Protection of Senior Investors from Financial Exploitation: Congress Enacts the Senior Safe Act

By Robert L. Tuch

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Introduction

Financial services firms have increased their awareness of the challenges that are presented when senior and vulnerable adult clients are subjected to financial exploitation and other forms of abuse. In addition, firms have become better prepared to address the challenges that are presented by clients experiencing diminished capacity.

Because investment professionals are often in a good position to detect signs of financial exploitation and diminished capacity, lawmakers and regulators have, during the past several years, addressed such things as reporting requirements, immunity from liability when certain disclosures are made, disbursement holds to prevent losses and the designation of trusted contact persons.

Reporting Suspected Financial Exploitation

Financial services firms may be subject to state-law reporting requirements regarding suspected financial exploitation of certain clients. The North American Securities Administrators Association ("NASAA") has adopted a Model Act to protect vulnerable adults from financial exploitation.[1] The NASAA Model Act has been adopted in some form by several states. Section 3 of the Model Act requires certain individuals to promptly notify Adult Protective Services and the state securities commissioner when they reasonably believe that financial exploitation of an "eligible adult"[2] may have occurred, may have been attempted or is being attempted. The Model Act provides immunity from administrative or civil liability when such disclosures are made by qualified individuals in good faith, exercising reasonable care.

Applicable privacy laws provide protection for financial services clients and others regarding the disclosure of their non-public personal information to third parties. In the absence of applicable laws or regulations containing immunity provisions (such as the Model Act provision noted above), persons desiring to report concerns regarding financial exploitation or other forms of abuse have in the past had to concern themselves with liability exposure.

The [Senior Safe Act] provides immunity from liability to covered financial institutions and certain employees and representatives of those institutions when those employees or representatives, in good faith and with reasonable care, disclose suspected exploitation of a senior citizen to a regulatory or law enforcement agency.

With the foregoing in mind, it is important to note that states that have not adopted a version of the NASAA Model Act may or may not have laws or regulations requiring the reporting of suspected financial exploitation of senior or vulnerable adults. Applicable state laws and regulations should be thoroughly researched to determine (i) whether mandatory reporting requirements exist, and (ii) the availability of immunity from liability that might otherwise arise from disclosing information about suspected exploitation. In those instances in which the reporting of suspected financial exploitation or other forms of abuse is not required under state law, firms may nevertheless desire to make a report to appropriate authorities. Without the protection of immunity provisions, however, many firms have been unwilling to assume the liability risk associated with making such reports. This set the stage for the enactment of the Senior Safe Act.

Passage of the Senior Safe Act

Bills were introduced in both the House and the Senate to provide immunity from liability for certain individuals who disclose potential examples of financial exploitation of senior citizens.[3] These bills would ultimately be incorporated into a large legislative package that included modifications of the Dodd-Frank Act.

On May 24, 2018, President Trump signed a bill that enacted the *Economic Growth, Regulatory Relief, and Consumer Protection Act.*[4] This legislation pulled back several provisions of the Dodd-Frank Act, reflecting the current Administration's view that certain provisions were unduly burdensome for financial services firms. Included within this legislation were provisions from numerous bill proposals, including the House and Senate bills referenced above.

Section 303 of this new legislation incorporates provisions from those House and Senate bills, which were designed to encourage financial services providers to report financial exploitation of seniors. The provisions contained within Section 303 constitute what has come to be known as the Senior Safe Act (the "SSA").

Key Provisions of the Senior Safe Act

Immunity from Liability. The SSA provides immunity from liability to covered financial institutions and certain employees and representatives of those institutions when those employees or representatives, in good faith and with reasonable care, disclose suspected exploitation of a senior citizen to a regulatory or law enforcement agency. This protection from liability, however, is conditioned upon the provision of training by the financial institution or a selected third party related to the financial exploitation of senior citizens. This training must meet certain content, timing and recordkeeping requirements that are discussed below.

