Point of view

Analyzing Strategic Regulatory Policy Shifts

Americas FS Regulatory Center of Excellence

October 2016

An Aging America: New Financial Regulation Policy Trajectories

kpmg.com

Glossary

CFPB:	Consumer Financial Protection Bureau
DOJ:	Department of Justice
EJCC:	Elder Justice Coordinating Council
ERISA:	Employee Retirement Income Security Act
FHA:	Federal Housing Administration
FinCEN:	Financial Crimes Enforcement Network
FINRA:	Financial Industry Regulatory Authority
FTC:	Federal Trade Commission
NASAA:	North American Securities Administrators Association
SEC:	Securities and Exchange Commission
UDAAP:	Unfair, deceptive or abusive acts or practices

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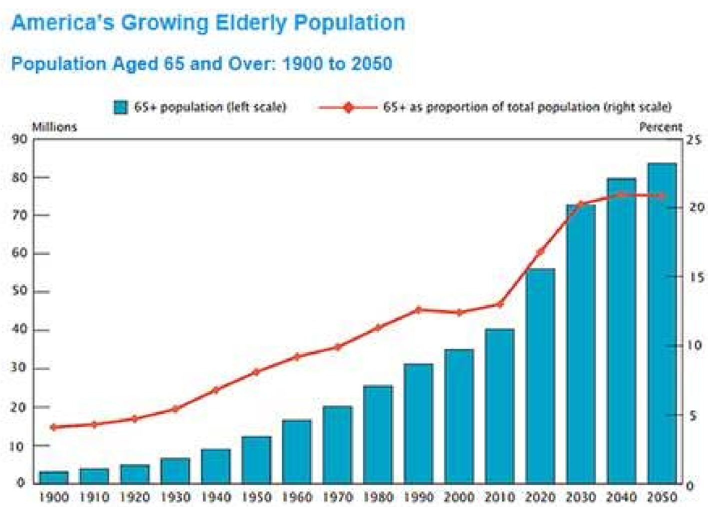
1. Background

Between now and 2030, the U.S. Census Bureau projects the percentage of the population aged 65 and over will nearly double to 20 percent, with the fastest growing portion among those aged 85 or older.[1] In 2011, the net worth of household headed by a consumer aged 65 and older was approximately $17.2 trillion.[2] Federal and state financial policymakers are, accordingly, taking action to enhance mechanisms that protect the elderly from financial harm.



65+ in the United States: 2010, Current Population Reports, by Loraine A. West, Samantha Cole, Daniel Goodkind, and Wan He, United States Census Bureau June 2014)

Elder financial exploitation, a form of elder abuse, can take many forms across all strata of society.[3] Those with accumulated equity in their homes or with other significant assets are potentially as much at risk as those with recurring sources of income such as Social Security or pension payments. In addition, isolation, bereavement, or disability can increase an elder's vulnerability to fraud. These risk factors can be compounded by lack of familiarity with financial matters or technology, creating a heighted susceptibility to unfair, deceptive, or abusive acts or practices.

Elder financial protection has been governed primarily by individual state laws and enhanced federal legislation. Over the last few years, federal policymakers have taken an increasingly active role in defining expectations to mitigate and prevent instances of elder abuse in the financial sector.

These policy trajectories create a range of over-lapping, sometimes contradictory, compliance and risk management challenges. Common themes around training and awareness, and reporting and immunity are emerging though the requirements remain variable.

Top Ten Frauds Targeting Seniors

1. *IRS Impersonation Scams*
2. *Sweepstakes Scams*
3. *Robocalls / Unwanted Phone Calls*
4. *Computer Tech Support Schemes*
5. *Identity Theft*
6. *Grandparent Scams*
7. *Elder Financial Abuse*
8. *Grant Scams*
9. *Romance Scams / Confidence Fraud*
10. *Home Improvement Scams*

However, at both the federal and state levels, regulators increasingly expect financial institutions to establish and implement an Elder Financial Protection Program. An aging America accentuates the need for a more consistent approach to protecting elders from financial harm. Both Congress and federal

[1] *Projections of the Population by Sex and Selected Age Groups for the United States: 2015-2060*, United States Census Bureau Table 3. http://www.census.gov/population/projections/data/national/2014/summarytables.html.

[2] See CFPB *Recommendations and report for financial institutions on preventing and responding to elder financial exploitation*, March 2016, available at: http://files.consumerfinance.gov/f/201603_cfpb_recommendations-and-report-for-financial-institutions-on-preventing-and-responding-to-elder-financial-exploitation.pdf

[3] The Center for Disease Controls identifies eight different types of financial abuse to which the elderly are particularly vulnerable: fraud, misappropriation, power of attorney misuse, undue influence, conservatorship abuse, abuse of trust, fiduciary abuse, and fiduciary duty abuse. *Elder Abuse Surveillance: Uniform Definitions and Recommended Core Data Elements*, Center for Disease Controls, National Center for Injury Prevention and Control, Division of Violence Prevention (2016). http://www.cdc.gov/violenceprevention/elderabuse/

financial regulators are now actively engaged in addressing varying aspects of elder protection. Richard Cordray, Director of the Consumer Financial Protection Bureau (CFPB), has characterized this initiative as an "all hands on deck strategy."

