements, while others have none. As a result, some of these designations may be misleading to the investing public. It is important that all investors not rely solely on a title to determine whether a financial professional has the appropriate expertise. In addition, the use of senior designations should be properly supervised. It may be prudent for firms that allow senior designations to adopt policies to safeguard against possible misuse of those senior designations.

Notable Practices: Senior Designations

- Requiring senior designations to have a verified curriculum, a continuing education element, and accreditation from a recognized independent institution.
- Requiring supervisory approval prior to the use of senior designations.
- Prohibiting the use of senior designations.

Marketing and Communications

Discussion of Relevant Rules

FINRA Rule 2210 includes requirements for a firm's communications with the public, including retail communications. Rule 2210(a)(5) defines retail communications to include any written (including electronic) communication that is distributed or made available to more than 25 retail investors within any 30 calendar-day period. Rule 2210(b)(1)(A) requires an appropriately registered principal to approve most retail communications before the earlier of its use or filing with FINRA's Advertising Regulation Department.[19] In addition, Rule 2210(c) requires broker-dealers to file certain retail communications with FINRA's Advertising Regulation Department. For example, with certain exceptions, broker-dealers must submit all retail communications concerning registered investment companies within ten business days of first use.

Rule 2210(d)(1) addresses the content standards of firms' communications with the public, which include the following:

- All member communications must be based on principles of fair dealing and good faith, must be fair and balanced, and must provide a sound basis for evaluating the facts in regard to any particular security or type of security, industry, or service. No member may omit any material fact or qualification if the omission, in light of the context of the material presented, would cause the communications to be misleading.

- No member may make any false, exaggerated, unwarranted, promissory, or misleading statement or claim in any communication. No member may publish, circulate, or distribute any communication that the member knows or has reason to know contains any untrue statement of a material fact or is otherwise false or misleading.

- Information may be placed in a legend or footnote only in the event that such placement would not inhibit an investor's understanding of the communication.

- Members must ensure that statements are clear and not misleading within the context in which they are made, and that they provide balanced treatment of risks and potential benefits. Communications must be consistent with the risks of fluctuating prices and the uncertainty of dividends, rates of return, and yield inherent to investments.

- Members must consider the nature of the audience to which the communication will be directed and must provide details and explanations appropriate to the audience.

- Communications may not predict or project performance, imply that past performance will recur or make any exaggerated or unwarranted claim, opinion, or forecast.

Rule 2210(f) includes requirements for public appearances. Rule 2210(f)(1) states that the content standards in Rule 2210(d)(1) also apply to public appearances by persons associated with broker-dealers. These public appearances include sponsoring or participating in a seminar, forum, radio, or television interview or otherwise engaging in public appearances or speaking activities that are unscripted and do not constitute retail communications, institutional communications, or correspondence. If an associated person recommends a security during a public appearance, Rule 2210(f)(2) requires the associated person to have a reasonable basis for the recommendation and to disclose certain conflicts of interest. In addition, Rule 2210(f)(3) requires firms to establish written policies and procedures that are appropriate to their business, size, structure, and customers to supervise their associated persons' public appearances. These procedures must provide for the education and training of associated persons who make public appearances as to the firm's procedures, documentation of such education and training, and surveillance and follow-up to ensure that such procedures are implemented and followed. Rule 2210(f)(4) clarifies that scripts, slides, handouts, or other written (including electronic) materials used in connection with public appearances are considered communications for the purposes of Rule 2210, and members must comply with all applicable provisions based on the communications' audience, content, and use (e.g., approval requirements for retail communications and content standards). Unscripted public appearances at a seminar are not subject to the principal pre-use approval requirements of Rule 2210(b)(1)(A).

Rule 17a-4(b)(4) under the Securities Exchange Act of 1934 ("Exchange Act") requires broker-dealers to preserve all of their communications with the public which are subject to FINRA rules. The records must be preserved for a period of not less than three years, the first two years in an easily accessible place.

Examination Observations

Staff reviewed marketing and advertising materials used by the examined firms and observed that the firms and their representatives used diverse approaches to promote services and securities to senior investors. A very small number of firms sent retail communications to senior investors specifically because of their age. Retirement planning was a dominant theme of retail communications focused on attracting senior investors. Other senior-related themes included long-term care insurance, wealth preservation, and wealth transfer. Firms promoted these themes through various channels such as brochures, print and electronic advertisement, newspaper columns, radio and television commercials, and seminars. Retirement seminars were a popular forum for soliciting potential investors, including senior investors.

With regard to radio, at least two firms permitted their representatives to host shows to broadly market the services they provide to investors, often discussing themes that may be appealing to senior investors such as retirement. Staff identified potential rule violations such as misleading advertisements and the failure to properly supervise the content of radio shows.

With regard to seminars, approximately half of the firms permitted representatives to host educational seminars covering a wide variety of investment topics, and at least five firms prohibited representatives from hosting seminars. Many seminars appeared designed to target senior investors, as well as middle-aged investors and investors approaching retirement. For example, some seminars focused on investors who were still working but were transitioning from the accumulation of wealth stage to retirement. Others were designed to discuss possible strategies regarding long-term retirement planning techniques that consider changes to income and when to start drawing from annuities, Social Security, pensions, and other defined benefit plan income.

Of the firms that permitted seminars and other forms of public appearances, staff observed that the firms generally had written supervisory procedures specifically covering this area. The specifics of written supervisory procedures differed among firms. For example:

- Some firms required a designated supervisor to review and pre-approve all materials related to the proposed seminar.

- Some firms stated that invitations to seminars could not imply that products would be sold during the seminar. Further, these firms required supervisors, or appropriate designees, to attend seminars periodically to ensure compliance with all regulatory and firm requirements.

- At least two firms established documentation standards for seminars. For example, some of the procedures required that representatives maintain documentation on the date(s) of the seminar, the title of the seminar, the seminar content, name(s) of firm representative hosting the seminar, the date the material for the seminar was submitted for approval, and the date the supervisor approved the seminar.

- Other firms required representatives to distribute evaluation forms to attendees to solicit feedback. Supervisors were then required to review these forms to help identify any issues of regulatory concern that may violate firm policies or the content requirements of FINRA Rule 2210.

Staff observed instances at two firms where the firm or its registered persons appeared to fail to comply with provisions that were set forth in the firm's written supervisory procedures. For example, deficiencies included the failure to obtain supervisory approval for materials used during seminars and, separately, the failure to maintain evidence of approval of seminar materials in contravention of firm written supervisory procedures that required such approval.

Conclusion

Retirement planning is often a dominant theme in retail communications that firms use to attract senior investors. Long-term care insurance, wealth preservation, and wealth transfer also are

common senior investor-related themes. These communications take a variety of forms including brochures, print and electronic advertisement, newspaper columns, radio and television commercials, and seminars. Firms appeared to generally comply with content standards and rules requiring firms to have written policies and procedures, although staff noted a few instances of potentially misleading advertisements and the potential failure to properly supervise the content of radio shows as well as the potential failure to comply with a firm's written supervisory procedures for seminar materials.

Notable Practices: Marketing and Communications

- Having written supervisory procedures that require supervisory approval to participate in unscripted seminars and other forms of public appearances that are not subject to the principal pre-use approval requirements of FINRA Rule 2210(b)(1)(A).

- Distributing evaluation forms to seminar attendees to solicit feedback which are then reviewed by a supervisor to identify any issues of concern that may violate firm policies or the content requirements of FINRA Rule 2210(d)(1).