The SSA refers to the following individuals in Section 303(a)(2)(A), which addresses immunity for individuals:

- individuals who serve as a supervisor or in a compliance or legal function for a covered financial institution; and
- registered representatives, investment adviser representatives and insurance producers who are affiliated or associated with a covered financial institution.

Each of these individuals can be protected from liability in any civil or administrative proceeding when disclosing suspected exploitation of a senior citizen, provided that (i) the requisite training has been received, and (ii) the disclosure was made in good faith and with reasonable care.

Section 303(a)(2)(B) provides the same protection from liability for covered institutions, provided that the disclosures are made by qualified individuals who meet the requirements noted above.

Defined Terms. Section 303 (a)(1) provides several definitions of terms that are used in the SSA. Included among them are definitions of "covered agency," "covered financial institution," "exploitation" and "senior citizen."

"*Covered agency*" is defined to include law enforcement agencies, agencies responsible for administering adult protective service laws, state securities and insurance regulators and the Securities and Exchange Commission.

"*Covered financial institution*" is defined to include credit unions, depository institutions, investment advisers, broker-dealers, insurance companies, insurance agencies and transfer agents.

"*Exploitation*" is defined to mean the fraudulent or otherwise illegal, unauthorized, or improper act or process of an individual, including a caregiver or a fiduciary, that:

- uses the resources of a senior citizen for monetary or personal benefit, profit, or gain; or
- results in depriving a senior citizen of rightful access or use of benefits, resources, belongings, or assets.

"*Senior citizen*" is defined to mean an individual who is not younger than 65 years of age.

Training. The training described in Section 303(b) may be provided by the covered financial institution or by a third party selected by the covered financial institution. Subsection (b)(1) refers to various individuals associated with covered financial institutions who have been identified as appropriate recipients of this training. Included are (i) the individuals described above who are qualified to disclose suspected exploitation of senior citizens and be protected from liability, (ii) associates who may come in contact with a senior citizen as a regular part of their professional duties, and (iii) associates who review or approve the financial documents, records or transactions of senior citizens in connection with their provision of financial services.

The training must instruct the recipients on how to identify and report suspected exploitation of a senior citizen internally and, as appropriate, to government officials or law enforcement authorities. This should include a discussion of common signs that indicate that exploitation may be taking place. The training should also include a discussion of the need to protect the privacy and respect the integrity of each individual customer of the covered financial institution. In addition, the training should be appropriate to the job responsibilities of the individuals who are in attendance.

The training should be provided to existing associates as soon as reasonably practicable. New associates should receive the training not later than one year after their start date.

Each covered financial institution must maintain a record of each individual who:

- is associated with the firm and is described in Section 303(b)(1) as an appropriate recipient; and
- has completed the requisite training either before or after joining the firm.

Upon request, a covered financial institution must provide either of the above-referenced records to a covered agency with examination authority.

Recognizing Diminished Capacity and Financial Exploitation

As noted above, those individuals who disclose suspected financial exploitation of a senior citizen to the appropriate authorities can be protected from liability when they comply with the SSA. While this article is focused on the SSA and how firms can help their senior citizen clients that might be subject to financial exploitation, it is important for firms to understand all the issues that should be addressed when working with senior citizens and with adult clients who may be considered "vulnerable." [5] Accordingly, this section will address how firms may be able to recognize traits that could be indicative of potentially diminished capacity, both in terms of clients' decision-making abilities and the influence exerted on clients by other people. Set forth below are signs of potentially reduced mental capacity and physical impairments that could prevent clients from protecting their interests. Additional signs are identified that could be indicative of financial exploitation.