The consequences for failing to keep pace with these policy developments can include regulatory restrictions and civil money penalties. They may also, in some instances, create potential criminal liability.

KPMG believes that elder financial protection is an increasingly important risk management area for financial institutions. The risk of elder financial harm, sustained by demographic trends, will remain a serious consumer threat drawing increased attention from policymakers and law enforcement. Financial firms are encouraged to evaluate carefully their Elder Abuse Prevention Programs when seeking to serve elderly consumers responsibly.

2. A Clear Policy Trajectory - Increased Federal Engagement

2.1 Recent Legislation

Three different Acts of Congress have recently created new legal obligations in this area.

In March 2010, Congress passed the Elder Justice Act as part of the Patient Protection and Affordable Care Act.[4] The Elder Justice Act establishes the Elder Justice Coordinating Council (EJCC) to coordinate federal government activities among 11 federal agencies regarding elder abuse, neglect, and financial exploitation across the federal government.

In 2016, Congress reauthorized the Older Americans Act of 1965 in order to protect against abuse, neglect, and exploitation.[5] Elder financial exploitation is considered a form of elder abuse. The Older Americans Act also established the Administration on Aging to administer grant programs for community planning and social services for older persons, research and development projects, and personnel training in the field of aging.

In 2013, Congress passed the Reverse Mortgage Stabilization Act authorizing the Secretary of Housing and Urban Development to exercise discretion "to improve the fiscal safety and soundness" of the reverse mortgage[6] program by issuing any necessary "additional or alternative requirements" on mortgagees.[7]

These legislative acts provide a foundation for existing regulatory initiatives.

2.2 Recent Regulatory Action

Federal regulatory efforts are guided to a large degree by in the EJCC, which released its first set of recommendations in 2014. Those recommendations emphasized the need to develop a public awareness campaign, implement cross-disciplinary training, and coordinate federal enforcement activities, policy initiatives, oversight, and education.

For financial institutions, these recommendations have been reflected in heighted regulatory efforts to raise awareness of the potential for elder financial harm both through management and staff training as well as through consumer outreach. Regulatory initiatives also encourage financial firms to report suspected elder financial harm to state and local authorities under existing federal provisions and also to trusted contacts named by the consumer. Finally, financial firms are required to develop and document the mechanisms they use to monitor and protect accountholder assets. Key regulatory actions taken in this regard are outlined below.

2.2.1 Federal Law Enforcement Reporting Obligations

As of 2011, all financial firms are required by the Department of Treasury's Financial Crimes Enforcement Network (FinCEN) to file Suspicious Activity Reports (SARs) in cases where elder financial exploitation is suspected and when certain monetary and other thresholds are met.[8] In addition, FinCEN directs financial firms to file reports consistent with their own policies and the requirements of states and local laws and regulations, where applicable. Financial institutions therefore must be familiar with the state and local requirements relevant to their operations.

Reporting obligations can, however, raise privacy concerns. In response, eight federal agencies jointly issued guidance[9] making clear that reporting suspected elder financial exploitation to appropriate government entities, whether required or not, does not generally violate the privacy provisions of the Gramm-Leach-Bliley Act (GLBA). The GLBA requires that consumers receive

[4] P.L. 111-148 (March 23, 2010)

[5] "Exploitation" is defined as 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." See Section 102(18)(A) of the Older Americans Act (P.L. 89-73 as amended by P.L. 114-144, enacted April 19, 2016).

[6] Reverse mortgages were created in 1988, with regulatory authority over those mortgages awarded to the Department of Housing and Urban Development's (HUD) Federal Housing Administration (FHA).[6] They enable homeowners at least 62 years of age to access the equity in their homes and defer payments on the loan until they sell the home, move out of the home, or die.

[7] P.L. 113-29 (August 9, 2013).

[8] See FIN-2011-A003, *Advisory to Financial Institutions on Filing Suspicious Activity Reports on Elder Financial Exploitation* (February 22, 2011). https://www.fincen.gov/statutes_regs/guidance/pdf/fin-2011-a003.pdf.

[9] *Interagency Guidance on Privacy Laws and Reporting Financial Abuse of Older Adults*(September 24, 2013). http://files.consumerfinance.gov/f/201309_cfpb_elder-abuse-guidance.pdf Participating agencies include: Federal Reserve Board, Office of the Comptroller of the Currency, Federal Deposit Insurance Corporation, National Credit Union Administration, Consumer Financial Protection Bureau, Securities and Exchange Commission, Commodity Futures Trading Commission, and Federal Trade Commission.

notice and opt-out opportunities before nonpublic personal information can be shared with nonaffiliated third parties.

