The New Financial Landscape for Consumers
Saving for – and into – Retirement

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Abstract

This paper describes two new developments in the financial services industry serving older clients. First, the paper describes the standards of care that financial industry professionals must follow in their dealings with consumers who are investing for retirement. The paper describes how a recently-adopted U.S. Department of Labor regulation expanding the fiduciary duty to individual investors under ERISA may improve the quality of advice retirement investors receive. Second, the paper evaluates recent proposals by state legislatures, state regulators, and federal regulators to encourage financial services firms to protect their clients from financial exploitation by shielding the firms from liability when they hold a transaction to investigate potential exploitation or when they report cases suspected financial exploitation.

Americans investing for retirement face a financial world that has grown increasingly complex over the last three decades as they have become more responsible for their retirement security. The period marks a shift from traditional defined-benefit pensions to a retirement system dominated by defined-contribution workplace retirement plans when workers have access to a plan. This do-it-yourself retirement system places not only more of the responsibility on the individual for choosing investments wisely, but it also shifts the risk of bad choices and market declines on the individual. Retirement investors face a panoply of products sold by firms and sales people. These firms and sales professionals have a variety of licenses and registrations, depending on the types of products and services they offer. These products and services include banking, insurance, and securities products. It can be a difficult task for an expert to get the formula right, let alone for individuals trying to make it on their own.

At the same time, the financial services industry serving retirement investors faces a changed landscape as it interacts with an increasing number of older consumers. The industry's older client base is growing as the number of Americans who are age 65 or older is increasing. In 2014, there were over 46 million people in the United States age 65 or older according to the Census Bureau. By 2050, the number of Americans age 65 and older is projected to grow to 83.7 million. [1]

This paper describes new developments in the financial services industry that will affect how consumers saving for retirement get financial advice and a new way to protect older consumers when they are no longer able to manage their money on their own.

First, the paper broadly describes the standards of care that financial industry professionals owe to consumers when they give advice about investing for retirement. It discusses the newly broadened fiduciary duty under ERISA and draws conclusions as to whether consumers will benefit.

The paper then examines the benefit to consumers of shielding the financial services industry from legal and regulatory actions when the industry make good-faith reports about suspected elder financial abuse. It also examines the benefit of shielding the industry from liability when it holds – delays or refuses to execute – transactions in good faith to stop or prevent suspected cases of financial exploitation. It includes consideration of six proposals that include one or both of these provisions. It summarizes each proposal. Then, the paper makes recommendations about what a law in this area should contain.

Duty of Care in the Financial Services Industry

The financial services industry is comprised of three different sectors: banking, insurance, and securities. In fact, the financial services industry is sometimes described as different industries that complement and compete with each other to offer an array of financial products and services that individuals may use to pay bills, save for short-term or long-term goals, insure against future catastrophe, and save for their retirement. Firms and salespersons in these industries must have a variety of licenses and registrations, and they may be subject to state, federal law, or a combination of both.

The three sectors are regulated based on the products and services they offer; however, there is some overlap, especially with industry consolidation, since firms may offer products from more than one of the industries. The standards of care that industry professionals must follow also vary. The individual investor may seek advice from financial salespersons, frequently called financial professionals, or financial advisors as they have become known. These financial advisors may have more than one title, depending on the products and services they offer. The term "financial advisor" with an "o" is actually a generic term that the industry has coined; it is not defined in statute or regulation. A financial advisor may be an insurance producer (the technical term for an insurance agent) or a registered representative of a broker selling securities. Or the financial advisor may be a representative of an "investment adviser" with an "e," which is a firm that offers investment advice about securities. For example

The banking sector offers transactional accounts, such as checking and savings accounts that help people pay ongoing expenses and save for short-term needs. Banks also offer products for longer-term savings, such as certificates of deposit (CDs). Banks also offer a wide variety of loans, including fixed-term secured loans, such as those secured by a home or a car, and a variety of unsecured loans with fixed repayment periods, as well as open-ended, or revolving, credit products, such as a credit card.

Banking regulation is complex, with multiple regulators having authority over various institutions and sometimes over the same institutions. Banks can receive a charter – their authorization to operate as a bank – from the federal government or from a state. Federally chartered banks are regulated by the Comptroller of the Currency for the safety and soundness of the institution. State-chartered banks are regulated for day-to-day safety and soundness by their state banking supervisor, whose title can be different depending on the state. The state banking supervisor may also enforce state-specific consumer protection laws. State-chartered banks also have a federal regulator. The Federal Reserve System and the Federal Deposit Insurance Corporation also share jurisdiction over federally-chartered and state-chartered banks.

The Consumer Financial Protection Bureau is the primary federal regulator for consumer protection in the banking industry, although the bureau has examination authority only over larger banks. The bureau also has consumer protection authority over several non-bank institutions such as mortgage companies (including originators, brokers, and servicers), payday lenders, and consumer reporting agencies (commonly called credit reporting agencies). Even though the bureau may not have primary supervisory jurisdiction, consumers may feel confident that they can contact the bureau with any complaints they may have. Banks and their employees do not need any additional licenses to sell traditional banking products, such as certificates of deposit or savings accounts. Banks and their employees are not held to a specific standard of care when selling traditional banking products. Instead, banks can violate federal consumer protection laws if they act in an unfair, deceptive, or abusive manner.

