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Helping Older Americans Keep Their Savings: The Elder Investment Fraud and Financial Exploitation Prevention Program

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An estimated \$2.9 billion is being taken away from older Americans every year, up from \$2.6 billion in 2008 according to the MetLife Mature Market Institute.³ A major portion of these wrongful takings result from "selling" older folks, including the millions of aging Baby Boomers, fraudulent and/or inappropriate investments. Kiplinger's has dubbed this "The Crime of the 21st Century."⁴

In this article, we will look at older Americans and explore why they are interesting targets for those seeking money, including the demographics and wealth distribution of those over 65. It will also look at the impact of market conditions on investment alternatives, especially since 2008. The particular vulnerabilities (and some surprising strengths) of older Americans will be addressed, as will the problems of communicating effectively with them.

We will then look at responses from both government and private organizations to attempt to interdict the financial abuse of the elderly. Governmental responses have restricted how investment sellers and advisers market themselves.⁵ In addition, sanctions for violating the law where an older person is involved have been increased,⁶ Government has also organized efforts to address elder investment fraud, including extensive investor education programs.⁷ And most recently, 26 states, the District of Columbia, and the Commonwealth of Puerto Rico have implemented an interdisciplinary initiative to try to find a better, more direct way to assess the financial acuity of older Americans and, potentially, to offer more effective outside intervention.⁸

The Scope of the Issue

By the 2010 Census, the population of Americans ages 65 and over was some 40.1 million, or about 13% of the total U.S. population of almost 309 million.⁹ That number is up from 31.2 million in 1990 and 35 million in 2000.¹⁰ The population of Americans 65 years old and older grew by 15.1% during the decade of 2000 to 2010 in significant contrast to the 9.7% growth in overall U.S. population.¹¹ There is every reason to believe that the acceleration in the number of older Americans will continue for some time into the future as the so-called "Baby Boom" Generation reaches senior citizen status. Indeed, beginning in January 2011, more than 10,000 members of the Baby Boom Generation hit age 65 every day, a circumstance that will continue for at least 19 years.¹² In sum, there is every reason to expect the growth of both the number of older Americans and the percentage of the entire population which they represent. That means the number of targets for elder investment fraud will grow as well, suggesting that "the crime of the 21st century" might become "the crime [wave] of the century," absent effective steps to combat the fraud feasons.

In addition to sheer numbers, older Americans present particularly attractive targets for financial fraud. There



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are two distinct reasons for this, which unfortunately feed into each other. Older Americans were believed to hold and/or control over \$13 trillion in household investible assets as of 2007.¹³ Even allowing for the precipitous decline in investments brought about by the 2007-2009 Recession, older Americans own and/or control well in excess of \$10 trillion today.¹⁴ Those assets are tempting targets for those who would take funds from others. The second reason for seeing older Americans as presenting especially interesting opportunities for fraud is precisely the effect of the 2007-2009 Recession and subsequent efforts by the Board of Governors of the Federal Reserve System (the "Fed") to "manage" the economy back to vibrancy.

The 2007-2009 Recession caused the net loss, even after the recovery through 2011, of some \$5 trillion of invested assets.¹⁵ Most of these funds were part of the resources older Americans intended to rely upon in their retirement. Suddenly total retirement assets dropped by some 22%.¹⁶ Aging Americans had less money in retirement accounts, savings, and other assets (including their homes, where home equity fell by over 30% from 2006 to 2008).¹⁷ Moreover the time to save and accumulate resources before retirement was foreshortened, as the economy only slowly recovered. Finally, older Americans seeking reasonable yield on financial assets were hamstrung by the efforts of the Fed. Since 2009 the Fed has held long-term interest rates below 2%.¹⁸ All of these factors suggest that an older person might be particularly susceptible to persons offering "above-market" returns, either in investments with terms of yield (interest and/or dividends) or for appreciation (principal growth). And such appears to be the case, based upon available anecdotal evidence.