"Red Flags" of Financial Exploitation

Erratic or unusual banking transactions, or changes in banking patterns:

— *Frequent large withdrawals, including daily maximum currency withdrawals from an ATM;*
— *Sudden Non-Sufficient Fund activity; o Uncharacteristic nonpayment for services, which may indicate a loss of funds or access to funds;*
— *Debit transactions that are inconsistent for the elder;*
— *Uncharacteristic attempts to wire large sums of money;*
— *Closing of CDs or accounts without regard to penalties.*

Interactions with customers or caregivers:

— *A caregiver or other individual shows excessive interest in the elder's finances or assets, does not allow the elder to speak for himself, or is reluctant to leave the elder's side during conversations;*
— *The elder shows an unusual degree of fear or submissiveness toward a caregiver, or expresses a fear of eviction or nursing home placement if money is not given to a caretaker;*
— *The financial institution is unable to speak directly with the elder, despite repeated attempts to contact him or her;*
— *A new caretaker, relative, or friend suddenly begins conducting financial transactions on behalf of the elder without proper documentation;*
— *The customer moves away from existing relationships and toward new associations with other "friends" or strangers;*
— *The elderly individual's financial management changes suddenly, such as through a change of power of attorney to a different family member or a new individual;*
— *The elderly customer lacks knowledge about his or her financial status, or shows a sudden reluctance to discuss financial matters.*

***Source**: FinCEN Advisory, FIN-2011-A003 (February 2011).*

The 2013 regulatory guidance permits financial institutions to disclose nonpublic personal consumer information without consumer authorization and without violating the GLBA in situations where elder financial exploitation is suspected to protect or prevent actual or potential fraud, unauthorized transactions, claims, or other liability as well as in response to legal, judicial, or regulatory requirements.

2.2.2 Financial Industry Regulatory Authority (FINRA)

In October 2015, FINRA expanded the scope of its elder-based initiatives by proposing a new regulation (Rule 2165: Financial Exploitation of Specified Adults) seeking to create "a uniform national standard" for responding to suspected financial exploitation. [10] The new rule would authorize, but not require, financial institutions (limited to FINRA-regulated firms) to place a temporary hold of up to 15 business days on the disbursement of funds or securities from the accounts of "specified adults"[11] when reasonable belief of financial exploitation exists. An internal review of the facts and circumstances prompting placement of the hold would be required.

In addition, notification and justification for the hold would be required to all parties authorized to transact business on the account as well as to any named "trusted contact" person. Financial institutions placing holds in a manner consistent with the proposed rule would be provided a "safe harbor when they exercise discretion in placing temporary holds."[12]

Persons qualified to place holds would include individuals who serve in a supervisory, compliance, or legal capacity reasonably related to the account of the specified adult. The proposed rule would require a financial institution to establish and maintain specific written supervisory procedures including, but not limited to, procedures on the identification, escalation, and reporting of matters related to financial exploitation of specified adults. The proposed rule would also require financial institutions to develop and document specific training policies or programs reasonably designed to ensure that registered persons comply with the requirements of the rule. The rule has not yet been issued in final form.

<u>Designation of Trusted Contact</u>. In conjunction with the Rule 2165 proposal, FINRA also proposed[13] that financial institutions must make reasonable efforts to obtain the name and contact information for a "trusted contact" person for all of its retail customers (i.e., not limited to "specified adults") when accounts

[10] FINRA Regulatory Notice 15-37, *FINRA Requests Comment on Rules Relating to Financial Exploitation of Senior and Other Vulnerable Adults* (October 15, 2015). Available at http://www.finra.org/industry/notices/15-37

[11] Natural persons aged 65 or older and natural persons aged 18 or older whom the firm reasonably believes has mental or physical impairments that render the individual unable to protect his or her own interests. Ibid.

[12] Supplementary Materials to Rule 2165, as proposed. Ibid.

[13] FINRA Regulatory Notice 15-37, *FINRA Requests Comment on Rules Relating to Financial Exploitation of Senior and Other Vulnerable Adults* (October 15, 2015). Available at http://www.finra.org/industry/notices/15-37

are opened or updated. The "trusted contact" would be an individual who could serve as a resource to the institution in administering the customer's account and could be contacted in the event the institution believes the customer is being subjected to financial fraud or abuse.[14] However, customers would not be required to provide the information and institutions would be permitted to open or maintain an account without the information, provided a reasonable effort has been made to obtain the information.

Financial institutions would be authorized to disclose information about the customer's account to the "trusted contact" in order to confirm specifics of the customer's current contact information, health status, and the identity of any legal guardian, executor, trustee or holder of a power of attorney. However, the trusted contact would not have authority to transact business on the customer's account. The proposed rule has not been issued in final form yet.

