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Protecting Seniors Continues to be a High Priority for Regulators

Executive Summary

Investment advisers owe a fiduciary duty to act in the best interest of their clients, no matter what their age. In addition to an investment adviser's fiduciary obligations, federal and state legislation protects senior investors and other vulnerable individuals.

While this white paper focuses on the Senior Safe Act, as well as Section 517.34 of the Florida Statutes, which protect specified adults, many other states have enacted various reporting and/or training requirements. Therefore, it is important that firms familiarize themselves with any training or reporting requirements in states in which their clients who are senior or other vulnerable investors reside. The Senior Safe Act does not mandate that a firm's employees be trained on how to identify and report what appears to be exploitation of seniors and other vulnerable adult investors. Nonetheless, to qualify for the immunity provided by the act, investment advisers must conduct training sessions designed to prevent financial exploitation of individuals covered by the statute.

An investment adviser can also protect their senior clients by implementing robust policies and procedures. Adherence to those policies and procedures can help to ensure that seniors will not be exploited if they suffer a cognitive decline in their sunset years.

Background

For many years, the SEC, the North American Securities Administrators Association (NASAA), and FINRA have taken action to protect seniors from financial exploitation. When the SEC's Division of Examinations published its examination priorities for the year on March 3, 2021, protecting seniors was once again a high priority.

The Senior Safe Act, which was enacted on May 24, 2018, was a major step toward the goal of protecting seniors from being exploited. The act was designed to give immunity to covered financial institutions that seek to report potential exploitation of a senior citizen to a covered agency. The term, "covered financial institution," includes Registered Investment Advisers (RIAs) and broker-dealers. Covered financial institutions are protected from liability in any civil or administrative proceeding in certain circumstances when they report the potential exploitation of a senior citizen to a covered agency. The immunity applies to both individuals and firms, if employees receive training on how to identify and report exploitation of seniors. These reports must be made in good faith and with reasonable care.

On June 15, 2021, the SEC, NASAA, and FINRA announced a new resource to help securities firms with implementing the Senior Safe Act training requirements. The SEC, NASAA, and FINRA created a presentation to train associated persons regarding how to detect, prevent, and report financial exploitation of senior and vulnerable adult investors. The training will also help firms to satisfy their state-mandated training requirements related to senior investor protection. The SEC's press release is available at https://www.sec.gov/news/press-release/2021-104**.**

A PDF version of the training module may be downloaded at the following link:

https://www.finra.org/sites/default/files/2021-06/NASAA-SEC-FINRA-Senior-Investor-Protection-Training.pdf.

RIA Compliance Group encourages all clients to conduct a training session for staff members using the above training module.

Section 517.34 of the Florida Statutes

To understand a firm's training obligations, it is helpful to review Section 517.34 of the Florida Statutes, which is entitled, "Protection of specified adults." The legislative intent of Section 517.34 was to encourage securities dealers, investment advisers, and associated persons to take action to protect specified adults. Section 517.34 is built upon the reasonable belief that specified adults with investment accounts have been or are the subject of financial exploitation. Section 517.34 provides securities dealers, investment advisers, and associated persons with immunity from liability for taking action to protect vulnerable individuals.

Investment advisers registered in states other than Florida will find similar legislation to protect seniors and other vulnerable investors. As of June 2021, there were 29 other states with a law or regulation governing financial exploitation. For example, in Texas, RIAs must notify the Texas State Securities Board to report critical information about the suspected financial exploitation. In Colorado, advisers must notify the Colorado Securities Commission on a "Protection of Vulnerable Adults from Financial Exploitation Reporting Form"

"Specified adult" applies to a person who is 65 years of age or older or a "vulnerable adult," which is defined in Section 415.102 of the Florida Statutes. A vulnerable adult is a person who is 18 years of age or older whose ability to perform the normal activities of daily living, or to provide for his or her own care or protection, is impaired due to a mental, emotional, sensory, long-term physical, or developmental disability or dysfunction, or brain damage, or the infirmities associated with aging.