Older Americans, in addition to dealing with the challenges presented by possible retirement and with the economic pressures brought on by the 2007-2009 Recession, face individual issues inherent in aging, which for many materially increase their vulnerability to abuse. As the number of older Americans has increased, so has the number of academic and medical studies about what the aging process entails and what effects it may have on mental acuity, judgment, risk assessment, and even ability to live independently. One major study found that the ability to make sound financial decisions, including assessing risks, potential returns, alternative investments and the like, peaks at approximately age 53 $\frac{1}{3}$.¹⁹ Thereafter financial acuity typically (though not always) deteriorates as time progresses. Other studies indicate that there are significant changes over time in the part of the brain (the Orbitofrontal Cortex) where executive functioning capacity is located.²⁰ These changes (and others connected to overall physical health, including type II diabetes, stroke, Parkinson's disease and the like) can lead to a condition that may (but also may not) eventually "progress" to Alzheimer's Disease.²¹ The result is a biochemical-related limitation on mental ability known as mild cognitive impairment.²² As an example, persons with marked changes in their Orbitofrontal Cortex are far less risk averse than persons of the same age without comparable changes.²³ Other studies have identified financial management (along with independent living and driving an automobile) as one of the most demanding and complex areas of decision-making capacity in older adults.²⁴ It is believed that more than one-third of Americans over age 71 have mild cognitive impairment, making them particularly vulnerable to efforts to sell them unsuitable and even outright fraudulent investment products.²⁵ Indeed the combination of rapidly-growing numbers of older Americans controlling vast amounts of investible wealth, facing the volatile stock market and near-zero interest rates, while the necessary mental capacity to make fine judgments is deteriorating as part of the aging process, creates what has appropriately been called "a potent, perfect storm" for financial fraud focused on the elderly.²⁶

Strategies of Response

As the number of older Americans increased, the NASAA (the organization of securities regulators in the 50 U.S. states, the District of Columbia, the Commonwealth of Puerto Rico, and the Canadian Provinces) put together an educational program entitled "Seniors Against Investment Fraud" in 2005 and began to make a series of presentations to seniors throughout the United States.²⁷ This effort and a related series of enforcement actions in a number of the states led the U.S. Securities and Exchange Commission, with the support of NASAA and of the Financial Industry Regulatory Authority, Inc. ("FINRA") (the self-regulatory organization that oversees broker-dealers and their registered representatives) to convene the first of what have become annual Senior Summits focused on protecting seniors from investment fraud and sales of unsuitable securities.²⁸ The resulting Senior Initiative has three components: (i) increased regulatory examinations to detect abusive sales tactics targeting



seniors; (ii) increased enforcement in cases involving seniors; and (iii) enhanced investor education and outreach, particularly for seniors.

In the years following 2006, many American states have amended their securities (so-called "Blue Sky") laws to restrict substantially the use of senior-specific designations by market professionals (such as "certified retirement specialist").²⁹ This intended to constrain, in part, the sales practices of securities professionals. A similar restriction has been adopted in some states with respect to licensed insurance producers who sell various annuity insurance products.³⁰

As part of the second prong of the Initiative, the securities laws have been amended in some jurisdictions to increase the penalty applicable if violating acts or omissions involve an older American as the victim, raising the amount of the otherwise applicable maximum fine.³¹ These steps evidence the hope that the threat of increased punishment will deter some illegal actions. One difficulty with deterrence is that it depends on the threat of *post hoc* punishment. NASAA reports that state regulators opened about 14,000 investigations in 2009 and 2010, many of which will take years to complete.³² There are reasons to believe that significant amounts of financial fraud involving seniors are not reported, given the number of complaints actually filed in contrast to surveys suggesting that as many as 20% of older Americans have experienced financial exploitation or have been targeted by persons attempting to defraud them.³³

That leaves the third prong of the Senior Initiative: investor education and outreach. The SEC, along with the state securities regulators and a number of other entities, has allocated significant resources to try to educate the public, and particularly the elderly, about investment fraud and unsuitable financial products — "if it sounds too good to be true, it almost certainly is." At least one commentator estimates the amount spent annually on these efforts is more than \$10 million.³⁴ There are, however, at least three reasons why investor education programs may not be as effective as had been hoped. First, any education program has to figure out how best to gain the attention of the intended "students." Given the plethora of media and the fragmentation of modern American society, it is not simple to reach any significant portion of adults of any age on a \$10 million dollar budget, as evidenced by the costs of the recent Presidential election campaigns. Second, studies of securities fraud schemes targeting older Americans have shown a number of recurring practices, which tend to interfere with and/or minimize the effectiveness of investor education. The sellers use gifted sales personnel, who are both self-confident and glib, touting "guaranteed" or "can't lose" propositions.³⁵ Many of these propositions in turn offer fast and large appreciation of money — the proverbial "get rich quick" opportunity. The sales personnel often assert that an offer is limited in time, noting that many others who are similarly situated have already invested. The sales personnel become attuned to learning as much as possible about a "customer," and then tailoring the sales effort to evoke a positive response. These sales personnel are especially careful to be charming, nice, respectful, and deferential when selling to older adults. Research on securities fraud victims also indicates that many are financially literate, often successful business people (especially men), confident in their judgments and capabilities and not necessarily willing to seek a "second opinion," let alone attend a fraud education program.³⁶ "Older adults do not like be reminded that they are old"...Rather, "the aging person wants to maintain his or her youthful self-concept, so messages that reinforce the perception... [of youth]" are more effective than messages that emphasize age.³⁷