2.2.3 Consumer Financial Protection Bureau (CFPB)

The CFPB's Office for Older Americans[15] identified a set of detailed "voluntary best practices" in March 2016 for financial institutions to use when assessing internal processes for preventing, detecting, and responding to suspected elder financial exploitation.[16] The practices encourage financial institutions to:

— Develop internal protocols and procedures specifically to protect elder account holders.

— Train management and staff to detect, prevent, and respond to elder financial harm.

— Use technology to flag suspicious transactions or account activity.

— Report all cases of suspected harm to relevant federal, state, and local authorities regardless of whether reporting is mandatory under state or federal law, including the filing of SARs (Suspicious Activity Reports), and recognizing that the privacy provisions of the GLBA (Gramm-Leach-Bliley Act) are not a barrier to reporting suspected elder financial harm.

— Protect elder account holders through age-friendly products and services, such as obtaining advance consent to share account information with a trusted third party, as well as through compliance with federal consumer financial protections laws, including the Electronic Funds Transfer Act (EFTA) and the Equal Credit Opportunity Act (ECOA).

— Collaborate with external organizations on the local, regional, and state level, including law enforcement and Adult Protective Services.[17]

In parallel, the CFPB has highlighted existing obligations for financial institutions to remain compliant with consumer protection laws and vigilant against potential unfair, deceptive, or abusive acts or practices (UDAAP) with regard to customer interactions and, in particular, financial products and services directed toward elderly customers.

Financial institutions that fail to implement a robust elder financial protection program could thus be at risk of violating the CFPB's UDAAP provisions, potentially incurring significant costs, such as restitution and penalties, and reputational harm. Given the level of specificity in these voluntary guidelines, KPMG expects that CFPB examiners will review elder protections as part of their supervisory examinations.

2.2.4 Securities and Exchange Commission (SEC)

The Securities and Exchange Commission (SEC) has been working with state securities regulators and FINRA since 2007 to define best practices for how firms should interact with senior investors. The joint work was updated most recently in 2010.[18] In 2013, the SEC also issued an Investor Bulletin jointly with state securities supervisors underscoring that their agencies do not "grant, approve, or endorse" professional designations including, but not limited to, designations regarding expertise in advising senior investors.[19]

In 2013, the SEC partnered with FINRA on a "Senior Investment Initiative" which evaluates how investment firms conduct business with senior investors aged 65 and older. The broker-

[14] Ibid.

[15] The CFPB's Office of Older Americans is part of the CFPB's Division of Consumer Education & Engagement. Creation of the Office of Older Americans was mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act. See PL 111-203, signed into law July 21, 2010.

[16] *Advisory for Financial Institutions on Preventing and Responding to Elder Financial Institutions on Preventing and Responding to Elder Financial Exploitation* (March 23, 2016). http://files.consumerfinance.gov/f/201603_cfpb_advisory-for-financial-institutions-on-preventing-and-responding-to-elder-financial-exploitation.pdf *Recommendations and Report for Financial Institutions on Preventing and Responding to Elder Financial Exploitation* (March 23, 2016). http://files.consumerfinance.gov/f/201603_cfpb_recommendations-and-report-for-financial-institutions-on-preventing-and-responding-to-elder-financial-exploitation.pd

[17] CFPB Office of Older Americans separately released a report and recommendations titled *Fighting Elder Financial Exploitation through Community Networks* (August 2016). http://files.consumerfinance.gov/f/documents/082016_cfpb_Networks_Study_Report.pdf

[18] 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). http://www.sec.gov/spotlight/seniors/seniorspracticesreport081210.pdf.

[19] *SEC-NASAA Investor Bulletin: Making Sense of Financial Professional Titles* (September 2013), available at
http://www.sec.gov/investor/alerts/ib_making_sense.pdf.

dealer joint exams focus on senior-specific issues related to: securities sales, training, senior designations, marketing and communications, account documentation, suitability, disclosures, consumer complaints, and supervision. Findings from the targeted exams highlight risks associated with sales of unsuitable securities and the adequacy of risk disclosures.[20]

2.2.5 Department of Labor

The Department of Labor finalized rules in April 2016 requiring investment advisers for an Individual Retirement Account (IRA) or an employee benefit plan under the Employee Retirement Income Security Act (ERISA) to provide impartial advice that is in the best interest of the customer. The rule applies to brokers, registered investment advisers, insurance agents and certain other types of advisers, and for some, reflects a heightened, "fiduciary" standard where they had previously been required to only recommend "suitable" investments.

All retail consumer transactions in these types of retirement plans will be affected by the rule, regardless of their age. Since a large – and growing -- number of investors are retirement age and facing complex decisions regarding their retirement investments, such as rollovers of benefit plan assets to IRAs, these changes in the duty of care for investment advisors reflect another effort to protect elders and their financial well-being.