Diminished Mental Capacity. The following signs of potential diminished mental capacity should be documented:

- **Memory loss that disrupts daily life:** Examples of this include forgetting recently learned information, important dates or events, or repeatedly asking for the same information.
- **Challenges in planning or solving problems:** Some people may experience changes in their ability to follow a recipe or monitor monthly bills.
- **Difficulty completing familiar tasks at home, at work or at leisure:** Some people may have trouble driving to a familiar location, managing a budget or remembering rules to a favorite game.
- **Confusion with time or place:** Examples include losing track of dates, seasons and the passage of time.
- **Problems with words in speaking or writing:** This involves problems with following or joining conversations. It may also involve having trouble remembering words to identify objects.
- **Misplacing things and losing the ability to retrace steps:** An example is placing things in unusual places and not remembering where the individual had been before losing them.
- **Decreased or poor judgment:** This includes extravagant purchases or giving large amounts of money to telemarketers. People with dementia may also pay less attention to personal hygiene.
- **Withdrawal from work or social activities:** Some people may begin to have trouble following their favorite sports team or remembering how to complete a project associated with a favorite hobby.
- **Changes in mood or personality:** Mood changes can include confusion, depression or the acts of being suspicious, fearful or anxious.

Physical Impairments. Investment professionals should also be thinking about how a particular physical impairment might prevent a client from protecting his or her interests. Below are possible issues that may be relevant:

- **An impairment that restricts a client's ability to communicate:** This could include a significant or complete loss of hearing, vision or the ability to speak.
- **An impairment that restricts a client's mobility:** If a client is bedridden or confined to his/her home or a facility, the client could be at increased risk of caretaker abuse and could be limited in his/her ability to communicate with people outside of the home or facility.

Warning Signs that Could Indicate Financial Exploitation. The following could be signs that financial exploitation may be taking place or may have taken place:

- inability to remember transactions or signing documents
- apparent lack of concern regarding investment risks, fees or other costs incurred
- isolation from friends and family
- inaccurate or suspicious explanations regarding transactions
- suspicious changes to beneficiaries
- account activity that is not typical or is inconsistent with client objectives and goals
- client wants to transfer or has transferred assets to suspicious parties or locations
- signs of client intimidation or reluctance by client to speak
- family members who suddenly appear claiming rights
- someone who is forging signatures
- additional names listed on the client's bank signature card
- unexplained change of address
- improper actions on the part of a guardian, holder of a power of attorney or other fiduciary

FINRA Rules Relating to Financial Exploitation of Seniors

Financial Exploitation of Specified Adults – Disbursement Holds. FINRA Rule 2165 is a recently adopted rule that provides a safe harbor for FINRA members relating to the placement of disbursement holds on customer accounts. The rule enables a broker-dealer that is a FINRA member to place a temporary hold on a disbursement of funds or securities from the account of a specified adult[6] if the broker-dealer reasonably believes that financial exploitation of the specified adult has occurred, is occurring, has been attempted, or will be attempted. Rule 2165 allows a broker-dealer to extend a temporary hold upon a state agency's request to do so.

It should be noted that the NASAA Model Act provides a similar safe harbor for both broker-dealers and investment advisers. To the extent a broker-dealer has an interest in relying on a disbursement hold safe harbor, Rule 2165 and applicable state laws and regulations, if any, should be carefully reviewed. Depending on the states where an investment adviser conducts business, a disbursement hold safe harbor may not be available.

Designation of a Trusted Contact. Broker-dealers are required to make reasonable efforts to obtain the name and contact information for a trusted contact person upon the opening of a non-institutional account or when updating information for an existing non-institutional account.[7] If the customer declines to provide the information or fails to respond to the firm's efforts to obtain the information, the firm can still open or maintain the account. The FINRA staff has indicated that a request to provide the name and contact information for a trusted contact (e.g., in an account opening form) constitutes a reasonable effort to obtain the information and, therefore, satisfies the requirements of FINRA Rule 4512.[8]

Pursuant to Supplementary Material .06 to Rule 4512, a FINRA member or its associated person is authorized to contact a trusted contact person and disclose information about a customer's account (i) to address possible financial exploitation; (ii) to confirm the specifics of the customer's current contact information, health status, or the identity of any legal guardian, executor, trustee or holder of a power of attorney; or (iii) as otherwise permitted by FINRA Rule 2165.

Investment advisers are not required to request information regarding a trusted contact person. This practice is strongly recommended, however. As more fully explained in the section below, broker-dealers and investment advisers should include within their policies and procedures a section that addresses the authorization of a third party to act as a trusted contact person.

