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Compliance Review

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IN THIS ISSUE

Considerations for serving aging clients

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I. Introduction

As people's awareness of how to live a healthier lifestyle continues to grow and our health care improves, our older population in the United States (i.e., persons 65 years of age and older) has dramatically increased. According to the U.S. Department of Health and Human Services, in 2014 one in seven Americans (i.e., 14.5% of the U.S. population) was over age 65.[1] By 2040, that number is forecasted to grow to 21.7%.[2]

The baby boomer generation, those individuals born between mid-1946 and mid-1964, began turning 65 in 2011. By 2031, the surviving baby boomers will be turning 85. This surge in an aging population brings many challenges to service providers within the financial industry.

As investment advisors, you have a fiduciary duty to do what is in your clients' best interests at all times. This means you have an obligation to understand the aging process in order to be able to serve that segment of your client base.

This white paper will discuss various considerations for working with aging clients from compliance, operational, and practical perspectives, including steps that should be taken for protecting aging investors and your firm. Through a case study, we will evaluate different scenarios that advisors may encounter and offer practical tips regarding how to address them.

II. Case study: Signs of diminished capacity

The following case study is a hypothetical scenario based on actual experiences advisors have had with aging clients.

Sylvia Jones has been a long-term client of Joseph Barnes, an investment advisor representative of Barnes Wealth Management. Sylvia is an affluent client with a net worth exceeding $10 million. Joseph has known Sylvia for approximately 25 years.

Sylvia has one son, whom she has not spoken to in over 20 years. While her health has historically been stable, she is starting to experience difficulty walking and her vision is

[1] U.S. Department of Health and Human Services, Administration for Community Living, *Administration on Aging: Aging Statistics*.
[2] Ibid.

declining. Her husband passed away approximately 10 years ago, and she currently resides by herself.

Approximately one year ago, Sylvia asked Joseph to join her for dinner to celebrate her 75th birthday. At this dinner, Sylvia introduced Joseph to her new gentleman companion, George, who is 30 years Sylvia's junior. George is a nighttime janitor.

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Sylvia meets with Joseph on a biannual basis to review her portfolio. He met with Sylvia in January and was surprised to see George present at this meeting. George asked many poignant questions, to which Sylvia authorized Joseph to respond. At their next meeting in early July, Sylvia started asking Joseph a lot of questions about her investments and appeared to be having some difficulty comprehending her portfolio statement. She then asked Joseph about investing in a new biotech drug, which she learned about through George. Through their discussion, Joseph learned that George has a friend who works at a biotech drug company, which is in the experimental phase of testing a new drug that could treat cancer, a disease that took the life of Sylvia's late husband. George kept encouraging Sylvia to invest $3 million into the company's private fund offering. Skeptically, Joseph agreed to review any fund offering documents that Sylvia could deliver to him. He also warned Sylvia that investing in an illiquid security may not be suitable for her current income needs and is contrary to her current investment goals and risk tolerance as reflected in her client profile. When asked whether anything in her life had changed, Sylvia replied, "no—except George and I are becoming close."

After not hearing from Sylvia for two weeks following their July meeting, Joseph called Sylvia to request the fund documents. Sylvia sounded disoriented and confused, as if they had never discussed the biotech investment opportunity. Joseph decided to visit Sylvia at her home. There, he discovered that Sylvia was disheveled as if she had not bathed in days. A stack of unpaid bills was present in the foyer. When Joseph asked Sylvia about the bills and whether she required any assistance, George suddenly appeared. He became very defensive, responded on Sylvia's behalf, and asked Joseph to leave.

Concerned, Joseph returned to his office to review Sylvia's account. He discovered that one week ago Sylvia had attempted to liquidate three of her large fixed income positions totaling $500,000, with no explanation and no notification to Joseph. Joseph decided to contact Sylvia's CPA to see if she had noticed any peculiar behavior from Sylvia. Joseph was very surprised to learn that Sylvia fired the CPA two months ago after Sylvia had illogically questioned her income tax return and accused the CPA of "taking her money" for an unfounded reason.

Not wanting to jump to conclusions, Joseph started reflecting on his visits with Sylvia over the past year and a half. Reading his Customer Relationship Management ("CRM") notes, he discovered that at the birthday dinner, Sylvia had been confused and asked many questions about her account; Joseph simply thought she was tired, but nevertheless, noted her questions. At his office, Sylvia had inquired about an aggressive illiquid investment opportunity, which seemed odd considering she never expressed interest in this type of opportunity before. She recently liquidated a large sum of money without telling Joseph, which was atypical behavior. When Joseph visited Sylvia's home, he saw a brand-new Ford F-450 truck in the driveway, which certainly was not Sylvia's style and likely not the type of vehicle George could afford. Reflecting on this, Joseph realized that over time, Sylvia had started to show gradual shifts and signs of aging and perhaps the onset of diminished capacity. Joseph was also concerned about possible elder abuse and undue influence by George. Joseph scheduled a meeting with his legal/compliance team to discuss what he should do.