The Securities Industry – Brokers and Investment Advisers

Securities are investments – something that depends on someone else's labor for its value. The term "securities" includes stocks and bonds; mutual funds; variable annuities, which include characteristics of both insurance and securities; and can even include individualized investments that incorporate some or none of these other items. The U.S. Securities and Exchange Commission (SEC) is the primary federal regulator of the securities industry, which includes securities brokers and investment advisers.

Securities Brokers

Brokers are securities firms that conduct trades on behalf of clients.[2] They can range from small firms to large, nationally recognized names. Brokers can be full-service, with face-to-face meetings between their representatives and clients, or they can conduct business exclusively online without ever having met their client face-to-face. The sales professionals for brokers are known as registered representatives, whether they work in-house for the firm or contract independently to sell securities for the firm.

Federal securities law requires brokers to become members of a Self Regulatory Organization (SRO). The SRO regulates the day-to-day activities of the brokers and their registered representatives. The largest SRO is the Financial Industry Regulatory Authority, commonly known as FINRA. FINRA regulates such activities as record-keeping, educational requirements and testing, and recommendations to clients. Under FINRA's rules, brokers must "have a reasonable basis to believe that "a recommended transaction or investment strategy involving a security or securities is suitable for the customer" based their customers' investment profile.[3] The recommendation must also be consistent with the customer's best interest. Instances in which the SEC or FINRA have found a broker's actions to be inconsistent with the customer's best interest include making a recommendation motivated by higher commissions rather than establishing an appropriate portfolio for the customer and making a recommendation of one product over another because of a higher commission.[4]

FINRA's rules must go through a notice and comment period similar to federal agency rules. In fact, FINRA rules go through a comment period with FINRA, as well as a federal comment period supervised by the SEC. Brokers and their representatives receive compensation through commissions their clients pay on transactions.

Investment Advisers

Investment advisers are firms that give advice about investing in securities. They frequently manage the investments of their clients. Investment advisers owe a fiduciary duty to their clients to act in the clients' best interests. An investment adviser's fiduciary duty is derived both from the common law concept of agency and from Section 206 of the Investment Adviser's Act of 1940. Section 206 is an anti-fraud provision, and Section 206(2) prohibits an investment adviser from engaging "in any transaction, practice, or course of business which operates as a fraud or deceit on any client or prospective client." In the case of SEC vs. Capital Gains Research Bureau, the U.S. Supreme Court said that the Investment Advisers Act recognized "the delicate fiduciary nature of an investment advisory relationship."[5]

There is no right to bring a private action to enforce the fiduciary duty under the Investment Advisers Act. The Act is enforced by the SEC or state securities regulators. The nature of the fiduciary duty under the Act is determined by how securities regulators enforce the duty and how the duty is interpreted by the courts. The Capital Gains Court noted that "courts have imposed on a fiduciary an affirmative duty of 'utmost good faith, and full and fair disclosure of all material facts,' as well as an affirmative obligation 'to employ reasonable care to avoid misleading' … clients."[6]

Whether investment advisers must register with the SEC or a state securities regulator depends on the value of the assets they manage on behalf of their clients. If an investment adviser manages $100 million or more of client assets, they are required to register with the SEC. If they manage less than $100 million of client assets, they are required to register with their state securities regulator. Representatives of investment advisers and brokers must register with their state securities regulator. Investment advisers receive fees based on the amount of money they manage on behalf of their clients, commonly referred as an assets under management fee.

The Life Insurance Industry

The insurance sector, including the life insurance sector, is primarily regulated by the states. While some life insurance is sold directly to the public, most life insurance products, especially those with savings component, are sold through agents and brokers, collectively known as insurance producers. The life insurance industry offers two product classes that people planning for retirement might use: life insurance and annuities.

An annuity is an insurance product that offers the possibility of a stream of income for a set period or for the life of the annuitant. When the stream of income begins within a month, the product is known as an immediate annuity. An immediate annuity offers a fixed sum for a specified period of time or for the life of the annuitant. Newer immediate annuity products offer features such as a guaranteed minimum payout or having a death benefit. These features have a cost, which is reflected in lower monthly payments or higher up-front fees.

Deferred annuities offer the ability of taking a stream of income at a later date. Most deferred annuities, though, are used as investments and never actually used to fund a stream of income. The insurance industry identifies two types of deferred annuities: fixed and variable. Fixed annuities usually pay a fixed rate of interest over time. They have become more attractive than bank certificates of deposit because they generally pay higher interest rates, especially in today's low-interest-rate environment. Variable annuities share attributes of securities. As their name implies, their value can vary with the value of the securities that underlie them. Variable annuities frequently have subaccounts that act like mutual funds, pooling investments in multiple stocks. The offer long-term growth tied to the markets. Many variable annuities offer a floor to protect against down-side risk. Like immediate annuities, they also offer death benefits and minimum payouts. These features are not without a cost.

Because variable annuities and variable life insurance are regulated as securities under the federal Securities Act, they must be sold by a broker and are subject to FINRA's suitability rules. Most states also have a suitability rule or statute that applies to fixed and variable annuities. The latest version of the Model Suitability Rule adopted by the National Association of Insurance Commissioners is based on FINRA's suitability rule. Life insurance is not generally subject to a suitability requirement except in Minnesota.