Finally research has shown that older persons begin to lose brain powers, especially memory.³⁸ This natural aging process leads a fair number of older Americans, as discussed above, to develop mild cognitive impairment. Thus, the investor education efforts face substantial hurdles and leading some academic researchers to suggest that investor education programs for older Americans are unlikely to prove sufficient to the task of protecting older Americans from having their savings taken.³⁹

The Elder Investment Fraud and Financial Exploitation Prevention Program

Faced with this situation in 2009, the Texas State Securities Board (the "Blue Sky" regulatory agency in Texas) collaborated with the Huffington Center on Aging and Texas Consortium Geriatric Education Center at the



Baylor College of Medicine to develop "an easy-to-use set of 'red flag' questions that ...primary care physicians and their...staff could use with older patients."⁴⁰ That work was led by Dr. Robert E. Roush, Director of the Education Center, with financing provided by a grant from the Investor Protection Trust, a non-profit devoted to investor education. The project first employed outside experts in decision-making capacity, neurology, psychiatry, and ethics, leading to use of a baseline protocol with four focus groups of six clinicians each, with a large number of older patients.⁴¹ One result is a pocket guide (a copy of which is attached to this paper as Appendix B) for use by health care providers: physicians, geriatric social workers, nurses, home health professionals, and others. The Program evolved from a pilot project in continuing medical education programs in Texas in 2009.⁴² Of the 200 physicians who took the course, 67 provided follow-up data showing a 55% rate of use of the guide leading to identification of patients "deemed highly vulnerable...to elder investment fraud and financial exploitation."⁴³ NASAA urged its members in 2010 and 2011 to implement the EIFFE Prevention Program and, as noted at the outset, that has resulted in continuing education programs in 26 states, the District of Columbia, and the Commonwealth of Puerto Rico as of October 2011.⁴⁴

The Program is still young, so substantial assessments of its effectiveness, or even anecdotal information about successful interventions, are not generally available.⁴⁵ In addition, the several states that have implemented the Program have sometimes given different approaches preferred emphasis: for example, California directs the EIFFE continuing medical education sessions almost entirely at physicians; Pennsylvania, in contrast, puts a primary focus on adult protective service workers and Geriatric Care Managers.⁴⁶ The lead presenter in New Jersey notes that most of the physicians who have attended the education program have been gerontologists, and that geriatric nurses and social workers tend to predominate in the classes.⁴⁷ What can be said is that the Program focuses on health care providers because they have more frequent interactions with their older patients, where sometimes those interactions are of significantly greater duration than available in an investor education presentation. Moreover, the health care provider theoretically will have a relationship with the patient involving some level of trust, confidence, and reliance, thus increasing the possibility of gaining meaningful information from the patient. In an effort to expand the participation of health care professionals and others (e.g. social workers, Adult Protective Services personnel, etc.) in the Program, the Investor Protection Trust is seeking to obtain Continuing Medical Education (and comparable continuing professional education) credit for Program participants.⁴⁸ In addition, the Trust intends to launch an online version of the accredited Program so that health care professionals and others can go through the Program's training, even if unable to attend face-to-face sessions.⁴⁹

The EIFFE Prevention Program also includes a tri-fold Patient Education brochure (a copy of which is attached to this paper as Appendix C) to be available in waiting rooms and for handout to older patients. In addition the EIFFE Program Pocket Guide gives health care providers referral contact information for social services and investor protection intervention.