III. Understanding diminished capacity

What is diminished capacity?

Diminished capacity is a mental or cognitive condition that affects a person's ability to understand their own acts or decisions.[3] While it is normal that through the aging process it will take clients perhaps longer to store or retrieve information mentally, it will not necessarily impair intellectual functioning.

One of the most common forms of diminished capacity in aging adults is dementia, now commonly referred to as a major neurocognitive disorder. Dementia describes a set of symptoms that may include memory loss and difficulties with thinking, problem solving, or language.[4] Unlike a minor neurocognitive disorder, dementia affects a person's daily life and behaviors. A person afflicted with dementia often experiences memory loss, confusion, emotional

[3] Lane, Geoffrey W., *Assessment of Capacity in Older Adults* (March 28, 2016).

[4] Alzheimer's Society, *What Is Dementia?* (2016).

disturbances (e.g., depression, anxiety, and paranoia), changes in personality, and loss of visual-spatial and language skills. Often, brain damage caused by strokes or illnesses such as Alzheimer's disease causes dementia.

Alzheimer's disease: The most common form of dementia

- 5.3 million Americans have Alzheimer's disease
- Impacts 1 in 9 Americans over age 65
- Diagnosed among 20% of American adults over age 70 and 33% of American adults over age 85
- 6th leading cause of death in America*
- Slow, progressive irreversible course
- Symptoms affect learning, behavior, and emotion

Sources: Alzheimers.net, *2016 Alzheimer's Statistics*.
*Centers for Disease Control, National Center for Health Statistics, *Leading Causes of Death* (2014).

Common signs of cognitive decline

Every person is unique and can experience cognitive decline differently. A person suffering from the early stages of Alzheimer's disease, for example, typically exhibits cognitive difficulties with thinking and memory that include problems with:

- Basic orientation (such as not knowing the date)
- Judging distances
- Following a conversation
- Making decisions or performing tasks (such as paying bills)
- Recalling events

Other noticeable signs include mood changes, suspiciousness, denial, poor judgment, and loss of initiative.[5]

Mid-stage symptoms often include disorientation (such as not knowing their current location), restlessness and wandering, profound memory loss, hallucinations, and language difficulty. In late stages, a person suffering from Alzheimer's disease may not be able to speak, recognize family members, or even control bodily function. Worse yet, there is no cure to the disease.

Assisting clients who exhibit diminished capacity

There are a variety of ways that a trusted individual can intervene to assist those who have a cognitive decline. Some of the most common interventions are noted here.

Have a competency evaluation: Whether or not a person is competent and has capacity to understand the nature of his or her acts can be evaluated through a functional assessment. This evaluation, conducted by a health care professional, uses information derived from interviews with the client and others in combination with observed behaviors to pinpoint areas of cognitive impairment. This evaluation helps to determine whether a client is impaired and in need of additional clinical evaluation and medical attention.[6]

Enact a health care proxy: A health care proxy is a document (legal instrument) with which an individual appoints an agent to legally make health care decisions on behalf of that person, when he or she is incapable of making and executing the health care decisions stipulated in the proxy. Once the health care proxy is effective, the individual continues making health care decisions as long as he or she is legally competent to decide. Importantly, in legal-administrative functions, the health care proxy is a legal instrument akin to a "springing" health care power of attorney.

Engage an attorney or care management team: An attorney can assist with ensuring that an individual's advance care directive reflects care choices and preferences, particularly if that person is unable to make decisions due to cognitive disorders. A care management team can be engaged to coordinate the many facets of medical and other care required to assist a patient's quality of life in their day-to-day living. This includes creating a safe environment, promoting social interaction, and enhancing moods and cognitive abilities.

Seek an assisted living facility: There are various forms of assisted living facilities that can assist aging clients. Based upon the individual's unique needs and budgetary constraints, assisted living offers a safe, comfortable housing alternative with care from specially trained staff. For more information, contact local care facilities that specialize in care to seniors with Alzheimer's disease and dementia.

IV. Recognizing elder abuse and exploitation

What is elder abuse?