Fiduciary Duty under ERISA

The Employee Retirement Income Security Act of 1974 (ERISA) sets minimum standards for most pension plans established by the private sector to provide protection for individuals in the plans.[7] Under ERISA, a retirement plan, whether a defined benefit or defined contribution plan, must have at least one fiduciary named in the plan. Many plans have more than one. Whether a person or entity is a fiduciary is determined by the functions that the person or entity performs for the plan, and most of the actions involved in operating a plan make the person or entity performing them a fiduciary. One of these functions is advising the plan or its participants about investing plan assets.

There are four fiduciary duties under ERISA, all of which are spelled out in the statute.[8] ERISA fiduciaries have a duty to act in the sole interest of the plan and plan participants. Persons or entities that give advice to participants, including those invested through a defined contribution plan, must give advice in the best interest of the plan participant. Second, they must carry out their duties prudently. This duty requires ERISA fiduciaries to carry out their duties as a person with specialized experience and knowledge would act in a given situation. Third, they must diversify plan investments, unless doing so would be imprudent. Finally, they must follow plan documents, unless doing so would violate ERISA. In addition, ERISA fiduciaries are subject to a prohibited transaction rule. This rule prohibits an ERISA fiduciary from participating in specified transactions, particularly those with a high potential for abuse or that present conflicts of interest.[9]

The DOL shares authority to enforce ERISA's fiduciary duty. Under ERISA, plan participants, beneficiaries, and fiduciaries may bring a private action to recover benefits due under the plan or enforce a right under the plan. ERISA fiduciaries are personally liable for a breach of their duty.[10] ERISA also authorizes prevailing parties to recover attorneys' fees.

People who rolled their money out of an ERISA plan have not enjoyed the same level of protection as when they were in the plan. In 2010, the Department of Labor (DOL), which has regulatory authority under ERISA, proposed a new rule to expand ERISA's definition of fiduciary. The proposal would extend ERISA's fiduciary protections beyond the money inside the plan. Under that proposal, all people advising plan participants would be subject to ERISA's fiduciary duty when they took money from their plan accounts. ERISA requires plan fiduciaries to manage plan assets prudently and with undivided loyalty to the plan, plan participants, and plan beneficiaries.[11] Fiduciaries must also refrain from engaging in "prohibited transactions," which ERISA prohibits because plan fiduciaries may have conflicts of interest in these transactions. These conflicts include accepting compensation based on the recommendation – or in other words a commission. DOL withdrew the proposal after extensive resistance from brokerage, banking, and insurance sectors.

DOL resubmitted a proposed rule in 2015. The 2015 DOL proposal again extended ERISA's reach to transactions that move money out of ERISA plans. People giving advice to plan participants who roll their plan money into an Individual Retirement Arrangement (IRA), or from one IRA to another, out of an IRA, or out of a covered account would be subject to ERISA's fiduciary duty.[12] The proposed rule included ERISA's limits on fees. Industry groups and firms from the brokerage and insurance sectors complained vociferously. To continue commission-based accounts and other prohibited transactions, the transaction would have to be covered by the Best Interest Contract Exception (BICE). Under the proposed rule, financial institutions and advisors would have to agree by contract to give only advice in the best interest of the participant. Only certain asset classes would be covered by the BICE, which would effectively prohibit products not covered.

DOL received over 3,000 comments about the proposal. Most industry comments were critical. Industry complained that the BICE would have been overly narrow and would have required cumbersome disclosures. In addition, industry maintained that the BICE would have prohibited them from offering proprietary products. Industry also complained about the preference for low-fee or low-cost products over all other financial products. It is not always true that the lowest-cost financial product is the best suited for all individuals.

In April 2016, DOL released a final rule almost a year after releasing the proposed rule. The final rule included several changes from the 2015 proposed rule. The final rule clarifies when a person has made a "recommendation" covered by the rule. Educational materials and advice to ERISA plan participants, such as plan information or general financial, investment, or retirement information will not constitute a recommendation. The rule treats IRA owners differently because there is no general plan and all advice is directed to an individual. The final rule also clarifies that marketing oneself or one's services without making a recommendation does not require fiduciary advice.

The final rule also changes the BICE in several ways. The contract now applies only to IRAs and non-ERISA plans. The contract can also be signed along with other documents. The final rule also allows sales of proprietary products, as well as insurance products and other commission-based products. The preamble to the rule also clarifies that advisors are not required to recommend the lowest-fee option if another product is better suited for a client. The final rule also grandfathers existing clients and has a phased implementation, with full implementation delayed until January 1, 2018.[13]

The industry reaction to the final rule can best be described as cautious, with perhaps a quiet sigh of relief. Few have been openly critical. Many have praised DOL for listening to industry concerns about workability.[14] However, some speculate that opponents could still mount a legal challenge.

