ELDER FINANCIAL ABUSE: PREVENTION AND REMEDIES

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I have written about elder financial abuse, and I will keep writing about it until stops.[1]

It is unfathomable to me that schemes to defraud the elderly are so pervasive. These seniors are attractive targets for financial exploitation. They are taken advantage of by scam artists, financial advisors, family members, friends, acquaintances, caregivers, home repair contractors, real estate firms, residential mortgage loan originators, credit repair companies, stock brokers, accountants, lawyers, collection agents, appraisers, fiduciaries, guardians, unscrupulous professionals and business people (or those posing as such), pastors, annuity salespersons, and doctors.

It is not news at this point that financial exploitation is a common form of elder abuse and that only a small fraction of incidents is reported to federal, state, or local enforcement authorities, despite persistent efforts by private companies and government agencies to slow its growth.

PREDATOR AND VICTIM

Why target the elderly? Because older adults often have retirement savings, accumulated home equity, or other assets. Combine those factors with a likelihood of eventual physical or mental impairments, a range of cognitive disabilities, emotional decline, isolation, loneliness, health problems, loss of a partner, family, or friend – all contributing to being vulnerable to financial exploitation and scams – and the result is a feeding frenzy to obtain ill-gotten gains!

Financially abused elders, are susceptible to exploitation for numerous reasons. They are often frail, and the predators assume that frail victims will not survive long enough to follow through on legal interventions, or that they will not make convincing witnesses. Severely impaired individuals are also less likely to take action against their abusers, as a result of illness or embarrassment. The elderly are likely to have disabilities that make them dependent on others for help. These "helpers" or new “best friends” may have access to homes and assets, and may exercise significant influence over the older person. Many elderly people are not financially sophisticated or are unfamiliar with modern technology involving money management.

Family and friends may prey on the elderly. Statistically, ninety (90%) percent of abusers are family members or trusted others! A younger family member might fear that the older family member will get sick and use up savings, depriving the abuser of an inheritance. Or, the abuse is rationalized, believing that the predator stands to inherit assets, and thus feels justified in taking what is thought to be "almost" or "rightfully" due. Then there are the family members who have negative feelings toward siblings or other family members whom they want to prevent from acquiring or inheriting the older person's assets. Or, friends and family who have had a negative relationship with the older person feel a sense of "entitlement." And, certainly, there are close relations who have substance abuse, gambling, or financial problems, which tempt them to defraud and financially abuse the elderly family member.[2]

What happens when an elderly person is financially abused? The devastation is deep, broad, and painful. These are some typical outcomes: loss of trust in others; loss of security; depression; feelings of fear, shame, guilt, anger, self-doubt, remorse, worthlessness; financial destitution; inability to replace lost assets through employment; inability to hire an attorney to pursue legal protections and remedies; becoming reliant on government ‘safety net’ programs; inability to provide for long term care needs; and, loss of the primary residence.[3]

Regulatory Responses

For many years, the Financial Crimes Enforcement Network (“FinCEN”) has kept track of very specific instances of elder abuse relating, for instance, to mortgage fraud. Importantly, it issues periodic advisories that offer statistics as well as outlines of new scams. My firm monitors FinCEN’s statistics and issuances, and we provide the findings in our newsletters, articles, and compliance alerts, and we place relevant documents and issuances in our website library.[4]

It is important to mention that elder financial abuse includes the Red Flags associated with identity theft. Therefore, the twenty-six Red Flags offered in the Interagency Guidance, through the Federal Trade Commission, are a resource.[5]

The Consumer Financial Protection Bureau uses its *Office of Financial Protection for Older Americans* to provide information and tools to avoid the financial exploitation of the elderly. Additionally, the agency has been carefully considering regulatory ways and means to curtail such financial abuse. Indeed, it has moved to the forefront in developing strategies to communicate that the Gramm-Leach-Bliley Act ("GLBA") does not prohibit companies from reporting suspected elder financial exploitation, which I will discuss in some detail in the following section.[6]

In this article, I will outline how the GLBA furthers the protection of the elderly from financial abuse. I will also provide an outline of some Red Flags as well as ways to increase public awareness about elder financial abuse. Understanding the ways and means available to provide consumer financial protection will help to end the plundering of the elderly.