Elder abuse is an intentional act, or failure to act, by a person in a position of trust, that creates a risk of harm to

[5] Alzheimer's Society, *What Is Dementia?* (2016).
[6] Crisis Prevention Institute, *Using Functional Assessments to Determine Mental Capacity in the Person with Dementia* (September 20, 2010).

an aging adult.[7] From a financial perspective, exploitation occurs when there is unauthorized, illegal, or improper use of an aging adult's resources by a person in a position of trust.[8]

Unfortunately, as aging adults' cognitive functions start to decline, there exists a greater likelihood they could be taken advantage of more easily. Common signs of elder abuse and exploitation include:

- Physical or emotional abuse
- Neglect
- Blocked access to belongings or assets (such as through misappropriation or improper use of power of attorney)

> 90% of elder abusers are family members; less than 5% of cases get reported to any agency.
>
> Source: The National Adult Protective Services Resource Center, *Elder Abuse Is Common, Lethal, and Expensive*.

Typically coupled with this are:

- The aging adult changes his or her regular habits.
- A previously uninvolved relative, caregiver, or friend speaks for or makes decisions on the aging adult's behalf.
- A "new friend" appears.
- The aging adult becomes isolated from family and professional advisors.
- The aging adult exhibits erratic behaviors, such as:
  - Unpaid bills and changes in spending habits
  - Unexplained change in professional advisors (such as CPA, doctor, attorney, or financial advisor)
  - Unexplained asset transfers
  - Atypical cash withdrawals/wire transfers

Interventions to consider

There are many ways trusted individuals can intervene to help stop the abuse of elder adults. In addition to the preliminary steps discussed previously to assist clients exhibiting diminished capacity, here are additional possible actions to consider.

Contact your local Adult Protective Services: Adult Protective Services investigates reports of abuse, neglect, self-neglect, and exploitation of older adults and, in most states, younger adults with disabilities. This service is provided to intervene and protect the victim to the extent possible. Adult Protective Services receives reports, investigates, put interventions in place, and develops a case plan to stop the abuse. If you suspect an incident of elder abuse has occurred in a long-term care facility, the report should be made to the local Long-Term Care Ombudsman, the local law enforcement agency, or state Medicaid fraud units (e.g., the Bureau of Medi-Cal Fraud and Elder Abuse). Notably, the reporting person is protected from both criminal and civil liability.

Arrange for care: Nursing homes and residential long-term care facilities can often provide a safe haven. However, abuse can occur there as well. If you suspect abuse, report it to the client's emergency contact and have the client evaluated by a physician or other medical professional. Seek assistance through clergy, health care facilities (such as hospitals), and adult day care centers.

Revisiting Sylvia's case

In our case study, Joseph did the right thing by going to his legal/compliance department for guidance. He recognized that Sylvia exhibited signs of diminished capacity and potential elder exploitation, but he was unclear on what to do next. Importantly, he had not made any new portfolio recommendations since his last meeting with Sylvia, and legal/compliance instructed him not to make any new recommendations or portfolio changes until they met to discuss the facts and circumstances surrounding his concerns for his aging client.

In preparation for the meeting, Joseph was asked to forward to the legal/compliance department all information related to the client account including, but not limited to, any powers of attorney, emergency contacts, or other fiduciary named on behalf of Sylvia's accounts. In the absence of such information, Joseph was to identify any key contacts—names of dependents, relatives, or close friends—and, to the extent available, their contact information. Furthermore, the compliance officer asked Joseph to document the signs he had witnessed that led to his concern about this aging client.

Joseph gathered all requested information, supplemented his client meeting notes, and forwarded all information for the legal/compliance department's review. Joseph was sure to include when he first witnessed Sylvia's changing behaviors, which dated back to her 75th birthday. He expressed concerns about George, including his apparent

[7] U.S. Centers for Disease Control and Prevention, *Elder Abuse: Definitions* (April 5, 2016).

[8] Ibid.

"undue influence" during the January meeting and in Sylvia's home. He also noted the erratic financial actions Sylvia took, including liquidating substantial positions without Joseph's input, inquiring about a potential alternative investment (an investment product with which she has no experience), and firing her long-term CPA after accusing her of potential professional negligence.

Next, Joseph flagged within his portfolio management system a notification to not trade or rebalance Sylvia's account until otherwise instructed by legal/compliance. He turned to the firm's compliance policies and procedures manual for guidance on the protocols he should follow for dealing with aging clients. From that, he learned that he should be careful not to carry out client-requested transactions that are potentially detrimental to an aging client. Finally, he followed up with and awaited the legal/compliance department's guidance on whether he should approach Sylvia and her emergency contact to evaluate and assist, as needed, with recommending or pursuing medical evaluations to check for potential health issues that could impair her abilities and/or subject her to potential financial exploitation by George, who appears to be manipulating Sylvia.