The Best Protection for the Consumer

The FINRA suitability rule, the Investment Adviser Act fiduciary duty, and the ERISA fiduciary duty all require financial services firms to act in their clients' best interests. ERISA's fiduciary duty is broader because it reaches all financial services firms that advise retirement investors, regardless of the type of products they offer. Whether a standard truly best serves the consumer is a function not only of the level of the duty of care but also of how that duty is enforced. For example, The Investment Advisers Act imposes a fiduciary duty on advisers, but consumers who have been wronged by a breach of the fiduciary duty under the Act must wait for the SEC or a state securities regulator to bring a case because there is no private enforcement under that Act. FINRA's suitability rule can be enforced by the SEC or FINRA, but a consumer may also bring a case for relief in a FINRA arbitration hearing.[15]

ERISA has a fiduciary duty of care, but its ultimate success at protecting consumers will depend on how well the final rule is enforced. It also authorizes private enforcement and even class-action lawsuits, in addition to enforcement by the DOL. Financial institutions that violate BICE could also be sued for breach of contract and could face class action lawsuits. Allowing individuals who have been wronged to sue will increase their chances of getting redress limited resources regulators have for enforcement.

Diminished Capacity, Financial Exploitation, and the Financial Services Industry

Financial capacity is "the ability "manage money and financial assets in ways that meet a person's needs and which are consistent with his/her values and self-interest …."[16] It involves a number of skills, including managing a checkbook, identifying and counting money, understanding debt, and judging the risks and benefits associated with an investment.[17] Decline in these skills is often an early warning sign for Alzheimer's disease or other dementias, since math and money management skills are some of the first abilities to decline in the early stages of dementia.[18]

Alzheimer's disease and other dementias are correlated with age. The vast majority of those estimated to have Alzheimer's disease are age 65 and older.[19] Individuals who have diminished financial capacity may be unable to recognize warning signs of fraud. They may also be more vulnerable to financial exploitation by the persons who are helping to manage their finances.[20]

Financial services firms are in a unique position to notice signs of possible diminished financial capacity, fraud, or financial exploitation. Firms can see the types of transactions their clients typically make and the frequency with which they make them. Firm representatives help clients decide which financial products to purchase, and they may notice if a client's financial practices change. Representatives may even see a client face-to-face on a regular enough basis to be able to notice other changes in behavior or appearance that could be early signs of dementia. They may even notice these signs before family members, especially if the family member does not live nearby or does not discuss financial matters with their loved ones. As the number of clients who have Alzheimer's disease or other dementias has grown, the industry has seen a larger number of clients who are vulnerable to fraud and financial exploitation.

Mandatory Reporting of Financial Exploitation – Federal Level

The federal Financial Crimes Enforcement Network (FinCEN), a division within the U.S. Department of the Treasury, collects and analyzes information on suspected financial crimes and disseminates the information to law enforcement agencies. FinCEN gets its information from financial services firms when they file a suspicious activity report (SAR) and other reports. Financial institutions in all sectors file SARs on illegal or questionable financial transactions. Filing a SAR is mandatory for transactions involving criminal activity if the aggregate amount of the transaction or transactions is at least $5,000 (or $2,000 for money services businesses such as Western Union). Firms may also file voluntarily if the aggregate amount does not reach the mandatory filing threshold.[21] In this way, a SAR has elements consistent with state mandatory reporting laws and elements consistent with permissive reporting laws. A SAR is generally confidential.

FinCEN issued an advisory notice in 2011 telling financial institutions how to file a SAR about suspected elder financial exploitation.[22] The advisory included examples of "red flags" that indicate potential elder financial exploitation and a request that SARs include the phrase "elder financial exploitation" in the narrative section if they involved cases of suspected elder financial abuse.

After the advisory, FinCEN noted a significant increase in the number of SARs using the phrases "elder financial exploitation" and "elder financial abuse." FinCEN reported 806 SARs using these terms in the six-month period immediately before releasing the advisory and 2,161 in the six-month period immediately after it, an increase of 1,355.[23] Institutions continued to file SARs noting financial exploitation at the increased rate throughout the rest of the reporting period, 18 months following the release.[24] FinCEN stated the SARs described patterns of financial exploitation by relatives or others close to elderly victims. FinCEN noted that many of the cases described coercing or cajoling the victim into transactions that benefitted the perpetrator at the victim's expense or through power of attorney abuse.[25]

FinCEN has since altered the SAR form so that elder financial exploitation is now a "check-off" box category instead of requiring firms to note it in the narrative. This should make filing a financial exploitation SAR easier for firms and make it easier for regulators to identify trends in financial exploitation.

Mandatory Reporting of Financial Exploitation – State Level

All states require third party to report suspected cases of elder abuse to state or local adult protective services departments. These laws generally shield reporters from civil liability so long as the report is made in good faith, even if the report turns out to be erroneous. Who is required to report varies by state.

Some states include elder financial exploitation within their statutes. Required reporters could include banks, securities firms, and insurance companies. The National Adult Protective Services Association and the New York County District Attorney's Office published a study in 2013 of state reporting statutes. At that time, 23 states and the District of Columbia required financial institutions to report cases of suspected elder financial exploitation.[26] In some states, the law specifically states that financial institutions must report. Generally, laws in these states apply only to banks, credit unions, and other depository institutions, but not to the insurance or securities firms unless otherwise specified. In other states, mandatory reporting laws require all "persons" to report suspected elder abuse or financial exploitation. All financial services firms, including banks and credit unions, as well as securities and insurance firms, are included in the definition of a "person" in these states. Two states, Georgia and Nevada, passed mandatory reporting for financial institutions in 2015. In both cases, the term "financial institution" specifically includes securities firms, both brokers and investment advisers, for the purpose of reporting financial exploitation.