The EIFFE Pocket Guide for health care providers has four pages. Page one lists two sets of red flags in checklist fashion: one relating to the patient's history, the other to clinical observations. Page two sets out some questions to be asked and notes possible referrals that may be needed. Page three gives names and e-mail addresses or referral resources. Finally, page four sets out a seven-point "Financial Concerns Checklist" to go over with the patient. The Pocket Guide is straightforward, physically handy, and should prove easy to use. As medical records are increasingly kept in electronic form the Pocket Guide should be readily adaptable as a diagnostic "app."⁵⁰

Some health care professionals have expressed concern about when and how deeply they should inquire of a patient about the patient's financial matters.⁵¹ Importantly, the Journal of the American Medical Association ("JAMA"), in an article published February 16, 2011, offers some guidance as to what questions may be asked, with the key dividing line being the presence or absence of a diagnosis of cognitive impairment.⁵² That guidance is derived from well-established protocols used in diagnosing cognitive impairment involving financial acuity.⁵³ Appendix D to this paper sets out that guidance for ease of reference. The JAMA article goes on to state the



following:

We believe that the physician's role in monitoring financial capacity of patients includes (i) educating older adult patients and families about the need for financial planning; (ii) recognizing signs of possible impaired financial capacity; (iii) assessing financial impairments in cognitively impaired adults; (iv) recommending interventions to help patients maintain financial independence; and (v) knowing when and to whom to make medical and legal referrals.⁵⁴

One may then say that the involvement of health care providers in the EIFFE Prevention Program is not merely an innovative approach to protecting older Americans from losing their savings; it is an inherent part of the professional obligation to render care.

Authors' Note

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The authors have substantial respect for the workings of our capital markets and for the importance of individual responsibility. In light of the impact of aging on mental faculties, however, it seems apparent that an older investor is often at a biologically-related disadvantage with the significant potential for financial loss. Financial stress may adversely affect both physical and emotional well-being, exacerbating existing health concerns in an aging population. Professionals and paraprofessionals alike, working within the health care system, have a unique opportunity to identify and protect their patients from financial elder abuse. The authors encourage readers to take the information and tools put forth in this article and share them with those within the health care professions. Knowledge is a powerful preventive tool.

Footnotes

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³"The MetLife Study of Elder Financial Abuse: Crimes of Occasion, Desperation and Predation Against America's Elders," MetLife Mature Market Institute, June 2011.

⁴Kiplinger's Personal Finance, November 2011, page 37.

⁵See NASAA Model Rule on the Use of Senior-Specific Certifications and Professional Designations CCH, NASAA para. 4791 (March 20, 2008), and see, e.g., New Jersey Statute Annotated §49:3-52.2

⁶Some 19 States have enhanced penalties for elder abuse as of November 2011 according to NASAA. See e-mail of January 12, 2012 from Leah Szarek, Manager of Communications and Investor Education, NASAA. See, also "Boomers Wearing Bull's-Eyes," The Wall Street Journal, Wednesday, December 14, 2011, page C1, Col 1.

⁷See GAO, Elder Justice: National Strategy Needed to Effectively Combat Elder Financial Exploitation, November 2012.

⁸Elder Investment Fraud and Financial Exploitation Prevention Program Coalition of Participating States, Investor Protection Trust, as of February 2012; a copy of this list is attached as Appendix A.

⁹USA Quick Facts from the US Census Bureau obtained by Internet Explorer January 11, 2012.

¹⁰U.S. Census Bureau Census 2000 Brief, October 2001.