Section 517.34 defines financial exploitation as the:

Wrongful or unauthorized taking, withholding, appropriation, or use of money, assets, or property of a specified adult; or any act or omission by a person, including through the use of a power of attorney, guardianship, or conservatorship of a specified adult, to:

1. *Obtain control over the specified adult's money, assets, or property through deception, intimidation, or undue influence to deprive him or her of the ownership, use, benefit, or possession of the money, assets, or property; or*

2. *Convert the specified adult's money, assets, or property to deprive him or her of the ownership, use, benefit, or possession of the money, assets, or property.*

Section 517.34 of the Florida Statutes outlines actions that may be taken to protect specified adults from financial exploitation. A broker-dealer or RIA may delay a disbursement or transaction of funds or securities from an account of a specified adult or an account for which a specified adult is a beneficiary or beneficial owner, assuming the following conditions are satisfied:

1. The broker-dealer or investment adviser reasonably believes that financial exploitation of the specified adult has occurred, is occurring, has been attempted, or will be attempted in connection with the disbursement or transaction.

2. Not later than three business days after the date on which the delay was first placed, the broker-dealer or RIA provides written notice to all parties authorized to transact business on the account and any trusted contact. Neither the broker-dealer nor the RIA is required to notify any party it reasonably believes has engaged in, is engaging in, has attempted to engage in, or will attempt to engage in the suspected financial exploitation of the specified adult. The notice, which may be provided electronically, must provide the reason for the delay. "Trusted contact" refers to a natural person 18 years of age or older who the account owner has expressly identified and who is recorded in a broker-dealer or RIA's books and records as the person who may be contacted regarding the account.

3. Not later than three business days after the date on which the delay was first placed, the broker-dealer or RIA notifies the Florida Office of Financial Regulation of the delay electronically on the prescribed form. The statute specifies the information required on the form, including the following statement in conspicuous type: *The office may take disciplinary action against any person making a knowing and willful misrepresentation on this form.*

The broker-dealer or RIA must immediately initiate an internal review of the facts and circumstances that caused the brokerage firm or investment adviser to reasonably believe that the financial exploitation of the specified adult has occurred, is occurring, has been attempted, or will be attempted.

A reimbursement or transaction delay expires 15 business days after the date when it was first placed. However, the broker-dealer or RIA may extend the delay for up to 10 additional business days if a review of the available facts and circumstances continues to support a reasonable belief that financial exploitation of the specified adult has occurred, is occurring, has been attempted, or will be attempted. A broker-dealer or investment adviser that extends a delay must notify the Florida Office of Financial Regulation on the prescribed form not later than three business days after the date on which the extension was requested. The notice must identify the broker-dealer or investment adviser that extended the delay, as well as the date on which the delay originally occurred. The length of the delay may be shortened or extended at any time by a court of competent jurisdiction. A broker-dealer or investment adviser may terminate a delay after communicating with the parties authorized to transact business on the account and any trusted contact.

A broker-dealer, an investment adviser, or an associated person who acts in good faith and exercises reasonable care in accordance with the statute, is immune from any administrative or civil liability that might otherwise arise from a disbursement or transaction delay where financial exploitation of a specified adult is suspected. A broker-dealer or RIA must be prepared to provide all records pertaining to a delay upon request by the Florida Office of Financial Regulation.

Training responsibilities required by Section 517.34

In order to qualify for immunity under Section 517.34 of the Florida Statutes, firms must develop training policies or programs. They must also conduct training for all associated persons at least once per year. In addition, they must retain a written record of all training sessions conducted.

Before placing a delay on a disbursement or transaction pursuant to Section 517.34, a broker-dealer or an investment adviser must take all of the following steps:

A. Develop training policies or programs that are reasonably designed to educate associated persons on financial exploitation issues;
B. Conduct training for all associated persons at least annually and maintain a written record of all training sessions conducted; and
C. Develop, maintain, and enforce written policies and procedures regarding the manner in which suspected financial exploitation is reviewed internally.

If applicable, policies and procedures should specify the manner in which suspected financial exploitation should be reported to supervisory personnel.

Unless firms have a reasonable belief regarding the occurrence of financial exploitation, Section 517.34 does not change a broker-dealer, RIA or an associated person’s obligation to comply with a client’s instructions to buy or sell securities, disburse funds or transfer securities, or close an account or transfer it to another firm or representative.

Policies and procedures designed to protect senior investors

The Senior Safe Act, Section 517.34 of the Florida Statutes, and similar legislation are not enough to protect senior investors. RIAs should implement policies and procedures to protect senior investors, especially in situations where a client is exhibiting signs of diminished capacity.

RIAs should analyze their operations with an eye toward eliminating the risks faced by senior clients. Policies and procedures could require heightened supervision and surveillance to protect senior investors. An RIA can also conduct compliance reviews that are focused on clients who may be more susceptible to cognitive impairment because of their age or other factors.