Account Documentation

Discussion of Relevant Rules

Both the SEC and FINRA have rules regarding the minimum information that firms must obtain and maintain for each customer account. Exchange Act Rule 17a-3(a)(17)(i)(A) requires broker-dealers to make and keep current a record for each customer account that includes the customer's name, tax identification number, address, telephone number, date of birth, employment status (including occupation and whether the customer is an associated person of a member, broker or dealer), annual income, net worth (excluding value of primary residence), and the account's investment objectives. In the case of a joint account, the account record must include personal information for each joint owner who is a natural person; however, financial information for the individual joint owners may be combined. The account record must indicate whether it has been signed by the associated person responsible for the account, if any, and approved or accepted by a principal of the member, broker or dealer. Rule 17a-3(a)(17)(i)(B) requires firms to furnish each customer with a copy of his or her account record within 30 days of opening the account and at least every 36 months thereafter. Furnishing account records is an important tool to help customers and firms promote the accuracy of investment profiles. This is of particular importance to senior investors due to changing liquidity needs and evolving objectives and risk tolerances, such as when investors move from accumulating assets to using assets to provide income during retirement.[20] Rule 17a-3(a)(17)(i)(B) also requires firms to notify customers of name or address changes of the customer or owner and to send updated customer account records reflecting changes in the account's investment objectives within 30 days.

FINRA Rule 4512(a)(1) requires, among other items, that a firm maintain the following information for each customer account: the customer's name and residence; whether the customer is of legal age; names of any associated persons responsible for the account, and if multiple individuals are assigned responsibility for the account, a record indicating the scope of their responsibilities with respect to the account; and signature of the partner, officer, or manager denoting that the account had been accepted in accordance with the member's policies and procedures.

Additionally, FINRA Rule 2090 requires firms to use reasonable diligence, in regard to the opening and maintenance of every account, to know and retain the essential facts concerning every customer and the authority of each person acting on behalf of such customer. FINRA has provided a "New Account Application Template" or voluntary model brokerage account form that firms may use as a resource when they design or update their new account forms.[21]

Examination Observations

Staff reviewed the types of information firms collected when opening accounts for senior investors to assess compliance with applicable rules. Approximately 98% of the firms collected

the information for new customer account records required by the rules. At least 30% of the firms obtained more information than what is required, including detailed expense information (including short and medium-term expenses), retirement status, whether there was a durable power of attorney, mortgage-related information, insurance policy information, healthcare needs, sources of income (whether those sources are fixed or will be in the future), savings for retirement, and future prospects for employment. In addition, at least 23% of the firms adopted FINRA's New Account Application Template or a variation. The firms that did not use the template used customized, firm-specific new account forms or multiple documents to obtain the required customer information.

Staff also assessed firms' compliance with requirements for updating senior customer account information. Some firms used automated supervisory alerts to help ensure that updated customer investment profiles accurately reflected changes in customers' personal and financial circumstances. Aged account records were being relied on for recommendations at 32% of the firms; at those firms, some of the account information reviewed was more than 36 months old.

Conclusion

Almost all of the firms appear to be consistently meeting their obligations to collect the required customer account information for senior investors when opening new accounts, and in many cases, firms were obtaining more detailed information than is required by the applicable rules; however, some did not appear to be properly updating account information or appeared to be relying on account records aged more than 36 months. It is important for customer account information to be updated so that it properly reflects customer financial needs, investment objectives, and risk tolerance, among other things.

Notable Practices: Account Documentation

- Obtaining more detailed customer account information than what is required by the applicable rules. For example, firms obtained detailed expense information from customers and calculated both short and intermediate-term expenses, among others.
- Using automated supervisory alerts to help ensure that updated customer investment profiles accurately reflect changes in customers' personal and financial circumstances.

Suitability

Discussion of Relevant Rules

Broker-dealers generally have an obligation to recommend only those specific investments or overall investment strategies that are suitable for their customers. The concept of suitability appears in specific SRO rules and has been interpreted as an obligation under the antifraud provisions of the federal securities laws.[22] FINRA Rule 2111 requires firm representatives to have a reasonable basis to believe that a recommended transaction or investment strategy is suitable for the customer based on the information obtained through reasonable diligence to ascertain the customer's investment profile. A customer's investment profile includes, but is not limited to, the customer's age, other investments, financial situation and needs, tax status, investment objectives, investment experience, investment time horizon, liquidity needs, risk tolerance, and any other information the customer may disclose to the representative in connection with the recommendation.

FINRA Rule 2330 includes additional requirements for recommended purchases and exchanges of variable annuities. For example, Rule 2330(b)(1)(A) provides that for a recommended purchase of a variable annuity to be suitable in accordance with Rule 2111, firm representatives must have a reasonable basis to believe that the customers have been informed, in general terms, of the various features (both restrictive and beneficial) of variable annuities; the customers would benefit from certain features of variable; and the particular variable annuity as a whole, including any underlying sub-accounts, riders, and similar product enhancements, are suitable. Rule 2330(b)(1)(B) includes similar requirements for recommending the exchange of a variable annuity, requiring firm representatives to take into consideration factors such as whether customers would incur surrender charges, be subject to the commencement of a new surrender period, lose existing benefits, or be subject to increased fees or charges; whether customers would benefit from product enhancements and improvements; and whether customers have had another variable annuity exchange within the preceding 36 months. In addition, Rule 2330(b)(2) requires firm representatives to obtain, at a minimum, the following information before recommending the purchase or exchange of a variable annuity: customer age, annual income, financial situation and needs, investment experience, investment objectives, intended use of the variable annuity, investment time horizon, existing assets (including investment and life insurance holdings), liquidity needs, liquid net worth, risk tolerance, tax status, and any other information a reasonable person would need in making recommendations to customers.

Examination Observations

Staff analyzed the suitability of recommendations of variable annuities, alternative investments, mutual funds, structured products, REITs, equities, and municipal bonds to senior investors based on a variety of factors, including the appropriateness of exchanges, excessive fees, concentration of liquid net worth, short investment time horizon, and age.

Staff found evidence indicating that 34% of the firms made one or more potentially unsuitable recommendations of variable annuities. One of the most prevalent factors contributing to questions about these recommendations was the appropriateness of exchanges, especially in light of fees. For example, one firm representative displayed a consistent pattern of recommending that investors exchange variable annuity contracts purchased within the previous 36 months. In one of those cases, an investor funded the purchase of a new contract by selling a contract he had purchased less than three years earlier, incurring a surrender charge, a loss of death benefit, and an increase in fees. In this case, the cost and commissions charged with the new contract along with surrender charges, increased fees, and a new surrender schedule appeared to outweigh the benefits, given the investor's age.

Other factors that prompted staff's further review of recommendations of variable annuities included patterns of a large percentage of investors' liquid net worth being invested in variable annuities, investment time horizons and age not matching features of the product, firm representative not sufficiently collecting investment profile information, and investment objectives that appeared inconsistent with the terms of recommended variable annuities.

Approximately 14% of firms made potentially unsuitable recommendations to purchase alternative investments, which can be difficult to value, involve high purchase costs, have limited historical data, and often lack liquidity. For example, at one firm, representatives failed to consider the age (90) and low income of one investor, and the limited investment experience and "growth and income" investment objectives of another investor. These senior investors held the positions for less than ten days and experienced significant realized losses.