- ¹¹U.S. Census Bureau, Census 2010 Brief, December 2010. Senior Journal, Senior Citizen Information and News, December 2011.
- ¹²Senior Journal, op. cit. at note 10. Federal Reserve Bank of San Francisco Economic Letter "Boomer Retirement: Headwinds for U.S. Equity Markets?" 2011-26, August 22, 2011.
- ¹³Kiplinger's Personal Finance op. cit. at note 4.
- ¹⁴"The Rising Age Gap in Economic Well-Being," Pew Research Center, November 7, 2011.
- ¹⁵Late -2000's Financial Crisis, Wikipedia, see under subhead "Wealth Effects" at p.22.
- ¹⁶Ibid.
- ¹⁷Ibid.
- ¹⁸Flagship Financial Group LLC, "Getting Started With Mortgage Rates," September 26, 2011.
- ¹⁹Kiplinger's Personal Finance, op. cit. at note 4.
- ²⁰Written Testimony of Don M. Blandin, President and CEO Investor Protection Trust, and Robert E. Roush, Ed.D. MPH, Director, Texas Consortium Geriatrics Education Center, and Principal Investigator, EIFFE Grant Huffington Center on Aging, Baylor College of Medicine, Special Committee on Aging, US Senate, March 16, 2011.
- ²¹Ibid.
- ²²Ibid. Moye and Marson, "Assessment of Decision-Making Capacity in Older Adults: An Emerging Area of Practice and Research," VII FOCUS, The Journal of Lifelong Living in Psychiatry 1, Winter 2009; Triebel, Martin and Griffith et al., "Declining Financial Capacity in Mild Cognitive Impairment: A 1-Year Longitudinal Study," 73 Neurology 928 2009.
- ²³Written Testimony, op. cit. at note 19.
- ²⁴Moye and Marson, op. cit. at note 21.
- ²⁵Written Testimony, op. cit. at note 19.
- ²⁶Kiplinger's Personal Finance, op. cit. at note 4.
- ²⁷Catalano and Lazaro, "Financial Abuse of the Elderly: Protecting the Vulnerable" 15 Public Investors Arbitration Bar Association Bar Journal 1, 2008.
- ²⁸Ibid.
- ²⁹Ibid.
- ³⁰Vessels, "Protecting Aunt Alice: 2008 State Developments in the Regulation of Annuity Sales in the Seniors Marketplace," American Law Institute, SP029 ALI-ABA 343, 2008.
- ³¹NASSA e-mail, op. cit. note 6.
- ³²"Boomers Wearing Bulls-Eyes," The Wall Street Journal, op. cit. at note 6.
- ³³Kiplinger's Personal Finance, op. cit. note 4.
- ³⁴Barnard, "Deceptions, Decisions and Investor Education," 17 Elder Law Journal 201, 2010.
- ³⁵Ibid.
- ³⁶Ibid.
- ³⁷Ibid, citing Mosch is "Marketing to Older Adults: An Updated Overview of Present Knowledge and Practice," 20 J. Consumer Marketing 516 (2003).
- ³⁸Ibid. Moye and Marson, op cit at note 21; Triebel, Martin and Griffith et al., op. cit. at note 21.
- ³⁹Barnard, op. cit. at note 32.
- ⁴⁰Written Testimony op. cit. at note 19. Interestingly, the GAO in its November 2012 Report, op. cit. at note 7, urges at p. 31 et seq. that bank personnel be required to receive similar training so that the bankers are able to identify financial exploitation of elder customers and to assist them.
- ⁴¹Ibid.
- ⁴²Ibid.
- ⁴³Ibid.
- ⁴⁴Coalition of Participating States, op cit at note 7.
- ⁴⁵The Investor Protection Trust will be conducting a survey in the Spring of 2013 of health care professionals who regularly see older patients to obtain data on the professional practices concerning elder investment fraud; email from the Investor Protection Trust dated January 28, 2013.
- ⁴⁶Telephone discussion, December 28, 2011, with Christina Kotsalos, Investor Education Coordinator,



Pennsylvania Securities Commission.

⁴⁷Telephone discussion, December 30, 2011 with Dr. Paul Bryman, DO, FACOI, AGSF, CMD, University of Medicine and Dentistry of New Jersey, Director, New Jersey Institute for Successful Aging.

⁴⁸January 28, 2013 email from the Investor Protection Trust.

⁴⁹*Ibid.*

⁵⁰Wikipedia, Electronic Medical Record, January 12, 2012.

⁵¹Widera, Steenpass, Marson, and Sudore, "Finances in the Older Patient with Cognitive Impairment," 305 *Journal of the American Medical Association* 7, 2011.

⁵²*Ibid.*

⁵³*Ibid.* See for example, Widera, Steenpass, Marson, and Sudore, Supplementary eTable, Performance-Based Tests to Request in Making a Referral to Financial Capacity Assessment, American Medical Association 2011 and "Financial Capacity" in Assessment of Older Americans With Diminished Capacity, A Handbook for Psychologists produced by the American Bar Association Commission on Law and Aging and the American Psychological Association, 2008.

⁵⁴Widera, Steenpass, Marson and Sudore, *op. cit.* at note 46.

If you have questions or would like to discuss any business law, banking, or financial services issue, please feel free to email pdhutcherson@norris-law.com.

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