Recommended Practices

Review of Applicable Laws and Regulations. Firms should, of course, fully understand how to make use of the SSA and the immunity from suit that is provided upon compliance with the SSA's provisions. In addition, as noted earlier, applicable state laws and regulations should be researched thoroughly. This will enable firms to make a number of important decisions when creating relevant policies and procedures, including:

- how to classify clients as "senior" adult clients;[9]
- determining the regulatory and law enforcement agencies that should be notified when reporting financial exploitation; and
- how to go about developing a disbursement hold process, to the extent a firm is permitted to place temporary holds on the disbursement of funds or securities from client accounts.

Finally, broker-dealers should carefully review FINRA Rules 2165 and 4512 to understand how those rules will apply and how to craft their policies and procedures governing disbursement holds and the disclosure of information to trusted contact persons.

Staff Training. The training of firm personnel is vital when it comes to effectively dealing with senior and vulnerable adult clients. Whether your training program is developed internally or you rely on a third-party service provider, you should focus on developing meaningful training content and should determine the timing of training sessions that are made available to associates. An effective training program should include the following elements:

- Identification of financial and other forms of exploitation of senior and vulnerable adult clients;
- Identification of possible cognitive impairment;
- the proper establishment, handling and review of an account for a senior or vulnerable adult client including, where appropriate, the designation of an authorized third party as a trusted contact person; and
- the process for documenting and reporting suspected financial exploitation of senior and vulnerable adult clients.

[T]hose individuals who disclose suspected financial exploitation of a senior citizen to the appropriate authorities can be protected from liability when they comply with the SSA.

Classifying Client Accounts. When onboarding clients or conducting reviews of client accounts, firms should determine whether a client should be identified as a senior adult. Classification as a vulnerable adult should also be undertaken at any time a determination is made that a client has a physical or mental impairment that has diminished the client's ability to manage money and financial assets to serve his or her best interests.

Documentation of Concerns; Escalation Within the Firm. If a registered representative ("RR") or investment adviser representative ("IAR") suspects a possibility of diminished capacity or exploitation of a client, the RR/IAR should document communications with the client and any interactions with family, friends or other caregivers as they occur. The RR/IAR should promptly notify his/her designated supervisor or a member of the compliance staff.

When notification is provided, the RR/IAR should be prepared to provide notes regarding all conversations that have taken place either in person, by telephone or by electronic means. The notes should include the dates of those conversations, as well as the persons who were present. The notes should be entered into the firm's client contact system. All notes should be clear and concise. The documentation should indicate that certain traits (e.g., inability to clearly communicate) have been observed on one or more occasions. Under no circumstances should a firm associate make any type of diagnosis of a client's mental state or cognitive ability.

Firms may wish to use a "watch" designation whereby a notation is made reflecting suspicion that a client may be vulnerable or experiencing traits associated with cognitive decline. A "watch" designation may also be considered when a client was the subject of a previous review for financial exploitation even though no financial exploitation was found to have taken place.

Reporting Suspected Financial Exploitation. Firms that are required to report suspected financial exploitation should create comprehensive policies and procedures that include:

- a definition of "financial exploitation";
- appropriate documentation and escalation provisions;
- identification of the appropriate individual or individuals who are responsible for making the report;
- contact information for the law enforcement and/or regulatory agencies that must receive such reports; and
- provisions that are designed to ensure compliance with the SSA.

Firms that are not currently subject to reporting requirements should nevertheless plan on making such reports and should create firm policies and procedures containing provisions similar to those outlined above.[10] These firms will need to take steps to ensure that they are in compliance with the SSA.

Third Party Authorization by the Client – Trusted Contact Persons. During the normal course of business, RRs and IARs should explore with clients the possibility of having a third party, such as a spouse, family member or trusted professional, who can be designated as a trusted contact person. The trusted contact person is limited to a consultative role whereby firm associates can disclose and obtain important information to help clients when there is concern about possible diminished capacity or financial exploitation (see *FINRA RULES RELATING TO FINANCIAL EXPLOITATION OF SENIORS – Designation of a Trusted Contact*).