Less than 10% of firms made potentially unsuitable recommendations of other types of securities to senior investors. For example:

- 9% made potentially unsuitable recommendations of mutual funds. In one instance, staff believed that recommendations of C shares were potentially unsuitable because the customer's investment horizon was eleven years or more, the investment objective was income, and the purchase of Class A shares in the same fund would have qualified the customer for breakpoints.

- 7% made potentially unsuitable recommendations for sales of structured notes and market-linked CDs, which often lack liquidity, carry complex risks such as default risk, and are difficult to value. It appeared that firm representatives failed to consider investors' risk tolerances, investment concentrations, the illiquid nature of these securities, and investors' age and time horizon when assessing suitability. For example, representatives made multiple recommendations for market-linked CDs, which exceeded maximum firm thresholds of investable assets and product concentrations. One such recommendation was made to an 87 year-old investor with a moderate risk tolerance, an investment objective of growth, and investment experience that was limited to mutual

funds. The product would not become liquid until the investor was 94 years old, and the investment tied up a significant percentage of the investor's assets.

- 7% of firms made potentially unsuitable recommendations for exchange-traded and non-traded REITs. For example, one firm employed a REIT Trading (switching) program that may have facilitated recommendations of REITS to senior investors. The program involved a recommendation to purchase a non-traded REIT followed by a recommendation to sell the REIT once it became publicly traded followed by a recommendation to buy a new-non traded REIT. In multiple cases, the firm representatives failed to combine orders to obtain volume discount benefits for their customers. In addition, staff cited several instances where firm representatives made the recommendations without adequate suitability information including investment objectives, risk tolerances, and investment experience.

Conclusion

In a low interest rate environment, firms may be recommending non-traditional investments to supplement the income streams of senior investors. Staff found that firms made more potentially unsuitable recommendations for non-traditional securities such as variable annuities, structured products, and REITs than for more traditional securities such as open-end mutual funds, equities, and fixed income investments. Firms must have a reasonable basis to believe that a recommended transaction or investment strategy is suitable for the investor based on the information obtained through reasonable diligence into an individual's investment profile.

Notable Practices: Suitability

- Adopting policies and procedures addressing suitability risks specific to senior investors.
- Requiring firm representatives to memorialize in firm computer systems conversations between the representatives and senior investors relating to the recommendations.
- Drafting product applications that require firm representatives to consider and document crucial investment profile information.
- Establishing strict firm product concentration guidelines for senior investors.

Disclosures

Discussion of Relevant Rules

Section 17(a)(2) of the Securities Act of 1933 ("Securities Act") makes it unlawful for any person in the offer or sale of securities, by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading. In addition, Section 5 of the Securities Act requires that firms furnish a prospectus in connection with the offer or sale of mutual funds and variable annuities. Mutual fund and variable annuity prospectuses contain details on the product's objectives, investment strategies, risks, performance, distribution policy, fees and expenses, and fund management.

FINRA Rule 2010 requires members, in the conduct of their business, to observe high standards of commercial honor and just and equitable principles of trade. This rule speaks to the necessity of full disclosure in relation to material information without omissions regarding broker-dealer firms and their interactions with investors. In addition, other FINRA rules include additional disclosure requirements for special products, such as variable annuities. For example, FINRA Rule 2330(b)(1)(A)(i) requires firm representatives to describe to customers, in general terms, the various features of variable annuities prior to recommending their purchase or exchange. These features include potential surrender periods and surrender charges, tax penalties, mortality and expense fees, investment advisory fees, potential charges for and features of riders, the insurance and investment components, and market risk.

Examination Observations

Staff asked the examined firms to provide all of their disclosures to senior investors relating to the sale of investment products between January 2012 and October 2012. Staff believes that 89% of the firms provided senior investors with appropriate, detailed, and relevant disclosures concerning the recommended securities.

Staff noted that 68% of the firms had sold variable annuities, as one of the top five revenue-generating products, to their investors. In order to comply with the additional requirements in FINRA Rule 2330, many firms adopted a variable annuity disclosure form to evidence collection of the information required by the rule. This disclosure form described the features of the particular variable annuity such as mortality and expense fees, surrender fees and period, liquidity needs of the investor, all riders and account benefits from the variable annuity, and general information about the variable annuity. The majority of firms required their representatives to fill out and submit this form to supervisory officers prior to the variable annuity transaction.

In addition, firms often required customers to sign the disclosures provided to evidence receipt. These disclosures included the variable annuity application, acknowledgement of receipt of the prospectus, state forms when required,[23] a schedule stating commission percentage breakdown and average fund expense ratio breakdown, mortality and expense fees, surrender fees and years remaining if applicable, and average fund expense ratio. When the variable annuity investment was a significant concentration of the customer's assets, at least two firms required customers to sign a disclosure stating their awareness of the high concentration and their sufficiency of liquid assets to cover expenses. In cases where the investor was exchanging one variable annuity for another, almost 10% of firms provided disclosures that included a variable annuity transfer and exchange form, disclosure of surrender costs versus the benefits of the new products, a product comparison for the old and new products, and the total expenses of switch transactions.

Of the 11% of firms that appeared to fail to provide adequate disclosures to senior investors prior to a transaction, the majority (7%) did so in relation to variable annuity transactions. For example, the section of variable annuity forms or disclosure letters describing the comparative fees and benefits between the current and the proposed annuities was often incomplete. In addition, some firms provided what appeared to be inaccurate and misleading disclosures pertaining to variable annuities, such as by inaccurately disclosing the loss of a death benefit resulting from an exchange or by not clearly communicating, inaccurately describing, or failing to disclose surrender charges.

Staff also observed what appeared to be inaccurate, incomplete, or misleading disclosures in relation to affiliated private placements and REITs. For example, one firm made what appeared to be misrepresentations concerning premiums advanced, guaranteed interest payments, and return of principal, as well as omissions with regard to underpayment of insurance premiums, a 10% fee on amounts advanced, and an $11.7 million tax lien in private placement memorandums and market materials for affiliated private placements. Another firm provided what appeared to be misleading and inaccurate sales literature regarding REITs to customers prior to their solicited purchase and subsequent liquidations. This sales literature touted certain enhancements from the original offering such as lower fees, but the prospectuses revealed that fees for liquidation and operations actually increased.

Conclusion

In general, firms appeared to be providing appropriate disclosure to investors with regard to recommended securities. Staff observed what appeared to be inaccurate or incomplete disclosures primarily related to non-traditional securities such as variable annuities and REITs. Despite general compliance with disclosure requirements, it is important to note that it is unclear how well investors understand the disclosures they receive on recommended securities.

Notable Practices: Disclosures

- Requiring a customer signature on a disclosure form indicating that the customer received a prospectus when purchasing new open-end mutual funds.
- Requiring an explanation of the tax ramifications and alternative investment possibilities for all customers that purchase a variable annuity in an individual retirement account.
- Providing a detailed description of registered representative compensation (both direct and indirect) for each product sold on their website.
- Providing one comprehensive disclosure form that includes simple definitions for industry nomenclature and the schedule of fees and expenses related to specific securities.