2.2.6 Federal Housing Administration

In May 2016, the Federal Housing Administration (FHA) proposed a rule to strengthen its Home Equity Conversion Mortgage (HECM) program (i.e., reverse mortgages). The proposal would add the following new consumer protections regarding reverse mortgages and the related Mutual Mortgage Insurance Fund: counseling requirements; disclosure requirements; lifetime and annual interest rate caps on adjustable rate HECMs; and foreclosure-related protections. It would also codify changes made under the Reverse Mortgage Stabilization Act of 2013[21] to increase the sustainability of this elder-oriented program. The rule has not yet been finalized.

2.2.7 Department of Justice

The Department of Justice (DOJ) created the Attorney General's Advisory Committee's Elder Justice Working Group in 2016. The working group seeks to improve the agency's information sharing on financial scams targeting the elderly. It also will advise the Attorney General on how to enhance efforts to address elder financial exploitation. Among these efforts, the DOJ is currently focusing on prosecutions regarding mail-based and telephone-based fraud schemes, embezzlement and Ponzi schemes, failure of care (Medicare/Medicaid fraud), and breach of fiduciary duty to elderly clients.

The DOJ is also working to enhance the capacity of state and local prosecutors, other law enforcement agencies and civil legal aid programs to identify, combat and prosecute elder abuse, neglect, and financial exploitation through targeted training programs and outreach initiatives.[22] These initiatives will be carried out through a newly created set of ten regional Elder Justice Task Forces that bring together federal, state, and local prosecutors, law enforcement, and agencies that provide services to the elderly. Their mandate is to coordinate and enhance criminal law enforcement efforts on these issues.[23]

2.2.8 Federal Trade Commission

The Federal Trade Commission (FTC) has reported that elders are more likely to be impacted by certain types of fraudulent marketing practices, including: sweepstakes, prize promotions and lottery scams; timeshare sales and re-sales; healthcare products and services; investments, business opportunities, and work-from-home programs; technical support services; and charitable donations. Based on data from the FTC's Consumer Sentinel database released to the U.S. Senate Judiciary Committee, [24] in cases where consumers submit a complaint and report their age as 60 or over, a significant and increasing number of frauds seek to obtain funds from elders by relying on impersonation techniques and telemarketing sales practices.[25]

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[20] *National Senior Investor Initiative*, Securities and Exchange Commission and Financial Industry Regulatory Authority, available at: https://www.sec.gov/ocie/reportspubs/sec-finra-national-senior-investor-initiative-report.pdf

[21] P.L. 113-29 (August 9, 2013).

[22] See testimony of U.S. Attorney John H. Horn before the U. S. Senate Judiciary Committee (June 29, 2016). Available at: https://www.justice.gov/opa/speech/us-attorney-john-h-horn-delivers-testimony-us-senate-judiciary-committee-protecting-older

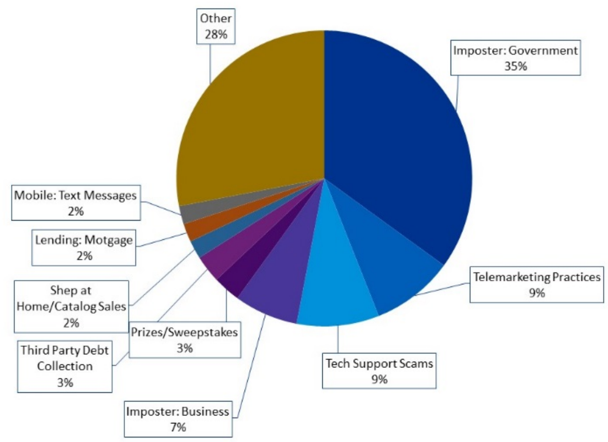
[23] Ibid.

[24] The FTC describes the Consumer Sentinel database in the following manner: "Consumer Sentinel is the unique investigative cyber tool that provides members of the Consumer Sentinel Network with access to millions of consumer complaints…(it) is free and available to any federal, state, or local law enforcement agency." https://www.ftc.gov/enforcement/consumer-sentinel-network

[25] See *Testimony of Lois Greisman, Associate Director of the Division of Marketing Practices in the Bureau of Consumer Protection*, Federal Trade Commission, before the U.S. Senate Judiciary Committee Hearing on "Protecting Older Americans from Financial Exploitation," June 29, 2016 (Figures 1 and 2). Available at: https://www.ftc.gov/system/files/documents/public_statements/967033/160629olderamericanstest.pdf

In response to this trend, the FTC has focused on law enforcement actions targeting specific frauds and payment mechanisms. 26 In addition, it has implemented regulations27 prohibiting sellers and telemarketers from accepting remotely created payment orders (such as remotely created checks), cash-to-cash money transfers (including wire transfers), and cash reload mechanisms (including prepaid cards). Prepaid cards, in particular, are subject to heighted regulatory concern because they can provide perpetrators of frauds with quick, anonymous, and irretrievable access to transferred funds outside of traditional banking operations and regulatory oversight.