Permissive Reporting of Financial Exploitation

Unlike some other states, Iowa and Virginia specifically permit, but do not require, financial institutions to report suspected financial exploitation. Iowa's law permits an employee of a financial institution to report financial exploitation to the state's Department of Human Services. Like many others, the Iowa law uses a definition of "financial institution" that includes only depository institutions such as banks or credit unions.

Virginia's reporting statute permits financial institutions to report cases of suspected financial exploitation. Under the Virginia reporting law, the term "financial institution" is broadly defined. It includes not only banks and credit unions, but also securities firms and insurance companies – all three sectors of the financial services industry.[27] Virginia's law was later amended to include accounting firms under the definition of financial institution.[28]

Barriers to Reporting

Financial services firms are in a good position to notice and to report cases of suspected diminished capacity or financial exploitation but say they face two major barriers. Firms can, in some instances, be held civilly liable for refusing to execute – or holding – a transaction. To be successful, a plaintiff would have to show that holding the transaction caused harm.[29] Firms are also wary about the potential for violating privacy regulations for reaching out to a third party to report their concerns. These concerns are not completely without merit.

The Gramm-Leach-Bliley Act of 1999 (GLBA) is the basis for protecting consumer privacy in the financial services industry under federal law. Generally, GLBA's privacy provisions require financial firms to obtain consumer consent before disclosing private information to unaffiliated third parties by describing the disclosure and their privacy policies. Consumers consent by not opting out of the disclosure.

To allay industry concerns about violating federal privacy regulations, federal financial regulators issued joint guidance in 2013 on privacy law and regulations under GLBA.[30] The guidance clarified the regulators' view that GLBA privacy requirements do not prevent a financial institution from reporting suspected elder financial abuse to local, state, or federal agencies, either at the agency's request or at the financial institution's initiative. Some GLBA privacy provisions specifically permit sharing this information under appropriate circumstances.[31] In a footnote, the guidance states that it applies only to GLBA privacy requirements and "does not address any other federal or state laws that may regulate such reporting." The guidance goes on to note that it "does not specifically address risk management expectations for financial institutions related to the reporting of elder abuse."[32] In other words, the guidance does not address a firm's actions to mitigate the possibility of being sued or of any potential regulatory liability under another law.

Shielding Industry for Reporting and Holding Transactions

In 2010, Washington State became the first jurisdiction to authorize a financial institution to hold a transaction when it enacted SB 6202.[33] Other states took notice. In 2014, Delaware followed suit with a similar bill, HB 417.[34] Missouri became the third state to pass hold legislation in 2015, with SB 244.[35]

Like "Good Samaritan" laws, which protect persons from civil liability when they come to the assistance of someone in medical distress, these new laws generally shield a financial services firm from liability when it temporarily holds or refuses to execute a transaction because the firm believes the transaction is being used to financially exploit a consumer. Such legislation recognizes that it is far easier to keep the money in the account than to recover it after fraud or financial exploitation occurs.

In addition to the action in state legislatures, regulators and industry groups began looking at this type of proposal during 2015. The North American Securities Administrators Association (NASAA) adopted a model law on the same subject, and the Financial Industry Regulatory Authority (FINRA) proposed a rule on the subject. The drafters of both the NASAA model and the FINRA proposed rule used the Missouri legislation as the starting point for their work. The National Association of Insurance and Financial Advisors (NAIFA), the trade association for independent life insurance and securities sales representatives, called on the National Association of Insurance Commissioners in 2015 to develop model legislation adapted to the insurance sector based on the Missouri legislation.[36]

Two U.S. senators have introduced legislation at the federal level, S. 2216, the Senior$afe Act of 2015. S. 2216 shields financial institutions and their employees from liability if they report suspected financial exploitation and follow the bill's requirements. The federal bill does not include an authorization to hold a transaction.

The Washington, Delaware, and Missouri bills, the NASAA model, the FINRA rule, and the Senate bill – collectively the proposals – provide incentives for financial services firms to protect their customers who may have diminished financial capacity or who might be victims of financial exploitation. They do not protect an otherwise competent consumer from merely making a bad financial decision.

Below is a brief description of each proposal in the order in which they were introduced.

Washington

Under SB 6202 of 2010, a "financial institution" may hold a transaction if the financial institution reasonably believes financial exploitation is involved. Securities firms, both investment advisers and brokers, are specifically included in the definition of "financial institution" under the statute. Once the hold is placed, the law requires firms to report the case to state authorities. The initial hold expires 10 days after the firm placed the hold if the transaction involves securities and 5 days after placing the hold if it does not involve securities. A court may order an extension of the hold or order injunctive relief.

Firms and their employees are immune from criminal, civil, and regulatory liability for acts made when they hold or disburse funds under the act, so long as they are done in good faith. They also receive immunity for participating in making a report, providing documentation, or allowing access to records if done in good faith. Financial institutions must give their new employees training that includes how to recognize financial exploitation and how to report under state law.