Customer Complaints

Discussion of Relevant Rules

Investors dissatisfied with their accounts or the service provided by their registered representative or firm (among other reasons) may file a complaint with the firm, FINRA, the SEC, or other relevant regulatory agencies. Exchange Act Rule 17a-3(b)(18) requires firms to make a record of every written customer complaint (including electronic) received by the firm concerning its associated persons. The record must include the complainant's name, address, and account number; the date the complaint was received; the name of each associated person identified in the complaint; a description of the nature of the complaint; and the disposition of the complaint. The rule also requires firms to keep a record indicating that each of its customers has been provided with a notice containing the address and telephone number of the department of the member, broker or dealer to which any complaints as to accounts may be directed. These firms are required to preserve these records for a period of not less than three years, the first two years in an easily accessible place. Exchange Act Rule 17a-4(j) requires registered firms to promptly produce these records to representatives of the SEC upon request.

FINRA Rule 4513(a) requires firms to keep and preserve in each office of supervisory jurisdiction, either a separate file of all written customer complaints that relate to that office (including complaints that relate to activities supervised from that office) and action taken by the member, if any, or a separate record of such complaints and a clear reference to the files in that office containing the correspondence connected with such complaints. Rather than keep and preserve the customer complaint records required under this rule at the office of supervisory jurisdiction, the member may choose to make them promptly available at that office, upon request of FINRA. FINRA also requires firms to preserve customer complaint records for at least four years.

Rule 4513(b) clarifies that for purposes of this rule, "customer complaint" means any grievance by a customer or any person authorized to act on behalf of the customer involving the activities of the member or a person associated with the member in connection with the solicitation or execution of any transaction or the disposition of securities or funds of that customer.

FINRA Rule 4530(a)(1)(B) requires each member to report to FINRA promptly, but in any event not later than 30 calendar days, after the member knows or should have known of the existence of any written customer complaints involving allegations of theft or misappropriation of funds or securities or of forgery. In addition, Rule 4530(d) requires each member to report to FINRA statistical and summary information regarding written customer complaints in such detail as FINRA shall specify by the 15th day of the month following the calendar quarter in which customer complaints are received by the member. Supplementary Material .08 clarifies that a "customer" includes any person, other than a broker or dealer, with whom the member has engaged, or has sought to engage, in securities activities. It also clarifies that each member must

report the following under Rule 4530(d): any written customer complaint reported under Rule 4530(a)(1)(B), any written grievances by customers with whom the member has engaged in securities activities that involves the member or a person associated with the member, and any securities-related written grievance by customers with whom the member has sought to engage in securities activities that involves the member or a person associated with the member.

Examination Observations

Staff reviewed a sample of complaints received by the firms examined to identify any patterns or trends, to detect potential deficiencies in the handling of senior investor accounts, and to detect issues related to firm activities.

While firms maintained records of investor complaints, at least two firms (5%) had difficulty aggregating the number of complaints received from senior investors because they did not track or code the complaints using the age of the customer. Conversely, at least one firm used an internal "senior-related" complaint code which allowed the firm to easily identify senior investor complaints. This use of a senior-related complaint code may help the firm identify issues and concerns specific to senior investors so that they can make necessary changes to:

- improve the effectiveness and the efficiency of their programs;
- identify approaches to manage the increasing challenges of cognitive decline;
- provide products or services that better meet the needs of the senior investors;
- identify and prioritize the underlying risks appropriate to a firm's business; and
- assess the integrity of firm controls to manage senior investor accounts.

Overall, customer complaints involved a wide range of securities and allegations of business conduct issues. The most common complaints among senior investors, with regard to business conduct issues, involved allegations of poor service or unreasonably high fees. Some of the other more common complaints involved allegations of misrepresentations, unsuitable investments, churning, unauthorized trading, and poor advice/recommendations. For example, one senior investor alleged that his account was churned and his registered representative engaged in unauthorized trading between 2007 and 2011. This firm terminated the registered representative after the representative acknowledged using discretion without obtaining prior written authorization. Another customer complaint alleged misrepresentation, unsuitable recommendations, and processing issues. Staff identified apparent deficiencies at the firm including failure to properly code customer complaints, failure to associate a registered representative to complaints, and failure to disclose complaints on the proper form (Form U4).

Conclusion

Staff observed that all of the firms examined were preserving and reporting customer complaints as required by the FINRA rules, but some had difficulty aggregating the number of senior

complaints in their system. The most common complaint themes among senior investors were allegations of poor service and unreasonably high fees.

Notable Practices: Customer Complaints

- Coding complaints as "senior related" in internal systems to enhance a firm's ability to more appropriately respond to senior investors and analyze complaint data.

Supervision

Discussion of Relevant Rules

Section 15(b)(4)(E) of the Exchange Act authorizes the Commission to censure, place limitations on, suspend, or revoke the registration of any broker- dealer who has failed to reasonably supervise persons subject to its supervision with a view to preventing violations of the federal securities laws or rules.

Paragraph (a) of FINRA's rule on supervision in effect at the time of the examinations (NASD Rule 3010)[24] required each member to establish and maintain a system to supervise the activities of each registered representative, registered principal, and other associated person that was reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable NASD Rules. Rule 3010(a) also clarified that the final responsibility for proper supervision rested with the member. Rule 3010(b) required each member to establish, maintain, and enforce written procedures to supervise the types of business in which it engaged and to supervise the activities of registered representatives, registered principals, and other associated persons that were reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable Rules of NASD.

Under this rule, firms that relied on automated supervisory systems must, at a minimum, require a principal, or principals, of the firm to:

- approve the criteria used in the automated supervisory system;
- audit and update the automated supervisory system as necessary to ensure compliance with applicable FINRA and federal securities rules and regulations; and
- review exception reports produced by the automated supervisory system.

A principal using an automated supervisory system, aid, or tool for the discharge of supervisory duties remained responsible for compliance with this rule.

Many FINRA rules expand on the requirements in NASD Rule 3010 with regard to supervision of specific products and firm activities. For example, FINRA Rule 2330(d) includes additional supervisory and recordkeeping requirements for firms that sell variable annuities. The member also must establish and maintain specific written supervisory procedures reasonably designed to achieve compliance with the standards set forth in Rule 2330, implement surveillance procedures to determine if any of the member's associated persons are effecting inappropriate exchanges, and have policies and procedures reasonably designed to implement corrective measures to address inappropriate exchanges and the conduct of associated persons who engage in inappropriate exchanges. As another example, FINRA Rule 2360(b)(20)(A) requires each member that conducts public customer options business to ensure that its written supervisory system policies and procedures adequately address this options business.

Examination Observations

Staff's review of firm supervision of the business conducted with senior investors focused on firm supervisory processes, written supervisory procedures, exception reporting, internal controls, and compliance reviews. Staff observed that 77% of the firms maintained written supervisory procedures specific to supervision of firm representatives who deal with senior investors. At least 16% of firms used 70 years old as the age for implementing age-based policies and procedures, and at least 5% established age-based policies and procedures for investors as young as 60. Senior-related policies and procedures varied from firm to firm.

A majority of firms' procedures addressed general senior-related supervision, but 11% of firms specifically cited or included some of the themes from FINRA Regulatory Notice 07-43[25] in their written supervisory procedures. This Regulatory Notice addresses firm obligations relating to senior investors and highlights industry best practices, suitability concerns, communications with the public (including use of designations and seminars), and dealing with investors with diminished capacity and occurrences of suspected financial abuse. Topics from the Regulatory Notice addressed in the firms' procedures include the following:

- use of senior designations and credentials;
- approval channels for product recommendations;
- retail communications targeting senior investors;
- luncheon programs and seminars;
- heightened review of product suitability for seniors;
- heightened review of the use of margin accounts by seniors; and
- supervisory requirements to contact senior investors.