In preparation for this meeting, legal/compliance considered the following regulatory guidance for dealing with aging clients.

V. Regulatory expectations

In 2008, the Securities and Exchange Commission ("SEC"), Financial Industry Regulatory Authority ("FINRA"), and the North American Securities Administrators Association, Inc. ("NASAA") collaborated on a report called *Protecting Senior Investors: Compliance, Supervisory and Other Practices Used by Financial Services Firms in Serving Senior Investors,*[9] which summarized practices shared by financial advisors, firms, and industry groups and outlined key practices relevant to diminished capacity. While it is not an enforceable regulation, such governing bodies will often cite this report when examining registered firms' senior investor policies.

Given the increased attention to elder financial abuse prevention, regulators are applying enhanced scrutiny in this area, and laws and regulatory focus are evolving.

In fact, to date, there have not been formal regulations passed by regulatory governing bodies that directly address aging clients.[10] However, given the increased attention to elder financial abuse prevention, regulators are applying enhanced scrutiny in this area, and laws and regulatory focus are evolving. There have been numerous regulatory releases in recent years, as well as proposed rules, providing valuable insight into the regulatory expectations. While many of the more specific regulatory pronouncements have come from FINRA, or been focused on broker-dealers and their registered representatives, the concepts expressed in each are universal and valuable information can be gleaned by Registered Investment Advisors ("RIAs"). Below is a summary of such initiatives.

Regulatory guidance

SEC Investor Bulletin and Consumer Advisory: Planning for Diminished Capacity and Illness[11]

The SEC's Office of Investor Education and Advocacy partnered with the Consumer Financial Protection Bureau's ("CFPB's") Office for Older Americans to generate this Bulletin not for financial professionals, but rather for the

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Schwab's compliance website includes a searchable database, compliance tools, and many other resources to assist you. Visit schwabadvisorcenter.com > News & Resources > Compliance. (See "Online compliance resources" on back page for more information.)

[9] U.S. Securities and Exchange Commission's Office of Compliance Inspections and Examinations, North American Securities Administrators Association, and Financial Industry Regulatory Authority, *Protecting Senior Investors: Compliance, Supervisory and Other Practices Used by Financial Services Firms in Serving Senior Investors* (September 22, 2008).

[10] Note that federal and state laws do exist in this area and should be consulted prior to engaging any services on behalf of an elderly client. For instance, states such as Vermont, Indiana, and Nebraska are currently considering adopting the NASAA's model rule, as discussed below, or similar bills. See Wealth Management's *Vermont Beefs Up Cyber, Elder Abuse Safeguards* (February 22, 2016) and Financial Advisor's *State Regulators Approve Model to Curb Elder Abuse* (February 1, 2016). Further, states like Washington, Missouri, and Delaware currently have rules in place governing advisor interaction with elderly clients. See SIFMA's *SIFMA Commends Missouri's 'Senior Savings Protection Act'* (June 15, 2015).

[11] U.S. Securities and Exchange Commission's Office of Investor Education and Advocacy, *Investor Bulletin and Consumer Advisory: Planning for Diminished Capacity and Illness* (June 1, 2015).

investors themselves. The Bulletin encourages investors to plan for possible "diminished financial capacity"[12] and stresses the importance of such planning tools as (1) organizing important documents, (2) providing financial professionals with trusted emergency contacts, and (3) creating a durable financial power of attorney. The Bulletin goes on to provide guidance for those who may not be suffering from diminished financial capacity themselves, but know someone who is, and how they may be able to help those individuals.

SEC speech, "Protecting Elderly Investors from Financial Exploitation: Questions to Consider" (Feb. 5, 2015)[13]

In February 2015, Rick Fleming from the SEC's Office of the Investor Advocate delivered a speech that focused on the protection of elderly investors—or, more specifically, tools the SEC may provide financial service professionals to protect clients when an advisor or registered representative suspects financial abuse. Mr. Fleming cites two important tools that are currently under consideration: (1) allowing financial professionals the ability to "pause" transactions if abuse is suspected, and (2) allowing exceptions to certain privacy restrictions that prevent financial professionals from contacting family members of clients for whom the financial professional feels may be experiencing diminished capacity and/or abuse. Mr. Fleming cites how certain states have already taken steps in furtherance of these initiatives,[14] but questions whether federal law should allow a financial advisor to refuse or delay a transaction, contrary to the explicit instructions of the client, if it appears the client is being defrauded or exploited. In any event, the speech exemplifies the added attention the SEC is dedicating to this topic. In fact, Mr. Fleming stated that the issue is of such importance to the SEC that it is one of only six items the Office of the Investor Advocate is currently reviewing.