Delaware

HB 417 of 2014 requires an employee of a "financial institution" who has reasonable cause to believe that financial exploitation has occurred, is occurring, or will occur (including attempted financial exploitation) to follow a firm's internal written policy, program, plan, or procedure for reporting financial exploitation. In turn, firms are required to have a policy, program, plan, or procedure that includes reporting cases of suspected financial exploitation. Brokers and investment advisers, along with banks, credit unions, and other depository institutions, are specifically included in the definition of "financial institution" under the bill.

The law requires the financial institution to report the suspected financial exploitation to the state Department of Health and Social Services, and it permits reporting to agencies such as the Delaware Department of Justice and the Federal Trade Commission. HB 417 also permits the institution to hold a transaction if it reasonably believes financial exploitation has occurred. The initial hold expires 10 days after it was placed. A hold can be extended for up to 30 days by an investigating agency or the firm if it has not heard back from the Department of Health and Social Services or the Delaware Department of Justice. The firm may also seek injunctive relief in court.

A person or entity that participates in holding a transaction and for reporting under the bill is immune from civil, administrative, and criminal liability as long as they acted in good faith. A person or entity is not liable for not holding or releasing a transaction so long as the person or entity acted in good faith and otherwise complied with the act.

Missouri

In 2015, Missouri passed a financial exploitation reporting law that covers only brokers. SB 244 authorized certain employees at a brokerage firm, called "qualified individuals," to notify the state's Department of Health and Senior Services and the state securities commissioner if they reasonably believe that financial exploitation has occurred, has been attempted, or is being attempted. Subsequent to this notification, the qualified individual may notify an immediate family member, legal guardian, conservator, co-trustee, successor trustee, or agent under a power of attorney.

A qualified individual may hold a request for a disbursement from a brokerage account if:

- the broker or qualified individual reasonably believes the disbursement will result in financial exploitation; and

- the broker or qualified individual
    - makes a reasonable effort to notify all parties authorized to transact business on the account within two business days; and
    - notifies the agencies within three business days.

A hold on a disbursement lasts for up to 10 business days, and a court may extend the hold.

A broker, broker's agent, or qualified individual is immune from civil liability for reports made or holds executed under the bill if they act in good faith and exercise reasonable care. The state securities commissioner is required to have a website with training resources on detection and prevention of financial exploitation.

North American Securities Administrators Association

The North American Securities Administrators Association (NASAA), the professional organization of state and territorial securities administrators, has drafted a model for its members to use at the state level either as the basis for draft legislation or a regulation in their jurisdictions. The model requires prompt notice to Adult Protective Services and the securities commissioner. Firms may also notify a third party previously designated by the victim (an emergency contact). The NASAA model applies to brokers and investment advisers, and allows a "qualified employee" to make the notification.

The firm may hold a disbursement from the account if (1) the firm or qualified employee reasonably believes the disbursement will result in financial exploitation; and (2) immediately (within two business days after the requested disbursement) provides written notice to all parties authorized to transact business on the account, as well as notifying APS and the securities commissioner. The firm must immediately initiate an internal review of the suspected financial exploitation and report the results to the agencies within seven business days.

A hold lasts for up to 10 business days after the hold was placed on the disbursement, unless one of the agencies requests an extension. A court may also extend the hold or provide other protective relief.

A firm that, in good faith and exercising reasonable care, delays disbursement is immune from administrative or civil liability. The firm may provide access or copies of records that are relevant to the financial exploitation investigation.

A qualified employee who, in good faith and exercising reasonable care, notifies a third party under the model is immune from administrative and civil liability. A broker that, in good faith and exercising reasonable care, holds a transaction under the model is immune from administrative and civil liability.

FINRA Proposed Rule

The U.S. Securities and Exchange Commission is the primary regulator of the securities industry, but federal law also requires brokers and their representatives to register with a self-regulatory organization (SRO). The largest SRO, the Financial Industry Regulatory Authority (FINRA), has proposed changes to its rules to combat elder financial exploitation and help protect consumers who have diminished financial capacity.

Under the proposed rule, brokers must make a reasonable effort when setting up a new account to obtain the name and contact information of a "trusted contact person" who is not authorized to transact business on the account. Brokers must disclose that they are authorized to contact this person. Brokers will not be held liable for not having the information if they make reasonable efforts to obtain the name and contact information.

Brokers, through a "qualified person," are authorized to place a temporary hold of up to 15 days on transactions that involve disbursement of funds or securities from the suspected victim's account. There must be a reasonable belief that financial exploitation has occurred or was attempted, is occurring or being attempted, or will occur or be attempted. The broker may extend the hold for 15 additional days if an internal investigation supports the reasonable belief about financial exploitation. A court may also extend the hold.

Compliance with the proposed rule is a "safe harbor" for brokers when they place a hold. This likely would protect the broker from a FINRA enforcement action. However, a FINRA rule cannot grant legal immunity because it is not a government actor. Compliance with the rule may be used as evidence for a defendant in a trial.

Federal Senior$afe Act of 2015

Senators Collins and McCaskill have introduced a bill at the federal level, S.2216, the Senior$afe Act of 2015. The bill does not authorize a hold or require reporting. The bill gives immunity, including in any civil or administrative proceeding, to an individual or covered financial institution for making a report about suspected exploitation of a "senior citizen" (a person age 65 or older) to a "covered agency." An individual qualifies for immunity if employed as a supervisor, compliance officer, or legal advisor at a "covered financial institution." The individual must also have received training regarding identification and reporting of suspected exploitation and made the disclosure in good faith and with reasonable care. A financial institution qualifies if it provides the training to each officer or employee who:

- is a supervisor, compliance officer, or legal advisor;
- may come into contact with a senior citizen as a regular part of their duties; or
- may review or approve the financial documents, records or transaction of a senior citizen.