The trusted contact person should not be given authority to transact business on behalf of the client. Should it be determined or suspected that a designated trusted contact person is the individual attempting to exploit the client, the firm should not disclose any information to that individual.

The role of the trusted contact person should be explained to the client. Upon determining that the client understands the role of the trusted contact person and desires to authorize one or more third parties to act in this role, firms should memorialize the scope of that person's authority in an authorization form that:

- sets forth the circumstances that would permit firm personnel to contact the trusted contact person(s);
- clearly indicates that the trusted contact person(s) is not authorized to transact business on the client's behalf;
- provides relevant contact information for the trusted contact person(s);
- describes the client's relationship with the trusted contact person(s);
- indicates that the firm is not required to contact the trusted contact person(s); and
- is dated and contains a signature line for the client's signature.

Conclusion

The Senior Safe Act provides a valuable safety net for financial services firms that suspect possible financial exploitation of their clients. Upon enacting the SSA, Congress recognized the need for firms to protect client interests by disclosing suspected financial exploitation to proper authorities while, at the same time, understanding the need to provide immunity from lawsuits for firms and their associates that make these disclosures in good faith and with reasonable care.

Financial services firms should review and understand the SSA and all other applicable laws and regulations related to the financial exploitation of clients. As outlined in this article, these firms should adopt robust policies and procedures that adequately address (i) the training of firm associates regarding the financial exploitation of clients; (ii) the recognition of diminished capacity and financial exploitation; (iii) the identification of senior clients and vulnerable adult clients; (iv) the processes for documenting concerns and the escalation of those concerns; (v) the process for reporting suspected financial exploitation to proper authorities; (vi) the use of disbursement holds, when permitted; and (vii) the authorization of third parties to act as trusted contact persons.

Compliance with the SSA can be accomplished by incorporating provisions within your compliance and supervisory policies and procedures that adequately address the training of firm associates and the process for reporting suspected financial exploitation referenced above. This should not create any issues for firms that are also governed by state laws and/or FINRA rules as long as those policies and procedures are carefully drafted, taking into account all applicable regulatory requirements.

The tracking of all applicable regulatory requirements can be challenging for some financial services firms. In light of this, a number of law firms and compliance consulting firms have created matrices that are kept up-to-date. Those law firms and consulting firms may also be available to provide assistance with your preparation of appropriate policies and procedures.

ENDNOTES

1 NASAA Model Legislation or Regulation to Protect Vulnerable Adults from Financial Exploitation (adopted on January 22, 2016).

2 The term "eligible adult" is defined in the NASAA Model Act to mean a person who is sixty-five years of age or older or a person subject to the applicable state Adult Protective Services statute.

3 H.R. 3758 – 115th Congress: Senior Safe Act of 2017. S.23 – 115th Congress: Senior$afe Act of 2017.

4 S.2155 – 115th Congress: Economic Growth, Regulatory Relief, and Consumer Protection Act.

5 For purposes of this article, a "vulnerable" client is one who has a physical or mental impairment that has diminished his or her ability to manage money and financial assets to serve his or her best interests.

6 For purposes of applying FINRA Rule 2165, the term "specified adult" shall mean: (i) a natural person age 65 and older, or (ii) a natural person age 18 and older who the FINRA member reasonably believes has a mental or physical impairment that renders the individual unable to protect his or her own interests.

7 FINRA Rule 4512(a)(1)(F) and related Supplementary Material .06 (Trusted Contact Person).

8 See *Frequently Asked Questions Regarding FINRA Rules Relating to Financial Exploitation of Seniors* (January 3, 2018).

9 The age threshold varies from state to state for purposes of determining who is a senior citizen.

10 Certain states that do not currently require the reporting of suspected financial exploitation either have bills pending that would require such reports or are considering proposed legislation or regulations that would require such reports.