A recent report found that only 13% of examined firms had escalation procedures dealing with diminished capacity and only 30% had suitability guidelines tailored specifically toward senior investors.[16]

National Senior Investor Initiative (Apr. 15, 2015)[15]

As part of a collaborative effort, the SEC's Office of Compliance Inspections and Examinations ("OCIE") and FINRA performed examinations on 44 broker-dealer firms (nothing similar has yet been done for RIAs) focusing on, among other things, the types of securities purchased by senior investors, suitability of recommended investments, and training of brokerage firm representatives. The resulting report summarizes the findings and is intended to help broker-dealers "assess, craft, or refine their policies and procedures"[16] for elderly clients entering retirement. Of note, the report found that only 13% of examined firms had escalation procedures dealing with diminished capacity and only 30% had suitability guidelines tailored specifically toward senior investors.[16] While the report concluded overall that firms seemed to be paying increased attention to elderly client issues, it also provided several "notable practices" on how firms could enhance their policies in this regard.

Other notable regulatory guidance

While advisors may not be associated with a broker-dealer and therefore not subject to FINRA regulations, it is nevertheless noteworthy to keep in mind this guidance, which could serve as best practices for advisors to consider when developing compliance controls.

a. FINRA Regulatory Notice 07-43[17]

This Regulatory Notice addresses firm obligations relating to senior investors and highlights industry best practices, suitability concerns, communications with the public (including use of designations and seminars), and dealing with investors with diminished capacity and occurrences of suspected financial abuse. The Notice also offers practical tips for firms to follow when drafting firm policies related to senior investors.

b. FINRA Report: Securities Helpline for Seniors[18]

In April 2015, FINRA implemented a "Securities Helpline for Seniors," a toll-free number that senior investors can call to obtain assistance from FINRA or raise concerns about issues with brokerage accounts and investments.[19] In December 2015, FINRA issued a report summarizing the impact of the hotline in just a few months. The report notes

[12] The Bulletin defines "diminished financial capacity" as a decline in a person's ability to manage money and financial assets to serve his or her best interest, including the inability to understand the consequences of investment decisions.

[13] U.S. Securities and Exchange Commission, Rick A. Fleming speech, "Protecting Elderly Investors from Financial Exploitation: Questions to Consider" (February 5, 2015).

[14] The speech noted laws passed in the state of Washington and Missouri as having set precedent for similar rules to be considered at the federal level.

[15] Financial Industry Regulatory Authority news release, "SEC Staff and FINRA Issue Report on National Senior Investor Initiative" (April 15, 2015).

[16] Ibid.

[17] Financial Industry Regulatory Authority Regulatory Notice 07-43, *Senior Investors: FINRA Reminds Firms of Their Obligations Relating to Senior Investors and Highlights Industry Practices to Serve these Customers* (September 2007).

[18] Financial Industry Regulatory Authority news release, "FINRA Releases Report on its Securities Helpline for Seniors" (December 30, 2015).

[19] Financial Industry Regulatory Authority, *FINRA Securities Helpline for Seniors*.

that FINRA fielded over 2,500 calls and helped recover nearly $750,000 in voluntary reimbursements during that time. The report goes on to highlight several effective practices firms should consider implementing in order to protect seniors. Many of these practices focus on strong policies and supervisory procedures that should consider suitability, product offerings, complaints, and training focused on senior clients.

Proposed state legislation

NASAA Model Legislation or Regulation to Protect Vulnerable Adults from Financial Exploitation (Adopted Jan. 22, 2016)[20]

In January 2016, NASAA announced that its membership had voted to adopt a model act[21] designed to give industry participants and state regulators new tools to help detect and prevent financial exploitation of vulnerable adults. The model rule requires qualified individuals[22] of investment advisors and broker-dealers who reasonably believe that financial exploitation of a vulnerable adult is being attempted to promptly notify Adult Protective Services and their state regulator. Further, it enables investment advisors and broker-dealers to delay disbursements from an account of a vulnerable adult if financial exploitation is suspected. Finally, it allows qualified employees of investment advisors and broker-dealers to provide relevant records of the financial exploitation to relevant authorities. The model rule also provides immunity from administrative or civil liability for investment advisors and broker-dealers who take actions permitted under the proposed act. The model act is currently available to NASAA members for consideration in their jurisdictions and may be adopted as legislation during state legislative sessions or implemented by regulation.