Figure 2: Top Product Service Codes for Consumers Age 60 and Over in Consumer Sentinel Network Complaints January 1 – May 31, 2016



***Source**: Testimony of Lois Greisman, Associate Director of the Division of Marketing Practices in the Bureau of Consumer Protection, Federal Trade Commission, before the U.S. Senate Judiciary Committee Hearing on "Protecting Older Americans from Financial Exploitation," June 29, 2016 (Figures 1 and 2). Available at:* *https://www.ftc.gov/system/files/documents/public_statements/967033/160629olderamericanstest.pdf*

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[26] Ibid.

[27] See *FTC Telemarketing Sales Rule*, 80 FR 77520 (December 14, 2016), available at: https://www.ftc.gov/system/files/documents/federal_register_notices/2015/12/151214tsr_frn.pdf

3. Pending Legislation

Federal and state legislatures are increasingly active with regard to elder financial protection, providing insight into policy trajectory and possible future regulatory policy initiatives.

3.1 Pending Federal Legislation

On July 5, 2016, the House of Representatives passed H.R. 4538, the Senior$afe Act of 2016. A related and substantially similar bill, S. 2216, the Senior$afe Act of 2015, is pending in the Senate.[28]

These bills expand the exceptions to the GLBA privacy provisions by permitting (but not requiring) financial institutions to report suspected financial abuse or exploitation of older adults to appropriate local, state, or federal agencies. The bills would also provide immunity from suit to individuals that disclose possible financial exploitation provided the individuals:

- Have received training on how to identify and report suspected exploitation and maintain customer privacy,
- Serve as a supervisor, compliance officer, Bank Secrecy Act officer, or registered representative (broker-dealer), and
- Exercise reasonable care.

These "covered individuals" would be immune from civil or administrative proceedings related to the disclosure. Financial institutions would also receive immunity with regard to any civil or administrative proceedings so long as the covered individual had received the required training and was an employee of the financial institution at the time of the disclosure. Notably, the bills would add an explicit duty of care obligation for financial firms regarding their elderly clients.

3.2 Pending State Legislation

In January 2016, the North American Securities Administrators Association (NASAA) voted to adopt the NASAA Model Act to Protect Vulnerable Adults from Financial Exploitation (Model Act).[29] It expands significantly the scope of regulatory reporting regarding suspected elder financial harm by making such reports mandatory from a broad group of "qualified individuals": broker-dealer agents; investment advisers; those who serve in a supervisory, compliance, or legal capacity for broker-dealers and investment advisers.[30] It also provides immunity from civil or administrative proceedings for mistaken disclosures, and authorization to place holds on fund disbursements similar to the FINRA Proposed Rule 2165.

As of January 1, 2017, the Model Act will be in effect in four states: Alabama, Indiana, Louisiana, and Vermont.[31] Three additional states (Delaware, Missouri, and Wisconsin) have reportedly enacted statutes prior to adoption of the Model Act permitting financial institutions to place temporary holds on "disbursements" or "transactions" if financial exploitation of covered persons is suspected.

[28] See H.R. 4538, Senior$afe Act of 2016, available at: https://www.congress.gov/bill/114th-congress/house-bill/4538/. See also S. 2216, Senior$afe Act of 2015, available at https://www.congress.gov/bill/114th-congress/senate-bill/2216

[29] See *NASAA Model Act to Protect Vulnerable Adults from Financial Exploitation*, as approved by the NASAA membership on January 22, 2016.

[30] "Eligible adults" are defined to include individuals age 65 or older and those adults who would be subject to the provisions of a state's adult protective services statute

[31] See Investment News, *Three states make elder financial abuse reporting mandatory starting Friday*, by Mark Schoeff, Jr. (June 30, 2016).

4. Parameters of Elder Financial Protection

4.1 Emerging Duty of Care

A clear policy trajectory points directly towards increased financial institution obligations regarding reporting of suspected elder financial harm.

As the chart below indicates, pending federal regulations, state laws, and federal laws are all poised to create a clear duty of care for financial institutions with respect to their elderly customers. They are also poised to provide immunity from liability and to create concrete additional regulatory reporting requirements, although at present the details differ regarding these components. Finally, both FINRA and multiple state laws are poised to require financial firms to take action (place holds on transactions) in cases where elder financial harm is suspected.