Multiple firms had written supervisory procedures that addressed suitability and know-your-customer requirements specifically for senior investors. For at least half of the firms, investor age played a critical role in establishing product suitability guidelines, assessing the suitability of transactions and accounts, and triggering exceptions or red flags. The procedures addressed the importance of obtaining investment profile information and a variety of senior-related topics including:

- dealing with investors who exhibit diminished capacity and other cognitive impairment;
- qualified plan rollovers;
- senior investors' appetite for increasing yield;
- current and future prospects for employment;
- sources of income and whether it is fixed or will be in the future;
- primary expenses including whether the customer still has a mortgage;
- income needed to meet fixed or anticipated expenses;
- savings for retirement and how they are invested;

- health care insurance and future needs to fund health care costs;
- rapid changes to financial profiles based on life events;
- third-party emergency contact information and permission to contact the third party in the event an issue requires clarification; and
- income and estate tax liabilities.

At least 30% of the firms had suitability guidelines for senior investors purchasing certain securities such as variable annuities, non-traded REITs, structured products, low-priced securities, high-yield funds, and other alternative products. At least 23% of the firms maintained such procedures for variable annuities and options. Generally speaking, the suitability product guidelines did not prohibit purchases of a particular product or security by senior investors. Rather, the written supervisory procedures typically included additional requirements or guidelines that firm representatives must follow when senior investors were purchasing certain securities. While these guidelines varied by firm and by customer age, they indicated that firms are paying increased attention to the accounts of senior investors. Examples of these product guidelines or requirements included:

- concentration guidelines for the sale of alternative products to investors who are 75 or older and red flags regarding the sale of variable annuities to senior investors;
- outreach requirements to ensure that investors understood the characteristics of the securities and risks associated with the transactions, such as requiring supervisors to call investors aged 70 or older who purchased variable annuities or requiring compliance departments to speak with customers aged 70 or older who purchased variable annuities and customers aged 75 or older who purchased market-linked CDs;
- heightened supervisory reviews of senior purchases of specific securities;
- pre-approval of purchases by customers aged 70 or older or prohibitions on sales of structured products to customers above a specific age unless the firm granted an exception; and
- exception reports that identified transactions in options securities by senior investors.

Some firms implemented procedures to review transactions by senior investors and/or senior investor accounts over a defined time period to determine whether transactions were suitable and to identify trends. For example, one firm required supervisors to review variable annuity purchases by investors aged 70 or older on a quarterly basis in order to identify potential patterns of inappropriate variable annuity exchanges.

At least three firms used centralized supervisory review groups at their main or regional offices for new accounts or transactions by senior investors. For example, one firm required a centralized supervisory review group to approve new brokerage accounts for investors aged 80 or older and to make initial determinations as to whether the securities to be purchased appeared to be suitable. Other firms required transactions to be routed to a review group based on the product type. One firm had a policy prohibiting investors aged 65 or older from purchasing

variable annuities unless the firm representative documented additional written justifications for the purchases and the centralized review group approved the transaction based on its suitability.

Typically, firms' supervisory structures were supported with some degree of automation. Firms used a wide variety of exception, supervisory, and compliance reports that considered investor age and other factors in tandem, such as liquid net worth, account losses, market performance, or the cost of insurance riders. One firm had as many as 150 suitability, solicitation, and disclosure exception reports for opening and handling accounts for senior investors.

Exception reports typically focused on trends involving the number of senior accounts opened over a defined time period, red flags for individual accounts and transactions, investor losses exceeding $25,000 within a 12-month period, or red flags identifying purchases exceeding 25% of an investor's liquid net worth. Examples of exception reports include the following:

- purchases of $10,000 or more of equity securities by investors aged 65 or older;
- purchases of limited partnerships and unlisted REITs by investors aged 65 or older;
- firm representatives credited with 20 or more initial variable annuity purchases by senior investors during each quarter;
- withdrawals from accounts where a power of attorney has been executed; and
- electronic withdrawals from retirement accounts that may too quickly deplete the account balance when factoring in market performance, a customer's life expectancy, and the quantity of money in an investor's account.

At least seven firms had implemented comprehensive supervisory review systems and processes using automated systems and tools that were integrated with firms' branch supervision and compliance departments. These systems were often complex and contained sophisticated rules that factored in a number of variables that used rule and risk-based scenarios to score investor accounts and transactions. These systems flagged accounts or transactions based on investor characteristics such as age, investment objective, products purchased, and concentration. Generally, the analytic methodologies used in these systems were dynamic, allowing firms to customize the scoring thresholds specifically in senior accounts that would trigger elevated supervisory reviews. Once a transaction or account triggered an exception, firms typically had specific escalation processes for supervisory or compliance review. For example, depending on a firm's protocols, flagged transactions could be escalated to the next level of supervision or to the compliance department.

These systems were developed and supported either by third-party vendors or by the firms. Third-party systems contained exception reporting capabilities that allowed firms to customize exception reports and alerts based on firm criteria to identify questionable account activities. For example, one firm used an automated trade entry system that provided information in different formats for firm representatives and for supervisors or compliance personnel. The view for compliance personnel flagged transactions based on visual cues or risk scores. Color-coded flags based on various factors were used to identify inappropriate or abusive sales practice activity.

Customizing an automated supervisory system enabled firms to react to changing trends within the firm and industry by prioritizing their surveillance programs accordingly.

Conclusion

Most of the firms maintained written procedures related to supervision of firm representatives who deal with senior investors. Firms most frequently used the age of 70 when implementing age-based policies and procedures, but some firms established age-based policies and procedures for investors as young as 60. While general requirements, suitability requirements, product guidelines, and other supervisory procedures varied by firm and by customer age, they indicated that firms are paying increased attention to the accounts of senior investors. In addition, many firms are paying increased attention to transactions in non-traditional securities and have adopted specific supervisory procedures for investments such as variable annuities, non-traded REITs, structured products, and other alternative products. Finally, firm supervisory structures typically are supported by automated systems, which help firms identify and address issues related to senior investors.

Notable Practices: Supervision

- Establishing firm policies that address FINRA Regulatory Notice 07-43, which discusses enhanced suitability practices, communications, dealing with investors suffering from diminished capacity, and occurrences of suspected financial abuse.
- Maintaining product suitability guidelines for senior investors purchasing complex or alternative products such as variable annuities, equity-indexed annuities, REITs, and options.
- Using a centralized supervisory review group to approve transactions and new accounts.
- Using automated systems and tools that are integrated with firm's branch supervisory review system and compliance departments.

Conclusion

OCIE and FINRA staff regard compliance with laws, rules, and regulations applicable to dealings with senior investors to be a high regulatory priority, and the importance of this topic is likely to continue for both regulators and broker-dealers for many years.

The current environment, where traditional savings accounts and other conservative investments are earning historically low yields, may prompt firms to recommend and senior investors to purchase more non-traditional securities, such as variable annuities, non-traded REITs, structured products, and other alternative products. OCIE and FINRA staff are concerned that broker-dealers may be recommending unsuitable securities to senior investors or failing to adequately disclose the related risks. It is imperative that senior investors receive proper and understandable disclosures regarding the terms and risks related to securities recommended to them, particularly non-traditional investments.