USING THE GRAMM-LEACH-BLILEY ACT

On September 24, 2013, certain federal regulatory agencies issued guidance ("Guidance") to clarify that the privacy provisions of the Gramm-Leach-Bliley Act ("GLBA") generally permit financial institutions to report suspected elder financial abuse to appropriate authorities.[7] Because the GLBA's privacy provisions generally require a financial institution to notify consumers and give them an opportunity to opt out before providing nonpublic personal information to a third party, **the Guidance seeks to clarify that it is generally acceptable under the law for financial institutions to report suspected elder financial abuse to appropriate local, state or federal agencies**.

The federal agencies that have collaborated to issue the clarification Guidance, entitled *Interagency Guidance on Privacy Laws and Reporting Financial Abuse of Older Adults*, are the Federal Reserve System ("FRB"), Commodity Futures Trading Commission ("CFTC", issuing as Staff Guidance), Consumer Financial Protection Bureau ("CFPB"), Federal Deposit Insurance Corporation ("FDIC"), Federal Trade Commission ("FTC"), National Credit Union Administration ("NCUA"), Office of the Comptroller of the Currency ("OCC"), and Securities and Exchange Commission ("SEC"). The purpose of the issuance is to provide guidance to financial institutions with respect to clarifying the applicability of privacy provisions of the GLBA, specifically regarding the reporting of suspected financial exploitation of older adults.

Employees of depository institutions and other financial service providers that constitute "financial institutions" for purposes of the GLBA may observe signs of possible financial exploitation of an older adult. Various federal and state authorities either require or encourage reporting of this type of information to the appropriate agency. The Guidance clarifies that reporting suspected financial abuse of older adults to appropriate local, state, or federal agencies does not, in general, violate the privacy provisions of the GLBA or its implementing regulations.[8] Specific privacy provisions of the GLBA, and its implementing regulations, permit the sharing of this type of information under appropriate circumstances without complying with notice and opt-out requirements.

This clarification is needed because the GLBA has an established general rule that a financial institution may not disclose any nonpublic personal information (known as "NPI") about a consumer to any nonaffiliated third party unless the financial institution first provides the consumer with a notice that describes the disclosure (as well as other aspects of its privacy policies and practices) and a reasonable opportunity to opt out of the disclosure, and the consumer does not opt out. But Section 502(e) of the GLBA does provide for certain exceptions to this general rule, thereby permitting such disclosure to nonaffiliated third parties without first complying with notice and opt-out requirements. For the purposes of reporting financial abuse of the elderly, NPI may be provided to local, state, or federal agencies where the exceptions are operative.[9] The NPI disclosures may be made either at an agency's request or through the financial institution's own initiative.

Here are exceptions to the GLBA notice and opt-out requirements that, to the extent applicable, permit NPI sharing with local, state, or federal agencies **for the purpose of reporting suspected financial abuse of older adults without the consumer's authorization and without violating the GLBA**:

- A financial institution may disclose nonpublic personal information to comply with federal, state, or local laws, rules and other applicable legal requirements, such as state laws that require reporting by financial institutions of suspected abuse.[10]

- A financial institution may disclose nonpublic personal information to respond to a properly authorized civil, criminal, or regulatory investigation, or subpoena or summons by federal, state, or local authorities or to respond to judicial process or government regulatory authorities having jurisdiction for examination, compliance, or other purposes as authorized by law.[11]

- A financial institution may disclose nonpublic personal information to protect against or prevent actual or potential fraud, unauthorized transactions, claims, or other liability. For example, this exception generally would allow a financial institution to disclose to appropriate authorities nonpublic personal information in order to report incidents that result in taking an older adult's funds without actual consent, or report incidents of obtaining an older adult's consent to sign over assets through misrepresentation of the intent of the transaction.[12]