The term "covered financial institution" includes banks, credit unions, broker-dealers, and investment advisers. The term "covered agency" includes state and federal regulatory agencies, law enforcement, and state adult protective services agencies.

Recommendation

These proposals represent novel incentives for financial services firms to use their unique skills and relationships with their clients to protect consumers from financial exploitation. All of the proposals contain elements worth emulating. Five of the six include the element of a transaction hold to protect the consumer from losing money. Four of the six include a section on training. Three embrace the concept of an emergency contact person who is not authorized to transact business on the account. The ideal proposal would have the following elements. States considering drafting legislation or regulations in this area should include these elements.

- **A reasonable initial hold period to allow the firm to stop a transaction before the money is gone.** Most proposals have a period of up to 10 days for the initial hold at the firm's discretion. One had a 10-day period for accounts with securities and a 5-day period for other accounts, including a transaction account such as a checking account. Firms are in the best position to quickly stop a transaction when they suspect financial abuse. Having an initial hold period longer than 10 days may rest too much discretion with the firm.
- **Mandatory reporting of suspected cases of financial exploitation.** Mandatory reporting is the strongest incentive to encourage financial services firm to report these cases to authorities. Notifying other parties on the account after the transaction has been held is also important.
- **Ability to extend the hold, with court approval, and including other court-ordered injunctive relief.** Being able to extend the hold beyond the initial period continues protecting the consumer from losing money when a firm has been unable to determine whether the transaction amounts to financial exploitation, especially when there is some evidence financial exploitation has occurred but perhaps not yet strong enough for law enforcement to bring a case. Requiring court oversight is good for an extension because it protects the consumer against someone at the firm holding a transaction for an unreasonably long period. A court may not require specific statutory authority to order other injunctive relief, but spelling it out in the statute could remind a court that it has that power in states that do not require specific statutory authority.
- **Shielding the financial institution and its employees if they acted in good faith and with reasonable care.** Shielding financial institutions and employees from civil and administrative liability if they are involved in holding the transaction or making a report is the best incentive to encourage firms and their employees to act in the consumer's best interest. The shield should be available to institutions and employees who acted in good faith and with reasonable care. Having both adds an additional layer of protection.
- **Covering all financial services firms.** Consumers use products and services from all sectors of the financial services industry. The best proposal covers all three sectors: banking, securities, and insurance.
- **Training for employees.** Financial services professionals are not trained law enforcement officers or medical professionals, but there are signs of financial exploitation they should recognize and are in a position to recognize in their client before other people could reasonably do so. The training should also include state-specific information on how to file a report and the mechanics of holding the transaction. Training is essential to helping firms and their employees have a meaningful role in combating financial exploitation.
- **Reasonable effort to obtain emergency contact information.** Having an emergency contact on file makes the decision of which family member to contact less difficult when the firm is concerned about its client and needs good information in a hurry. Firms should not be held liable if a client refuses to provide contact information. The emergency contact information should be

updated when other information about the account is updated so that the firm has the most current information available.

[1] United States Census Bureau; An Aging Nation: The Older Population in the United States; Population Estimates and Projections: Current Population Reports Ortman, J., Velkoff, V. and Hogan, H. (May 2014). Accessed at https://www.census.gov/prod/2014pubs/p25-1140.pdf.

[2] Securities brokers are sometimes referred to a broker-dealers. Under the securities law, a "broker" makes trades on another person's behalf, and a "dealer" makes trades on his or her own behalf. Since this paper deals with how consumers are treated, it refers only to brokers.

[3] FINRA Rule 2111(a).

[4] See FINRA Notice 12-25 (December 2012) at 3.

[5] SEC vs. Capital Gains Research Bureau, 375 U.S. 180, 191 (1963), at (citing 2 Loss, Securities Regulation (2d ed. 1961), at 1412.

[6] Ibid., at 194.

[7] ERISA also establishes minimum standards for health plans, but this paper does not address ERISA's jurisdiction over health plans.

[8] SEE ERISA § 404.

[9] See ERISA § 502.

[10] See ERISA § 409.

[11] See ERISA § 404(a).

[12] An Individual Retirement Arrangement is broader than an Individual Retirement Account. An Individual Retirement Arrangement includes an Individual Retirement Account; it also includes …. Both are referred to by the acronym IRA. To prevent confusion, this paper will use the term IRA to mean an Individual Retirement Arrangement.

[13] For a complete list of changes contained in the final DOL rule, see DOL's chart illustrating changes between the proposed and final rules, which is available on the Employee Benefits Security Administration's Conflict of Interest Final Rule page on the DOL website. The chart is available at http://www.dol.gov/ebsa/pdf/conflict-of-interest-chart.pdf.