This report highlights recent industry trends that have impacted the investment landscape and discusses the key observations and practices identified during the recent series of examinations with regard to securities sold to senior investors, training, use of senior designations, marketing and communications, account documentation, suitability, disclosures, customer complaints, and supervision. OCIE and FINRA staff are providing this information to broker-dealers to support their thoughtful analysis of their policies and procedures as they serve the needs of senior investors.

This Report is intended to highlight for firms risks and issues that staff of the SEC's Office of Compliance Inspections and Examinations and FINRA identified in the course of examinations of broker-dealers. In addition, this Report describes practices, issues, or factors that firms may consider to (i) assess their supervisory, compliance and/or other risk management systems related to risks and issues involving senior investors and (ii) make any changes, as may be appropriate, to address or strengthen such systems. These factors are not exhaustive, and they constitute neither a safe harbor nor "checklist." Other factors besides those described in this Report may be appropriate alternatives or supplements to consider, and some of the factors may not be applicable to a particular firm's business. They do not present any legal opinion or advice. Moreover, future changes in laws or regulations may supersede some of the factors or issues raised here. The adequacy of supervisory, compliance, and other risk management systems can be determined only with reference to the profile of each specific firm and other facts and circumstances.

Appendix A – Reference Material for Firms

Examination Priorities for 2015

- OCIE, SEC, Examination Priorities for 2015
  http://www.sec.gov/about/offices/ocie/national-examination-program-priorities-2015.pdf
- FINRA, 2015 Regulatory and Examination Priorities Letter
  http://www.finra.org/web/groups/industry/@ip/@reg/@guide/documents/industry/p602239.pdf

Securities

- Office of Investor Education and Advocacy ("OIEA"), SEC, Mutual Funds: A Guide for Investors
  http://investor.gov/sites/default/files/mutual-funds.pdf
- OIEA, SEC Investor Bulletin: Variable Annuities – An Introduction (February 2014)
  http://www.sec.gov/investor/alerts/ib_var_annuities.pdf
- FINRA Investor Alert: Public Non-Traded REITS – Perform a Careful Review Before Investing
  http://www.finra.org/Investors/ProtectYourself/InvestorAlerts/REITS/P124232

Training

- FINRA Rule 1250: Continuing Education Requirements
  http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=10204

Senior Designations

- OIEA SEC-NASAA Investor Bulletin: Making Sense of Financial Professional Titles (September 2013)
  http://www.sec.gov/investor/alerts/ib_making_sense.pdf
- OIEA, SEC Investor Information, "Senior" Specialists and Advisors: What You Should Know About Professional Designations
  http://www.sec.gov/investor/pubs/senior-profdes.htm
- NASD Rule 3010: Supervision (superseded by FINRA Rules 3110 and 3170)
  http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=11763
- FINRA Rule 3110: Supervision (there are revisions that will be effective July 1, 2015)
  http://finra.complinet.com/en/display/display_main.html?rbid=2403&record_id=15446

- FINRA Regulatory Notice 11-52: Senior Designations (November 2011) http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p125092.pdf
- FINRA, Senior Designations http://www.finra.org/industry/issues/seniors/p124734
- CFPB, Senior Designations for Financial Advisers: Reducing Consumer Confusion and Risks (April 2013) http://files.consumerfinance.gov/f/201304_CFPB_OlderAmericans_Report.pdf
- North American Securities Administrators Association, Regulators Urge Investors to Carefully Check Credentials of 'Senior Specialists' (December 2005) http://www.nasaa.org/7684/regulators-urge-investors-to-carefully-check-credentials-of-senior-specialists/

Marketing and Communications

- FINRA Rule 2210: Communications with the Public http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=10648
- Exchange Act Rule 17a-4, Records to be preserved by certain exchange members, brokers and dealers http://www.ecfr.gov/cgi-bin/text-idx?SID=8e0ed509ccc65e983f9eca72ceb26753&node=17:4.0.1.1.1&rgn=div5#se17.4.240_117a_64

Account Documentation

- Exchange Act Rule 17a-3, Records to be made by certain exchange members, brokers and dealers http://www.ecfr.gov/cgi-bin/text-idx?SID=1f5fa29b3dd8174ea183036757d3d99a&node=pt17.4.240&rgn=div5#se17.4.240_117a_63
- FINRA Rule 2090: Know Your Customer http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=9858
- FINRA Rule 4512(a)(1): Customer Account Information http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=9958
- FINRA New Account Application Template http://www.finra.org/Industry/Tools/P117268

Suitability

- OIEA, SEC Investor Information, Suitability http://www.sec.gov/answers/suitability.htm

- OIEA, SEC Investor Information, SEC Center for Complaints and Enforcement Tips
  http://www.sec.gov/complaint.shtml
    - Tips, Complaints and Referrals Portal
      https://denebleo.sec.gov/TCRExternal/disclaimer.xhtml
- FINRA Rule 2111: Suitability
  http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=9859
- FINRA Rule 2330: Members' Responsibilities Regarding Deferred Variable Annuities
  http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=8824
- FINRA Regulatory Notice 13-31: Suitability (September 2013)
  https://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p351220.pdf

Disclosures

- Section 17(a)(2) of the Securities Act
  http://www.sec.gov/about/laws/sa33.pdf
- Section 5 of the Securities Act
  http://www.sec.gov/about/laws/sa33.pdf
- FINRA Rule 2010: Standards of Commercial Honor and Principles of Trade
  http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=5504
- FINRA Rule 2330: Members' Responsibilities Regarding Deferred Variable Annuities
  http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=8824

Customer Complaints

- Exchange Act Rule 17a-3, Records to be made by certain exchange members, brokers and dealers
  http://www.ecfr.gov/cgi-bin/text-idx?SID=8e0ed509ccc65e983f9eca72ceb26753&node=17:4.0.1.1.1&rgn=div5#se17.4.240_117a_64
- Exchange Act Rule 17a-4, Records to be preserved by certain exchange members, brokers and dealers
  http://www.ecfr.gov/cgi-bin/text-idx?SID=8e0ed509ccc65e983f9eca72ceb26753&node=17:4.0.1.1.1&rgn=div5#se17.4.240_117a_64
- FINRA Rule 4513: Records of Written Customer Complaints
  http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=9959
- FINRA Rule 4530: Reporting Requirements
  http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=9819

Supervision

- Section 15(b)(4)(E) of the Exchange Act
  http://www.sec.gov/about/laws/sea34.pdf
- FINRA Rule 2330(d): Members' Responsibilities Regarding Deferred Variable Annuities (Supervisory Procedures)
  http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=8824
- FINRA Rule 2360(b)(20)(A): Options (Duty to Supervise)
  http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=6306
- NASD Rule 3010: Supervision (superseded by FINRA Rules 3110 and 3170)
  http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=11763
- FINRA Rule 3110: Supervision (there are revisions that will be effective July 1, 2015)
  http://finra.complinet.com/en/display/display_main.html?rbid=2403&record_id=15446
- NASD Notice to Members 05-50: Member Responsibilities for Supervising Sales of Unregistered Equity-Indexed Annuities (August 2005)
  http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p014821.pdf