- To the extent specifically permitted or required under other provisions of law, and in accordance with the Right to Financial Privacy Act of 1978,[13] a financial institution may disclose nonpublic personal information to law enforcement agencies (including the CFPB, the federal functional regulators, and the FTC), self-regulatory organizations, or for an investigation on a matter related to public safety.[14]

It is the case that a financial institution may disclose nonpublic personal information with the consumer's consent or consent of the consumer's legal representative.[15]

Red Flags of Elder Financial Abuse

As I mentioned above, FinCEN publishes an advisory that tracks financial elder abuse as well as mortgage fraud schemes involving such exploitation. The FinCEN advisory that was published in February 2011 provides a set of Red Flags that should be used by financial institutions in order to identify, mitigate, reduce, and eliminate elder financial exploitation.[16]

One step that has been taken, required by both banks and nonbanks, is the mandate to file Suspicious Activity Reports ("SARs") with FinCEN, where there is a suspicion involving money laundering and terrorist financing, as well as activities relating to elder financial abuse and other consumer fraud. The primary purpose of this type of SAR filing is to assist law enforcement in identifying individuals and organizations involved in financial crime.[17] On a case by case basis, these signs might require the filing of a Suspicious Activity Report.

As described in the foregoing advisory, the possible signs of abuse include, but are not limited to:

- **Erratic or unusual banking transactions, or changes in banking patterns**
  - Frequent large withdrawals, including daily maximum currency withdrawals from an ATM;
  - Sudden non-sufficient fund activity;
  - Uncharacteristic nonpayment for services, which may indicate a loss of funds or access to funds;
  - Debit transactions that are inconsistent for the older adult;
  - Uncharacteristic attempts to wire large sums of money; or
  - Closing of CDs or accounts without regard to penalties.

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

- The older adult lacks knowledge about his or her financial status, or shows a sudden reluctance to discuss financial matters.

FinCEN provides numerous Red Flags, some of which may be extrapolated for use by residential mortgage loan originators.[18]

The following list contains some of the Red Flags that we have noticed in the course of our Anti-Money Laundering Program audits for nonbanks and banks:

- **Insufficient or Suspicious Information**
  - A customer uses unusual or suspicious identification documents that cannot be readily verified.
  - A customer provides an individual tax identification number after having previously used a social security number.
  - A customer uses different tax identification numbers with variations of his or her name.
  - A customer's home or business telephone is disconnected.
  - The customer's background differs from that which would be expected on the basis of his or her business or employment activities.
  - A customer makes frequent or large transactions and has no record of past or present business or employment experience that may substantiate and explain the transactions.

- **Funds and Asset Transfers**
  - Many funds transfers are sent in large, round dollar amounts, without adequate explanation or verifiable sourcing.
  - Source of funds in asset statements occurs to or from a financial secrecy haven, or to or from a higher-risk geographic location without an apparent business reason, or the activity is inconsistent with the customer's business or employment history.
  - Large, incoming funds transfers are received from a foreign entity, with little or no explicit reason or documentable explanation.
  - Funds transfer activity in asset statements is unexplained, repetitive, or shows unusual patterns.
  - Payments or receipts are evidenced with no apparent links to legitimate contracts, businesses, employment, goods, or services.

Training and Education

Training of personnel who have contact with the public, and especially the elderly, must be on-going in an effort to remain educated regarding the most recent scams and techniques of financial exploitation. Certainly, there is no replacement for public awareness about elder financial abuse.