	FINRA Proposed Rule	Senior$afe Act	NASAA Model Act	CFPB Guidelines
Reporting requirement for suspected elder financial harm:				
Mandatory			x	
Voluntary	X	x		X
Government		x	x	X
Third Party	x (a)		x	X (a)
Training Requirement	x (b)	x		X
Delayed Disbursement of account funds	x		x	(e)
Immunity from civil or administrative proceedings for disclosing suspected edler financial harm to:				
Government authorities		x	x	
Designated third Party	x (c)		x	
Duty of Care	x (d)	x	x	

(a) Covers reporting to account holders and named third party
(b) Training policies and procedures required though no specific requirement the reporting individual must have received training
(c) "safe harbor" with regard to temporary hold
(d) "safe harbor" provided when discretion is exercised
(e) Development of age-friendly products and services, including disbursement thresholds

4.2 Differing Definitions of "Elder"

Compliance initiatives at financial institutions are further complicated by conflicting definitions of what constitutes an "elder" for purposes of heighted scrutiny, protection, and reporting. For example:

- Two laws (the Elder Justice Act of 2009[32] and the Older Americans Act of 1965, as amended in April 2016) define the perimeter of protection to cover individuals aged 60 or above.[33]
- Two proposed laws (the Senior$afe Act[34] and the NASAA Model Act) and one proposed regulation (FINRA Proposed Rule 2165) define the perimeter of protection to begin at age 65.
- Two federal laws and one federal program use age 62 as the threshold for triggering protections: (i) the Equal Credit Opportunity Act (ECOA) and its implementing regulation, Regulation B, regarding age discrimination; [35] (ii) the Dodd-Frank Wall Street Reform and Consumer Protection Act, which created the CFPB and its Office of Older Americans, [36] and (iii) the Federal Housing Administration's reverse mortgage program.[37]
- FinCEN specifies no age threshold to file SARs in conjunction with suspected elder financial exploitation.

These differing thresholds could present compliance issues for financial institutions operating across financial sectors (capital markets, banking, and insurance) and across multiple states as they establish both policies and procedures specific to "elders" and systems triggers tied to the different parameters and expectations.

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[32] PL 111-148, signed March 23, 2010, Title VI, Subtitle H, of the Patient Protection and Affordable Care Act.
[33] See Older Americans Act, as amended through P.L 114-144 (the Older Americans Act Reauthorization Act of 2016), enacted April 19, 2016. Available at http://www.aoa.gov/AoA_programs/OAA/Index.aspx and https://www.congress.gov/bill/114th-congress/senate-bill/192/text
[34] See H.R. 4538, Senior$afe Act of 2016 and related bill S. 2216, Senior$afe Act of 2015. Available at https://www.congress.gov/bill/114th-congress/senate-bill/2216
[35] See 15 U.S.C. 1691 et seq. and 12 C.F.R. 1002, including the official staff commentary to the regulation.
[36] See PL 111-203, Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act), signed into law July 21, 2010.
[37] See Department of Housing and Urban Development, Home Equity Conversion Mortgages. Available at: http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/sfh/hecm/hecmabou

5. Implications and conclusions

Elder financial exploitation is a serious issue that is expected to grow with the aging of the U.S. population. Many financial services professionals witness acts of financial exploitation firsthand. Federal and state policymakers now seek to harness this front line position to protect elderly consumers from financial harm.

Emerging and proposed federal standards suggest strongly that future regulatory attention will initially focus on increasing regulatory reporting requirements alongside efforts to train consumer-facing employees and supervisors. Though coming from multiple fronts and varying perspectives, legislative and regulatory attentions fundamentally focus on two actions:

1) increasing awareness of elder financial exploitation by ensuring financial services professionals can recognize developing "red flags"; and

2) encouraging financial services professionals to intercede, through transaction "holds" and/or reporting on behalf of elder consumers they suspect may be victims of financial exploitation.

The anticipated and significant growth in the elderly population underscores the need for a more consistent approach to elder financial protection. It also suggests strongly that the relatively new and heighted federal involvement will not abate going forward. Financial institutions may be challenged to find a balance between customer service and customer protection when contemplating an approach to protecting elders, especially with regard to taking actions such as reporting suspicious activity or placing transaction holds.

Financial institutions should proactively approach elder financial protection using as their guides the CFPB's "voluntary best practices" and FINRA's proposed rule. At a minimum, financial institutions should review their own internal policies and procedures for consistency with the regulators' collective stance, which emphasizes training for client-facing employees and management; reporting to appropriate federal, state and local authorities whether mandatory or not (CFPB) as well as reporting to identified trusted contacts (FINRA); compliance with laws and regulations, including those governing UDAAP, suitability, ECOA, and fiduciary duty; and records retention to support suspicions regarding elder financial exploitation and good faith reporting.

As part of this review, financial institutions should, among other things, consider:

— Ensuring that training programs for client-facing employees and management are frequently updated to reflect the rapidly changing regulatory expectations for elders across consumer and investment products and services, focuses on identification of "red flags" and makes clear how employees should escalate and report suspected elder financial exploitation.