VI. Special considerations

As the guidance and proposed regulations outlined previously make clear, it is imperative for firms to evaluate their business model to determine how to address working with elderly clients. While there is not a one-size-fits-all approach to this process, there are certain aspects that should be considered by any financial firm in this regard. Some of the more prevalent considerations are discussed here.

The age and life stage of the client

This seems obvious, but considering the age and life stage (whether pre-retired, semi-retired, or retired) goes to the heart of the matter when working with senior clients. As demonstrated in the case study, the advisor had known Sylvia long before she experienced any signs of diminished capacity. Thus, how the advisor approached working with Sylvia changed over time. While the exact number will differ, firms should include as part of their policies when the firm considers a client to be "elderly." This age typically ranges from 60 to 75, but by establishing the number, the firm is able to clearly determine when a client is subject to the "elderly client policies" of the firm. To be clear, some clients will be subject to these policies prior to reaching the established age due to a variety of issues such as illness or injury. The firm should also develop policies that provide for regular monitoring of those clients who are approaching or exceed the pre-established elderly age. The policies should focus on recognizing signs of diminished capacity or elder abuse. Had the advisor in our example not had continuous contact with Sylvia, the signs of diminished capacity and elder abuse might have gone unnoticed.

Regulatory focus areas

Firms should always pay special attention to those client interactions that are repeatedly focused upon by regulatory agencies. As described in several of the releases found in the prior Regulatory Guidance section, such interactions include, but are not limited to those mentioned here.

Types of securities purchased for a retiree

While risk of elder financial abuse is not limited to certain kinds of financial products, the types of securities that are purchased for senior clients are still of particular importance to regulators. Firms should have policies that dictate the types, and concentration, of securities available to elderly clients. Furthermore, should elderly clients specifically request types of securities that would not normally be purchased for such clients—such as securities that involve lock-up periods or are of increased risk—the firm should have policies that govern how it should handle such requests.

Suitability of recommendations to senior investors

Every financial firm managing or purchasing assets on behalf of clients needs to have policies concerning suitability that dictate how the firm determines whether any transaction is appropriate for a client based on the financial situation of that client. However, firms tend to overlook tailoring such policies to specifically account for a customer's age or life stage, factors that can dramatically alter a client's goals, objectives, and risk tolerance. In this regard, firms should consider establishing additional policies for elderly clients that specify, among other things, (1) the gathering of additional client information (e.g.,

[20] *NASAA Model Legislation or Regulation to Protect Vulnerable Adults from Financial Exploitation* (January 22, 2016).

[21] The NASAA model act applies to adults age 65 and older and individuals who qualify for protection under a state adult protective services statute.

[22] The model act defines "qualified individual" as broker-dealer agents; investment advisor representatives; those who serve in a supervisory, compliance, or legal capacity for broker-dealers and investment advisors; and any independent contractors that may be fulfilling any of those roles.

employment status, income requirements, health care insurance status, etc.);[23] (2) setting strict firm investment concentration guidelines for senior investors, and (3) developing policies firm personnel are to follow in order to ensure that strategies are being fully explained and understood by senior investors.

Communications and/or advertisements targeting older investors

Advertisements distributed by financial professionals are subject to an array of rules and regulations dependent upon the governing body overseeing such professionals. While such rules do not specifically delineate between advertisements geared toward senior investors and any other investors, firms should be cognizant of who their advertisements are designed to target, and whether additional disclosures may be required as a result. For instance, advertisements that focus on retirement planning, long-term care insurance, wealth preservation, and wealth transfer are dominant themes in advertisements used to attract senior investors.[24] Firms should develop policies to ensure that any such communications have disclosures that are clear to the elderly individual most likely to receive and review the communication. Furthermore, such policies should provide clear instruction as to the approval process any communication must receive.

Best practices to consider

Financial firms should adopt and implement a compliance program and controls geared toward the risks and investment strategy of the firm. To this end, there are several additional compliance matters related to senior investors that firms should consider as best practices. Not all such practices will be applicable to all firms. However, if not already included as part of the firm's policies and procedures, the following items should be carefully considered for possible inclusion.

Train advisors regarding specific aging client issues

Training is an important tool for firms to help ensure that their personnel understand the needs of senior investors. Training should cover a wide array of topics, including the policies of the firm that relate to senior investors such as suitability. Training should also discuss those red flags mentioned earlier that personnel should be looking for to identify whether a client is portraying signs of diminished capacity and/or elder abuse. Most importantly, training should cover the steps personnel should take to escalate concerns they have within the firm if they notice such red flags.