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 requires the CFPB to facilitate the financial literacy of individuals aged 62 or older, on protection from unfair, deceptive, and abusive practices and on current and future financial choices, including through dissemination of materials on such topics.[19] To raise public awareness toward preventing, identifying, and responding to elder financial exploitation, consider the program *Money Smart for Older Adults*, which is a financial resource tool that serves as a helpful source of training and information.[20] This is an instructor-led training program developed jointly by the FDIC and CFPB.[21] The module provides awareness for older adults and their caregivers on how to prevent elder financial exploitation and also encourages advance planning and informed financial decision-making. There is a *Money Smart for Older Adults: Participant/Resource Guide* for use by participants, which is available through the CFPB.[22]

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1 See, for instance, *Elder Financial Abuse*, Foxx, Jonathan, National Mortgage Professional Magazine, August 2012. Visit also our website Library at www.LendersComplianceGroup.com for newsletters, additional articles, and relevant documentation.
2 For more information, visit National Committee for the Prevention of Elder Abuse (NCPEA), an association established in 1988, consisting of researchers, practitioners, educators, and advocates dedicated to protecting the safety, security, and dignity of America's most vulnerable citizens. Visit: http://www.preventelderabuse.org/ The NCPEA is a partner or participant in the National Center on Elder Abuse, funded by Congress to serve as the nation's clearinghouse and resource for abuse and neglect. Another leading organization is the National Adult Protective Services Association (NAPSA), formed in 1989. It shares information with, solves problems for, and improves the quality of, services for victims of elder and vulnerable adult mistreatment. Visit: http://www.napsa-now.org/
3 Ibid.
4 Op. cit. 1
5 See 12 CFR, Part 41, Supplement A to Appendix
6 For some strategies, see Humphrey, Skip, *Recognizing Elder Financial Abuse*, March 8, 2013, posted at: http://www.consumerfinance.gov/blog/recognizing-elder-financial-abuse. (Mr. Humphrey is an Assistant Director at the Consumer Financial Protection Bureau and head of the Office of Older Americans.)
7 *Interagency Guidance on Privacy Laws and Reporting Financial Abuse of Older Adults*, September 24, 2013.
8 The Guidance discusses when reporting is allowed under the GLBA, but it does not address any other federal or state laws that may regulate such reporting. Furthermore, the Guidance does not specifically address risk management expectations for financial institutions related to the reporting of elder abuse.
9 GLBA (15 U.S.C. 6802(e), Section 502(e)
10 15 U.S.C. 6802(e)(8) and implementing regulations at ___.15(a)(7)(i)

[11] 15 U.S.C. 6802(e)(8) and implementing regulations at ___.15(a)(7)(ii)-(iii)
[12] 15 U.S.C. 6802(e)(3)(B) and implementing regulations at ___.15(a)(2)(ii)
[13] 12 U.S.C. 3401 et seq.
[14] 15 U.S.C. 6802(e)(5) and implementing regulations at ___.15(a)(4)
[15] 15 U.S.C. 6802(e)(2) and implementing regulations at ___.15(a)(1)
[16] See *The SAR Activity Review: Trends Tips & Issues*, Issue 23, May 2013, available at: http://www.fincen.gov/news_room/rp/files/sar_tti_23.pdf.
[17] See FinCEN, *Advisory to Financial Institutions on Filing Suspicious Activity Reports Regarding Elder Financial Exploitation*, FIN-2011-A003 (Feb. 22, 2011), available at: http://www.fincen.gov/statutes_regs/guidance/pdf/fin-2011-a003.pdf.
[18] See Federal Financial Institutions Examination Council (FFIEC), *Bank Secrecy Act/Anti-Money Laundering Examination Manual*, F–1, Appendix F: Money Laundering and Terrorist Financing "Red Flags," April 29, 2010
[19] Section 1013(g)(1) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010
[20] *Money Smart for Older Adults* (June 2013), available at: www.fdic.gov or www.consumerfinance.gov.
[21] See *Money Smart for Older Adults, Instructors,* at: http://www.fdic.gov/consumers/consumer/moneysmart/OlderAdult.html
[22] *Money Smart for Older Adult, Participant/Resource Guide,* at: http://files.consumerfinance.gov/f/201306_cfpb_msoa-participant-guide.pdf