[14] See, e.g., Schoeff, Mark, Jr., Investment News, "An Original Critic, FINRA's Ketchum Praises Improvements in Final DOL Fiduciary Rule, April 15, 2016. Accessed at http://www.investmentnews.com/article/20160415/FREE/160419932/an-original-critic-finras-ketchum-praises-improvements-in-final-dol?NLID=daily&NL_issueDate=20160415&utm_source=Daily-20160415&utm_medium=email&utm_campaign=investmentnews&utm_visit=595187.

[15] This paper does not compare whether consumers would better served with a right to bring a civil action instead of a FINRA arbitration case. However, most consumer advocates who have studied the issue maintain that a consumer would be better off being able to bring a civil action in court than in a FINRA arbitration hearing. Few have compared whether a consumer is better off being able to bring an arbitration case than having no private enforcement mechanism, as is true under the Investment Advisers Act.

[16] Marson, D.C., Hebert, K., and Solomon, A. "Assessing Civil Capacities in Older Adults with Dementia: Consent Capacity, Financial Capacity, and Testamentary Capacity." In Larrabee, J.G. editor, *Forensic Newrophyscology: A Scientific Approach,* 2nd edition. New York: Oxford University Press. pp. 401-37 (2012).

[17] Triebel, K.L. and Marson, D.C., "The Warning Signs of Diminished Financial Capacity in Older Adults" GENERATIONS: JOURNAL OF THE AMERICAN SOCIETY ON AGING (36:2) pp. 39-44 (2012).

[18] Ibid.

[19] 2015 Alzheimer's Disease Facts and Figures, Alzheimer's Association (2015), at p. 16.

[20] Generally, financial exploitation is defined under state law and may differ somewhat from state to state; however, a common definition elder financial exploitation could be summed up as "the illegal or improper use of an older adult's funds, property, or assets." *See* GAO, Strong Federal Leadership Could Enhance National Response to Elder Abuse GAO 11-208 (Washington, DC: March 2, 2011).

[21] Financial Crimes Enforcement Network, FinCEN Suspicious Activity Report: (FinCEN SAR) Electronic Filing Instructions (Released October 2012 – Version 1.2) at p. 4. Available at https://www.fincen.gov/forms/files/FinCEN%20SAR%20ElectronicFilingInstructions-%20Stand%20Alone%20doc.pdf#page=2. (Last accessed on November 4, 2015).

[22] Financial Crimes Enforcement Network (FinCEN), "Advisory to Financial Institutions on Filing Suspicious Activity Reports regarding Elder Financial Exploitation," FIN-2011-A003 (Feb. 22, 2011) Available at https://www.fincen.gov/statutes_regs/guidance/html/fin-2011-a003.html. (Last accessed on November 4, 2015).

[23] Financial Crimes Enforcement Network, "The SAR Activity Review: Trends and Tips" Issue 23 (May 2013) at p. 4. Available at https://www.fincen.gov/news_room/rp/files/sar_tti_23.pdf. (Last accessed on November 4, 2015).

[24] Ibid. at p.3.

[25] Ibid. at p.4.

[26] 2013 Nationwide Survey of Mandatory Reporting for Elderly and/or Vulnerable Persons, The New York County District Attorney's Office National Adult Protective Services Association, Chan, M. and Horowitz, C., Eds. (New York, NY: August 2013). Available at http://www.napsa-now.org/wp-content/uploads/2014/11/Mandatory-Reporting-Chart-Updated-FINAL.pdf. (Last accessed on October 26, 2015).

[27] Virginia Acts of Assembly, 2001 Session, Chapter 191.

[28] Virginia Acts of Assembly, 2004 Session, Chapter 749.

[29] At least one FINRA arbitration case settled in 2014 listed a delay in processing an account transfer among its causes of action. *See E.S. and Partners Trading and Eric S. Stiskin v. Lightspeed Trading, LLC, Thomas Gibb, John Mazzola, and James Moschetto*, Case Number 13-02173. The case was brought in 2013 and settled in 2014. Claims included delay in processing account transfer, erroneous information, and lack of internal control.

[30] The guidance was issued jointly by the Board of Governors of the Federal Reserve System, the Commodity Futures Trading Commission, Consumer Financial Protection Bureau, the Federal Deposit Insurance Corporation,

the Federal Trade Commission, the National Credit Union Administration, The Office of the Comptroller of the Currency, and the Securities and Exchange Commission.

[31] Interagency Guidance on Privacy Laws and Reporting Financial Abuse of Older Adults (Washington, DC: October 4, 2013).

[32] Ibid, at note 2. In all probability, the guidance is saying it does not address whether the firm would be sued in a civil action.

[33] SB 6202 became Chapter 133 of 2010.

[34] HB 417 became Chapter 438 of 2014.

[35] SB 244 was signed by the governor on June 12. As of October 31, 2015, it had not been assigned a chapter law.

[36] See Testimony of Steve Kline, of the National Association of Insurance and Financial Advisors, before the National Association of Insurance Commissioners (NAIC) Industry Liaison Committee, (June 28, 2015) Available at http://naic.org/meetings1508/committees_industry_liaison_2015_summer_nm_materials.pdf?1446834018858. (Last accessed on November 3, 2015) at pp. 5-10 of the larger document. NAIFA developed model legislation on its own for its state affiliates to use and lobby within states, but it is not part of this analysis. The NAIC announced that it would work through a task force on senior exploitation issues at its Spring 2016 meeting in April.