Keep in mind that training should not be limited to internal personnel only, but to aging clients as well. Firms should be proactive in educating clients on how to avoid being victims of financial fraud. Firms should also be explicit in the disclosures provided to clients regarding products and services offered to ensure that elderly clients clearly understand their financial investments.

Training should not be limited to internal personnel only, but to aging clients as well. Firms should be proactive in educating clients on how to avoid being victims of financial fraud.

Consider senior-specific professional designations

In keeping with the theme of receiving additional training on how to work with elderly clients, firms should consider having certain sales and management personnel attain senior-specific professional designations and certifications. Such designations vary widely, however, and firms should specify as part of their policies exactly which designations are approved by the firm. Approved designations should require formal certification programs, which include rigorous curriculum and continuing professional education. It should be noted that the SEC and FINRA, consistent with other federal agencies, state securities regulators, and self-regulatory organizations ("SROs") do not grant, approve, or endorse any professional designation.[25] As such, firms must adhere to particular regulations[26] that govern how they may advertise such designations to the general public.

Evaluate costs and fees associated with investment products and services

Recent initiatives (such as the SEC's Retirement-Targeted Industry Reviews and Examinations ("ReTIRE") Initiative[27] and the Department of Labor's ("DOL's") final rule on "Definition of the Term 'Fiduciary'; Conflict of Interest Rule—Retirement Investment Advice"[28]) have focused on how financial professionals determine investment products and services—particularly when performing rollovers for elderly

[23] See Financial Industry Regulatory Authority Regulatory Notice 07-43 for further recommendations on questions to ask senior investors.

[24] National Senior Investor Initiative (April 15, 2015).

[25] Ibid.

[26] Such regulations include, but are not limited to, Rule 206 of The Investment Advisers Act of 1940, as amended, NASD Rules 2110 and 2210, and NYSE Rule 472.

[27] U.S. Securities and Exchange Commission's OCIE National Exam Program Risk Alert, Volume IV, Issue 6, *Retirement-Targeted Industry Reviews and Examinations Initiative* (June 22, 2015).

[28] Federal Register, Vol. 81, No. 68, Part V, *Definition of the Term 'Fiduciary'; Conflict of Interest Rule–Retirement Investment Advice* 29 CFR Parts 2509, 2510, 2550 (April 8, 2016).

clients. The expectations portrayed in these initiatives are that the financial professionals will prepare documentation to present to clients that support whether or not a rollover is appropriate for a particular client. In developing such documentation, it is recommended that certain information be included, such as (1) an explanation of the tax ramifications of performing a rollover, (2) alternative investment possibilities, (3) a detailed description of the registered firm's compensation (both direct and indirect) resulting from a rollover, and (4) a customer signature line evidencing that the client had an opportunity to review the information and ask any questions he or she may have.

There are several tools available to both financial professionals as well as senior investors to help ensure that senior investors are being properly managed, including:

- Investor Complaint Center
- Aging Life Care Managers
- FINRA Securities Helpline for Seniors
- FINRA Investor Education Foundation

VII. Best practices to consider

Operational best practices

Investment advisors often serve as the first line of defense for addressing aging client needs. More than ever, as a client ages, advisors must engage in active dialogue to ascertain what that aging client needs. At the onset of the engagement, it is imperative for advisors to ask their clients, "If something happens to you or if I have a concern, whether it be a medical condition or financial exploitation, is there someone you trust—an emergency contact—whom I can contact on your behalf?" This information should be gathered and memorialized at the inception of the client relationship. If the client does not know how to respond, ask them to think about this carefully and capture this information at the next client meeting.

Next, confirm with clients who has authorization on their accounts. For example, we learned in our case study that Sylvia has an estranged son. As an investment advisor, Joseph needed to know whether Sylvia's son is the closest next of kin and whether Sylvia will grant Joseph permission to speak to the estranged son under certain circumstances. To the extent she will, this should be outlined in advance with the client.

As we have learned, working with aging clients poses many challenges. To the extent an investment advisor services retail clients, it is essential to turn to your operational procedures to create and implement a dynamic system for working with aging clients. Sample operational policies to consider implementing and providing accompanying mandatory training for all advisors include:

- Determine what and how to document atypical aging client behaviors such as erratic financial questions and decisions, unexplained withdrawals, drastic shifts in investment style, and changes in beneficiaries and professional advisors.
- Conduct a review of aging client files and documentation frequently to fill in any gaps. For example, if the firm maintains copies of trust documents, check for instructions for determining the grantor's incapacity.
- Inquire whether the client has a power of attorney in place. If there is no power of attorney, ask the client to complete a form instructing the firm who their emergency contact is and what to do (e.g., how to contact, freeze the account, etc.) if diminished capacity is suspected.
- Designate who within the firm all aging client concerns should be escalated to and who will notify legal/compliance. Typically, it is best not to make any portfolio changes and hold all transactions while awaiting direction from legal/compliance.