An RIA with an aging client base should consider implementing escalation procedures where there are signs that a client appears to have diminished capacity or is the victim of financial abuse. Escalation procedures articulate the steps to be taken when an RIA or IAR encounters a client who appears to be s suffering from diminished capacity. The policies and procedures are similar to those designed to protect seniors from abuse. They differ, however, because there is often no indication that anyone is attempting to exploit the senior.

To address both types of situations, RIAs should consider implementing policies and procedures that require that the following steps be taken:

- When onboarding clients, IARs should encourage them to identify a trusted contact who may be communicated with under certain circumstances;
- During meetings with existing clients, IARs should encourage them to identify a trusted contact who may be communicated with under certain circumstances;
- If existing clients have already identified a trusted contact, IARs should make certain that they are still comfortable with their choice;
- IARs are required to document cases where diminished capacity or financial abuse is suspected and then alert a designated member of the firm to help handle the situation;
- The firm's legal and compliance department should also be kept apprised of the situation;
- Depending upon state law, the gravity of the situation, and other circumstances, the firm should consider contacting a government protective services organization; and
- If a client shows signs of diminished capacity, IARs should communicate with the client's trusted contact to help determine what additional steps or course of action should be taken.

Once diminished capacity or financial abuse is suspected, IARs are prohibited from making securities recommendations to the client until they address the situation in the manner prescribed by the firm.

Additional policies and procedures may be necessary to address situations where an individual holds a power of attorney for a client such as requiring IARs to:

- Identify changes in account activity, such as withdrawals, when a power of attorney has been added or given to another person;
- Send copies of all account statements to the account-holder, as well as the individual holding a power of attorney; and
- Verify the authenticity of signatures.

Policies and procedures should stipulate the types of books and records that are necessary in situations where financial abuse is suspected or the client appears to be suffering from diminished capacity.

Heightened review of senior investors' accounts

Policies and procedures can implement measures to protect senior clients including:

- Conducting account reviews to identify diminished capacity and potential exploitation;
- Scrutiny of certain products marketed to senior investors, such as variable annuities;
- Implementation of age restrictions on investing in certain investments and products;
- Training requirements, such as classes on aging issues and how to identify diminished capacity and other cognitive issues; and
- Using exception reports to identify red flags, such as older clients holding speculative investments.

Obviously, it would be a red flag to find cryptocurrency investments in a senior investor's account.

Marketing to senior investors

RIAs should establish strict guidelines for marketing to senior investors. As an example, it is typically an unethical business practice for an IAR to use a certification or professional designation if the individual has not met the requirements to use it. It is also an unethical business practice to use a nonexistent or self-conferred certification or professional designation.

Firms' marketing policies and procedures should prohibit an IAR from using a title or designation that requires few educational qualifications, training and achievements to earn it.
Advisers should not call themselves a specialist unless they have the credentials and experience to substantiate that advertising claim. Regulators are particularly concerned about advisers who claim they specialize in senior issues.

In March 2008, members of NASAA voted to adopt the NASAA Model Rule on the Use of Senior-Specific Certifications and Professional Designations. The model rule prohibits the misleading use of senior and retiree designations. Whether investment advisers are SEC or state-registered, they should implement policies and procedures designed to prevent this misleading marketing practice.

In addition, as COVID-19 restrictions are eased, some RIAs will return to using the so-called "free-lunch seminars" to target senior investors. Examiners will evaluate whether:

- Seminars are actually sales presentations, even though they are promoted as being educational in nature;
- The RIA is supervising the event;
- RIAs and IARs are using misleading advertisements to attract attendees;
- Members of the firm are exaggerating their credentials, experience, performance, and expertise;
- Unsuitable products are marketed using high-pressure tactics; and the
- The adviser fully discloses all risks.

If an RIA uses seminars to market its advisory services to senior investors, the firm's policies and procedures should ensure that the adviser's presentations are fair and balanced.

Takeaways

Investment advisers owe a fiduciary duty to protect their clients' interests. By adhering to their fiduciary obligations, RIAs can help to ensure that their most vulnerable clients are safe from exploitation and financial problems related to aging. Policies and procedures can help advisory personnel to adhere to their fiduciary obligations.

The training module provided by the SEC, NASAA, and FINRA is accompanied by a disclosure that warns, "This training is intended to assist firms in implementing the Senior Safe Act training requirements. Since the required training must be specific to organizations and roles, this training by itself is not sufficient to satisfy the Senior Safe Act training requirements." Therefore, it is clear that every firm's training should be tailored to the company's business model, as well as the specific situations that the RIA and IARs are likely to face.