— Documenting the relevant state and local reporting requirements (mandatory or voluntary), identifying the specific agencies where reports must/may be submitted, and establishing policies regarding reporting in areas where the requirements are voluntary or silent.

— Determining whether an SAR will be filed in all situations when reports are submitted to a state or local authority.

— Reviewing their current product and services offerings to identify potential risks to elder consumers as well as to identify potential opportunities to introduce new elder-friendly features.

— Establishing thresholds for action, such as: who has authority to report suspected financial harm; who has authority to "hold" a transaction; how long should "holds" remain in effect; what is the age threshold for monitoring account activity; what is the age threshold to begin offering elder-friendly options or products and services; what documentation is needed to support good faith reporting?

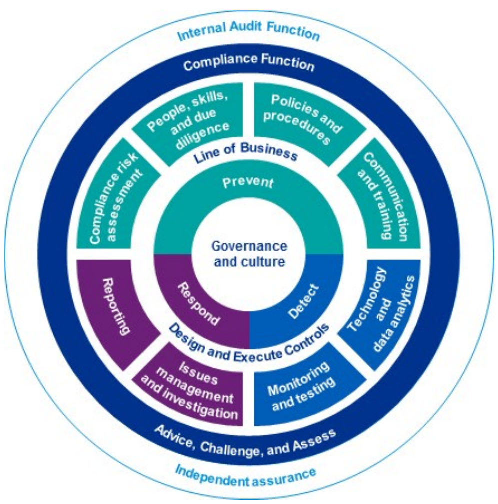
— Reviewing and ensuring that retail sales programs do not present potential conflicts of interest for employees and that the employee code of conduct is well known and enforced.

6. Questions to consider and how KPMG can help

The policy trajectory identified in this publication indicates that regulatory scrutiny and compliance requirements regarding financial services provided elderly consumers are poised to increase. Regulators expect that financial institutions will have standards of practice in place for protecting elder consumers from financial harm and for addressing elder financial exploitation when it is suspected.

KPMG has developed a Compliance Transformation Framework to assist financial institutions in evaluating the effectiveness and efficiency of their Elder Financial Protection Programs, as well as highlighting areas for enhancement, if necessary. The approach can also assist financial institutions in their efforts to manage compliance with the rapidly shifting regulatory expectations regarding elder financial protection.

Examples of issues to consider for the different program elements under each of the four components in the framework follow.



Governance and Culture

- Board of director and senior management oversight and involvement
- Compensation structures and incentives
- Accountability and discipline enforcement

Prevention

- An inventory of obligations (federal and state)
- Clearly articulated roles and responsibilities (including escalation protocols)
- Policies and procedures, including compliance requirements and a code of conduct
- Regular and frequent training

Detection

- Application of technology to flag suspicious activity in support of the compliance program
- Development of key risk indicators and key performance indicators and ongoing relevance
- Monitoring and tracking of regulatory change
- Transaction, process, and controls testing for alerts/referrals of suspicious activity

Response

- Mandatory and voluntary reporting to law enforcement and state and local jurisdictions
- Response procedures to government investigations
- Issues management and remediation
- Frequency of periodic reporting to board of directors and management

KPMG is prepared to assist financial institutions:

- Design, develop, and implement an Elder Financial Protection Program
- Review and update business line policies, procedures, and practice for key activities where persons considered to be an elder are involved
- Review, design, develop, and implement monitoring controls and management reporting specific to elder abuse

Questions to consider

Financial institutions that are assessing and strengthening their Elder Financial Protection Programs are asking detailed questions

- How do we demonstrate our focus on the "customer" (customers' best interest at the heart of the business model)?
- Do we have a centralized inventory of compliance obligations, mapped to our policies and procedures, compliance testing and compliance training?
- Do we have a centralized function for elder financial protection? How are jurisdiction-based investigations and third-party reporting reported/handled internally?
- Are there written internal protocols and procedures for protecting account holders from elder financial harm?
  - Are the protocols and procedures general or business unit specific?
  - How do we address regulatory differences related to age thresholds
  - Is there a one-to-one correlation between SAR filings and filings in state and local jurisdictions?
  - What responsibilities do we have when elder financial harm is suspected? How do we assure we have taken "reasonable care" before reporting these suspicions?
- Do we conduct an elder financial harm risk assessment? Do we include elder financial harm questions within business unit or product specific risk assessments?
- Do we conduct elder financial harm training? How frequently? Is it customized to include our current internal protocols and procedures?
- Do we use any technology (e.g., fraud detection systems) to identify, analyze, and report activity that may be associated with elder financial harm across business lines and legal entities?
- How are third-party relationships monitored for regulatory and compliance risk?
- How are compliance issues inventoried, prioritized, remediated, and reported?
- Do we have clear management standards for investigations, examinations, and inspections?

Source: KPMG

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