Compliance best practices

The legal/compliance department has one of the most important responsibilities of understanding regulatory expectations and ensuring that applicable securities rules and regulations, as well as state laws and firm policies and procedures, are being adhered to. Working with aging clients goes beyond the scope of financial industry knowledge and into the realm of medical and social work considerations.

Because this is such a complex area, training of both compliance officers and investment advisors is paramount. As was discussed earlier, there is no regulatory expectation for compliance officers to be medical experts. However, there is an expectation to adhere to the fiduciary standards placed on investment advisors to always act in the best interest of the client.

To help fulfill that obligation, the firm is tasked with the obligation to develop policies and procedures applicable to the advisor's business model.[29] To the extent that the advisor does service aging clients, consider implementing the following:

- Train advisors on the stages of aging, focusing on situational examples involving early, middle, and late stages of dementia; elder abuse scenarios; and other aging considerations. As necessary, bring in social workers to assist.
- Document a "response plan" on what actions will be taken by the firm for aging client concerns. This may include sending account statements to both the account holder and power of attorney, contacting emergency contacts for medical concerns, and reaching out to law and regulatory authorities with concerns of elder abuse and exploitation.
- Review the terms of your standard advisory contracts and investment policy statements with counsel before acting and preventing trades in a client's portfolio. For example, if an advisor and client agree to actively manage a client's account or to rebalance the account at certain set intervals, advisors may have a contractual and fiduciary obligation to do so. In other instances, the states and FINRA have either enacted or proposed certain safe harbors whereby a financial advisor may be permitted to not take such action where such action could detrimentally impact the aging client.

Barnes Wealth Management from our case study worked with its counsel to add the following language to its investment advisory contracts:

"In the event that advisor suspects elder abuse, financial exploitation, or a cognitive issue, advisor may, in its sole discretion, freeze a client's account until such time that client's guardian, attorney-in-fact, or other authorized representative is contacted to address this concern. During this time, no new recommendations or portfolio rebalancing will occur."

- Summarize regulatory guidance so that advisors can understand why aging client compliance and operational protocols are important.
- Develop suitability considerations for aging client services.
- Communicate investment guidelines for dealing with elderly clients.
- Enhance account opening procedures by requesting emergency contact information, powers of attorney, and applicable documents, as necessary, and capture in a central depository such as the firm's CRM system.

TIP: Be able to capture when accounts have a power of attorney added or switched to someone else.

- Develop protocols for documenting conversations with aging clients and capturing changes observed (both physical and cognitive).
- Implement an escalation process for what to do if you suspect a client has dementia or is a victim of elder abuse.
- Create and implement supervisory and internal controls identifying unique trends or patterns that could suggest diminished capacity and/or elder abuse (e.g., multiple withdrawals atypical for that client).

TIP: Develop a process for verifying the authenticity of the client's signature. Also, provide guidelines for duplicate account statements to be sent to the account holder and the person with power of attorney.

- Conduct education and training seminars for advisors.
- Consider under what circumstances the firm will self-report an aging client issue to Adult Protective Services, law enforcement, and/or regulatory authorities.

TIP: Check with counsel prior to taking action.

[29] U.S. Securities and Exchange Commission, *Final Rule: Compliance Programs of Investment Companies and Investment Advisers*, February 5, 2004 (Release Nos. IA-2204; IC-26299; File No. S7-03-03).

VIII. Conclusion

As clients continue to live longer, and as the baby boomers approach retirement, it is essential for firms to be proactive in implementing a thoughtful, dynamic process for serving aging clients. Regulatory agencies, as well as state and federal lawmakers, view older investors as particularly vulnerable and in need of protection. As investment advisors, you have a fiduciary obligation to always act in your clients' best interests, which can be particularly challenging when working with aging clients and their financial needs. In many instances, you may be the first line of defense in identifying an elderly client issue. It is important to remember that at all times.

The purpose of this white paper is to provide insight into the regulatory expectations and offer helpful guidance for you to refine your internal control structure to protect your aging clients and your advisory practice. By implementing sound practices and offering consistent training, your firm will be in a good position to meet the demands of working with and serving aging clients.

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