Additional Resources

- SEC Seniors Summit, in coordination with FINRA,NASAA and AARP (September 2007) *http://www.connectlive.com/events/secseniorssummit/*
- SEC-OCIE, NASAA, and FINRA, Protecting Senior Investors: Report of Examinations of Securities Firms Providing "Free Lunch" Sales Seminars (September 2007)
  http://www.sec.gov/spotlight/seniors/freelunchreport.pdf
- SEC-OCIE, NASAA, and FINRA, Protecting Senior Investors: Compliance, Supervisory and Other Practices Used by Financial Services Firms in Serving Senior Investors (September 2008)
  http://www.sec.gov/spotlight/seniors/seniorspracticesreport092208.pdf
- SEC-OCIE, NASAA, and FINRA, Protecting Senior Investors: Compliance, Supervisory and Other Practices Used by Financial Services Firms in Serving Senior Investors: 2010 Addendum (August 2010)
  http://www.sec.gov/spotlight/seniors/seniorspracticesreport081210.pdf
- SEC, Senior Investors *http://www.sec.gov/divisions/marketreg/seniorinvestors.htm*
- SEC Charges Operators of Boiler Room Scheme Targeting Seniors to Invest in Football-Related Scam
  http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370539842427
- FINRA Regulatory Notice 07-43: Senior Investors (September 2007)
  http://www.complinet.com/file_store/pdf/rulebooks/NASD07-43.pdf
- FINRA Regulatory Notice 08-27: Misleading Communications About Expertise (May 2008)

http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p038522.pdf

- NASD Notice to Members 04-89: NASD Alerts Members to Concerns When Recommending or Facilitating Investments of Liquefied Home Equity (December 2004) *http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p012714.pdf*
- FINRA Investor Alert: "Free Lunch" Investment Seminars – Avoiding the Heartburn of a Hard Sell *http://www.finra.org/investors/protectyourself/investoralerts/fraudsandscams/p036745*
- FINRA Investor Alert: Seniors Beware: What You Should Know About Life Settlements *http://www.finra.org/web/groups/investors/@inv/@protect/@ia/documents/investors/p125848.pdf*
- FINRA Investor Alert: Reverse Mortgages: Avoiding a Reversal of Fortune *http://www.finra.org/Investors/ProtectYourself/InvestorAlerts/RetirementAccounts/P038113*
- FINRA E-Learning Courses *http://www.finra.org/Industry/Education/OnlineLearning/E-learningCourses/index.htm*
    - Senior Investor Issues: Diminished Decisional Capacity
    - Senior Investor Suitability Considerations
    - Supervisory Considerations for Working with Seniors

Appendix B – Description of Securities

Below is a description of the top revenue-generating securities that the examined firms sold to senior investors and some of the potential benefits and risks related to these securities:

(1) Mutual funds pool investor money to purchase securities. Investors may purchase shares in the fund, from the fund itself, or through a broker for the fund. Open-end mutual funds are a type of investment company. They must register under the Investment Company Act of 1940 and issue securities under the Securities Act. Each mutual fund must deliver a prospectus to customers under Section 10(a) of the Securities Act. Risks related to mutual funds may include market risk and the risk derived from its underlying assets. Different types of mutual funds may also be subject to different types or levels of volatility, fees, and expenses.[26]

(2) Variable annuities are securities regulated by the SEC.[27] They are contracts between an investor and an insurance company under which the investor makes a lump sum payment or a series of payments in exchange for periodic payments by the insurer at some agreed upon future date.[28] Variable annuities offer certain potential advantages to investors. For example, they are a tax-deferred investment, offer a range of investment options, and often provide riders such as a guaranteed death benefit or other guarantees. On the other hand, variable annuities may have a surrender period that starts after the initial purchase and may last six to eight years or sometimes as long as ten years. If funds are withdrawn during the surrender period, the insurer will assess a surrender charge, typically a percentage of the amount withdrawn, which declines gradually over the period.

(3) Equities are a type of security that gives holders a share of ownership in a company.[29] Advantages to holding equities may include income from dividends, growth, and liquidity. Equities bear risk such as the potential realized or unrealized losses from market fluctuations.

(4) Fixed income investments include individual bonds and market-linked CDs. These investments may provide payments of a fixed amount on a fixed schedule to the owner for the duration of the investment. Although the consistency in the stream of income may be attractive, there are risks associated with each type of investment. Some risks may include market risk, credit risk, and default risk.[30]

(5) A UIT is a type of investment company that issues redeemable securities; makes a one-time public offering of a specific, fixed number of units; has a termination date that is established when it is created; does not actively trade its investment portfolio; and does not have a board of directors, corporate officers, or an investment adviser to render advice during the life of the trust. The amount of capital invested determines the proportionate share of principal and interest the investor receives from the trust. A UIT may buy back outstanding shares of the trust at the current net asset value, and shares may be redeemed at any time. UITs may carry risks such as illiquidity or inflation risk as well as risks derived from the underlying assets.[31]

(6) An ETF is an investment company that is traded like equity securities on an exchange. Although classified as an open-end company or UIT, it differs in many respects. For example, an ETF does not sell individual shares; investors usually purchase creation units with a basket of securities and subsequently sell those shares on the secondary market or sell creation units back to the ETF. An ETF holds assets such as equities, commodities, or bonds and trades close to its net asset value over the course of the trading day. Most ETFs track an index, a commodity, or a basket of assets such as an equity index or bond index. ETFs seek to achieve their stated objectives on a daily basis. Performance over longer periods of time may differ significantly from the index performance over those time periods. Some ETFs pursue active management strategies and publish their portfolio holdings on a daily basis. These products share many of the same risks as mutual funds.[32]

(7) REITs are corporations, trusts, or associations that own and usually operate income-producing real estate or real estate-related assets. REITs provide investors with a way to earn a share of income produced from commercial real estate without actually owning commercial real estate. Investors can purchase shares of REITs through a broker-dealer, and these shares typically offer high yields. Many REITs are registered with the SEC and are publicly traded on a stock exchange, offering investors a liquid investment in income producing real estate or real estate-related assets. There also are REITs that are registered with the SEC but are not publicly traded on an exchange. These non-traded REITs are generally illiquid investments with limited ability to redeem shares because there is no public market and potentially with high fees associated with their sale.[33]

(8) The definition of an alternative investment can vary, as they generally cannot be directly classified as traditional securities such as stocks or bonds. They can include exchange-traded notes, hedge funds, and private placements. Alternative investments can help investors diversify exposure away from mainstream markets (e.g., because of their low correlation coefficients with both equities and fixed income). Potential risks include difficulty in valuation, potentially high purchase costs and large initial investment, limited historical data, lack of liquidity, and complexity.[34]

(9) Structured securities products include structured notes and other market-linked securities, reverse convertible notes, principal-protected notes, and collateralized debt obligations. Structured products are not defined in the federal securities laws. They are sold in the retail market and usually consist of a traditional security combined with one or more other asset classes, typically a bond and an option component. As a result, structured products typically have some form of option or embedded financial derivative exposure. Structured products may offer investors varying levels of principal protection, high interest payments, leveraged exposure to the underlying asset class, and a fixed maturity date (in most cases), and they may seek to achieve a highly customized risk-return objective. Structured products, however, often carry complex risks, including default risk, lack of liquidity, lack of transparency, and valuation difficulty.[35]

Endnotes

[1] The views expressed herein are those of the staff of OCIE, in consultation with other staff of the Securities and Exchange Commission ("SEC" or "Commission") including the Division of Trading and Markets and in coordination with FINRA. The Commission has expressed no view on the contents of this report. This document was prepared by the SEC staff, in coordination with FINRA, and is not legal advice.
[2] Administration on Aging Administration for Community Living, U.S. Department of Health and Human Services, A Profile of Older Americans: 2012, page 1 (2012), available at http://www.aoa.gov/Aging_Statistics/Profile/2012/docs/2012profile.pdf.
[3] Id. at 3.
[4] Richard Fry, D'Vera Cohn, Gretchen Livingston, and Paul Taylor, The Rising Age Gap in Economic Well-being: The Old Prosper Relative to the Young, Pew Research Center, pages 1-2 (November 7, 2011), available at http://www.pewsocialtrends.org/files/2011/11/WealthReportFINAL.pdf.
[5] Dow Jones Industrial Average, available at http://finance.yahoo.com/echarts?s=%5EDJI.
[6] Changes in U.S. Family Finances from 2007 to 2010: Evidence from the Survey of Consumer Finances, Federal Reserve Bulletin, Vol. 98, No. 2 (June 2012), page 4, available at http://www.federalreserve.gov/pubs/bulletin/2012/pdf/scf12.pdf.
[7] Office of Compliance Inspections and Examinations Security and Exchange Commission, North American Securities Administrators Association, Financial Industry Regulatory Authority, Protecting Senior Investors: Report of Examinations of Securities Firms Providing "Free Lunch" Sales Seminars, page 2 (September 2007), available at http://www.sec.gov/spotlight/seniors/freelunchreport.pdf.
[8] Securities and Exchange Commission's Office of Compliance Inspections and Examinations, North American Securities Administrators Association, and Financial Industry Regulatory Authority, Protecting Senior Investors: Compliance, Supervisory and Other Practices Used by Financial Services Firms in Serving Senior Investors (September 22, 2008), available at http://www.sec.gov/spotlight/seniors/seniorspracticesreport092208.pdf.
[9] U.S. Securities and Exchange Commission's Office of Compliance and Inspections and Examinations, North American Securities Administrators Association, and Financial Industry Regulatory Authority, Protecting Senior Investors: Compliance, Supervisory and Other Practices Used by Financial Services Firms in Serving Senior Investors 2010 Addendum (August 12, 2010), available at http://www.sec.gov/spotlight/seniors/seniorspracticesreport081210.pdf.
[10] FINRA Regulatory Notice 11-52: FINRA Reminds Firms of Their Obligations Regarding the Supervision of Registered Persons Using Senior Designation (November 2011), available at http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p125092.pdf.
[11] SEC-NASAA Investor Bulletin: Making Sense of Financial Professional Titles (September 2013), available at http://www.sec.gov/investor/alerts/ib_making_sense.pdf.
[12] Board of Governors of the Federal Reserve System, Commodity Futures Trading Commission, Consumer Financial Protection Bureau, Federal Deposit Insurance Corporation, Federal Trade Commission, National Credit Union Administration, Office of the Comptroller of the Currency, and Securities and Exchange Commission, Interagency Guidance on Privacy Laws and Reporting Financial Abuse of Older Adults (2013), available at http://www.sec.gov/news/press/2013/elder-abuse-guidance.pdf.
[13] 12 CFR 208.62.
[14] The SEC's Examination Priorities for 2015 are available at http://www.sec.gov/about/offices/ocie/national-examination-program-priorities-2015.pdf, and FINRA's 2015 Regulatory and Examination Priorities are available at http://www.finra.org/web/groups/industry/@ip/@reg/@guide/documents/industry/p602239.pdf.
[15] FINRA, Senior Designations, available at http://www.finra.org/industry/issues/seniors/p124734.
[16] NASD Rule 3010 (a, b, c, d, and g) has been superseded by FINRA Rules 3110 and 3170. Retired NASD Rule 3010 is available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=11763.

[17] See FINRA Regulatory Notice 11-52: FINRA Reminds Firms of Their Obligations Regarding the Supervision of Registered Persons Using Senior Designation (November 2011), available at http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p125092.pdf.

[18] North American Securities Administrators Association, Regulators Urge Investors to Carefully Check Credentials of 'Senior Specialists' (December 12, 2005), available at http://www.nasaa.org/7684/regulators-urge-investors-to-carefully-check-credentials-of-senior-specialists/.

[19] FINRA Rule 2210(b)(1)(C) and (b)(1)(D) provide certain exceptions from this requirement. For example, pursuant to FINRA Rule 2210(b)(1)(C), principal review is not required for communications which another broker-dealer filed with FINRA's Advertising Regulation Department and received a letter from the Department stating that the communication appears consistent with applicable standards. Also, FINRA Rule 2210(b)(1)(D) exempts from prior to use principal review any retail communication that is posted in an online interactive forum so long as the broker-dealer supervises the use of such communications in the same manner as required for supervising and reviewing correspondence pursuant to NASD Rule 3010(b).

[20] Using customer account records that are aged more than 36 months may increase the likelihood of unsuitable recommendations due to potential changes in customers' personal and financial circumstances.

[21] The voluntary template was created with input from industry professionals and other regulators to present investor with information in a clear, intuitive format. The template includes instructions and other information presented in plain English, highlights of key disclosures, and incorporation of related investor education information. For additional information, see http://www.finra.org/Industry/Tools/P117268.

[22] See Section 5(1)(2) of the Guide to Broker-Dealer Registration, Division of Trading and Markets, U.S. Securities and Exchange Commission (April 2008), available at http://www.sec.gov/divisions/marketreg/bdguide.htm.

[23] Numerous individual states prescribe specific form requirements for insurance sales. These form templates are developed and distributed by the states to the insurance carriers. The carriers then incorporate and provide the forms to the insurance agencies that offer the product.

[24] NASD Rule 3010 (a, b, c, d, and g) has been superseded by FINRA Rules 3110 and 3170. Retired NASD Rule 3010 is available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=11763.

[25] FINRA Regulatory Notice 07-43: FINRA Reminds Firms of Their Obligations Relating to Senior Investors and Highlights Industry Practices to Serve these Customers (September 2007), available at http://www.complinet.com/file_store/pdf/rulebooks/NASD07-43.pdf.

[26] For additional information, see "Mutual Funds," available at http://www.sec.gov/answers/mutfund.htm.

[27] Annuities, such as fixed annuities, are not securities and are thus not regulated by the SEC; they fall under the purview of state insurance regulators.

[28] For additional information, see "Variable Annuities," available at http://www.sec.gov/answers/varann.htm.

[29] For additional information, see "Stocks," available at http://investor.gov/investing-basics/investment-products/stocks#.VNN73zZOmUl.

[30] For additional information, see "Bonds," available at http://investor.gov/investing-basics/investment-products/bonds#.VL_yozZOnnt.

[31] For additional information, see "Unit Investment Trusts (UITs)," available at http://www.sec.gov/answers/uit.htm.

[32] For additional information, see "Exchange-Traded Funds," available at http://www.sec.gov/answers/etf.htm.

[33] For additional information, see "Real Estate Investment Trusts (REITs)," available at http://www.sec.gov/answers/reits.htm.

[34] For additional information, see "Investor Bulletin: Private Placements Under Regulation D," available at http://www.sec.gov/oiea/investor-alerts-bulletins/ib_privateplacements.html, and "Hedge Funds," available at http://www.sec.gov/answers/hedge.htm.

[35] For additional information, see "Investor Bulletin: Structured Notes," available at http://www.sec.gov/oiea/investor-alerts-bulletins/ib_structurednotes.html.