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Ensuring Robust Senior Investor Protections: Permitting a Temporary Pause on Suspicious Transactions

[1] "Non-Traditional Costs of Financial Fraud, Report of Survey Findings," Prepared for FINRA Investor Education Foundation by Applied Research & Consulting LLC, March 2015.

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

[3] "Elder Financial Exploitation," National Adult Protective Services Association.

[4] "The New York State Cost of Financial Exploitation Study," NYS Office of Children and Family Services, June 15, 2016.

[5] U.S. Department of Justice, Department of Health and Human Services, Connolly, M.T., Brandl, B., & Breckman, R. (2014). The Elder Justice Roadmap: A Stakeholder Initiative to Respond to an Emerging Health, Justice, Financial and Social Crisis. See also Gunther, J. (2011), "The Utah cost of financial exploitation," Salt Lake City, UT: Utah Division of Aging and Adult Services; and Gunther, J. (2012), "The 2010 Utah Cost of Financial Exploitation." Salt Lake City, UT: Utah Division of Aging and Adult Services.

[6] "The New York State Cost of Financial Exploitation Study," NYS Office of Children and Family Services, June 15, 2016.

[7] Retirement Statistics, Statistic Brain, 2014. Available at: http://www.statisticbrain.com/retirement-statistics/.

[8] Cohn, D. and Taylor, P. "Baby Boomers Approach 65 – Glumly," Pew Research Center, Dec. 2010.

[9] "Baby Boomers Retire," Pew Research Center, Dec. 2010.

[10] Alabama: Act No. 2016-141, Arkansas: Act No. 668 (2017), Colorado: Chapter 289, Session Laws of 2017, Delaware: Title 39, Chapter 31, Delaware Code (2015), Indiana: Act. No. 221 (2016), Louisiana: Act No. 580 (2016), Maryland: Ch. 838, 2017, Mississippi: Sec. 75-71-413 (MS Code of 1972) (2017), Missouri: RSMo 409.600-409.630 (2015), Montana: Chapter 84 (2017), New Mexico: Chapter 106 of 2017, North Dakota: New Section in Ch. 10-04, Code of ND (2017), Oregon: Chapter 514, 2017 Laws, Tennessee: Pub. Ch. 424 (2017), Texas: Art. 581-45 (Vernon's TX Civil Statutes) (2017), Washington State: Ch. 133, Laws of 2010.

[11] By its nature as a state regulation, the liability shield would not survive a conflict with a cause of action based in statute, such as a cause of action under a state's power of attorney code. Vermont: Regulation S-2016-01.

[12] FINRA Regulatory Notice 17-11.

THE PROBLEM

Financial exploitation of senior and vulnerable adults is a serious and growing issue that has destructive impacts on both the individual and the state. Seniors can often lose the entirety of their retirement savings to bad actors, leaving them unable to maintain their independence or pay for their own healthcare – not to mention the added stress, significant health impacts, and often the loss of important relationships.[1]

Nationally, seniors lose an estimated $2.9 billion every year in cases of financial exploitation reported by media outlets,[2] while only an estimated 1 in 44 cases are even reported to authorities.[3] While no one has yet been able to estimate the full impact of financial exploitation on the national economy, there is no doubt that the impact is extensive. An additional challenge is that the bad actor is often a family member, friend or caregiver of their victim – in fact, a July 2016 study in New York State found that 67% of verified cases of financial exploitation were committed by family members.[4]

Financial exploitation also has serious consequences for the state. When a senior loses their life savings, they are generally not in the position to re-earn those losses. Moreover, the loss of this income often results in a loss of independence, an inability to support themselves and increased reliance on government programs.[5] Examining estimates from the same New York State study referenced above, the identifiable costs of financial exploitation (in that study) to NYS service agencies and public benefits programs could be over $600M per year.[6] The actual costs are likely to be far greater.

For myriad reasons, seniors are a primary target for fraudsters. Americans older than 50 account for 77% of personal financial assets in the United States[7] and the population is growing. Roughly 10,000 Americans will turn 65 every day through 2030[8] and the population of people age 65 and older are expected to account for 18% of the nation's population.[9] Given the demographic factors, the scope of this problem can only be expected to grow.

ONE SOLUTION

One solution that has been (and is being) pursued by legislators and regulators at the state and national levels is the establishment of "Report and Hold" laws. These laws are based on the premises that financial institutions can often notice the signs of exploitation before others and that, if the institutions are able to prevent potentially exploitative transactions or disbursements from being processed, then significant harm can be avoided. These laws, generally, provide broker-dealers and other financial institutions with a reporting pathway to investigative agencies (usually including state securities regulators – who often have more specialized, relevant expertise not available in some law enforcement or adult protective services (APS) offices), and allow these institutions to place a temporary pause on suspicious transactions or disbursements so that an investigation can take place before irreparable harm is caused to the saver.

It is important to note that financial institutions have been temporarily pausing or outright refusing to process certain suspicious transactions or disbursements for many years, even before the first Report and Hold law in 2010. Different institutions often rely on different statutes or court cases to take such actions, while some rely on their contracts with the customer. This can often result in a lawsuit against the institution either way (i.e., the institution will often be sued if it refuses to process the order, and can similarly be sued for its failure to reject the order). These Report & Hold laws are designed to provide financial institutions with a rebuttable, affirmative defense that it can assert in very specific circumstances (e.g., when financial exploitation of certain adults is suspected) to make it easier – especially for smaller firms without significant legal budgets – to take steps to protect their clients from financial exploitation.

By the end of 2017, 16 states have enacted Report and Hold statutes,[10] 1 state adopted a Report and Hold regulation,[11] and the brokerage industry's front-line national regulator (the Financial Industry Regulatory Authority or "FINRA") has adopted a Report and Hold safe harbor that is effective as of February 5, 2018.[12]

One critical point of divergence among these laws is whether they apply to disbursements (money leaving a covered account) or transactions (a much broader term that can encompass exploitative trades or sales of securities, as well as disbursements). While there is much to examine regarding these state laws, this discussion will focus solely on this issue.

DISBURSEMENTS VS. TRANSACTIONS

Neither transactions nor disbursements are explicitly defined in any state Report and Hold law, or in the FINRA rule. However, in plain language – and in practice – the difference between disbursements and transactions is a vital distinction in scope. Disbursements specifically refer to money leaving a covered account, but it does not apply to the underlying sale or similar actions. Transactions, however, would apply more broadly and – in addition to covering disbursements – would also allow financial institutions to place a temporary pause on exploitative sales or liquidation of assets.

For example, if a bad actor exploits an individual into liquidating all their holdings in their retirement account in order to pay the bad actor, then – in a state which only protects against exploitative disbursements – the financial institution would not be protected if it refused to liquidate the holdings; it would only be protected under that law if it liquidated the holdings and then refused to allow the money to leave the brokerage account.

However, even the transaction itself can have disastrous consequences. A few examples of damaging transactions include:

- **Certian Mutual Fund and Variable Annuity sales.** FINRA generally considers most redemptions of mutual funds and annuities to be transactions, and not disbursements, from the accounts of FINRA member firms. This means that certain funds held in mutual funds and variable annuities could be more vulnerable to exploitation.

- **Penalties due to another change in the account (surrender charges).** Surrender charges are incurred when one withdraws money from a variable annuity a certain time after a purchase payment is made. The surrender charge is usually a percentage of the amount withdrawn. Unnecessary surrender charges (and similar fees) incurred from exploitative withdrawals could be avoided if broker-dealers are provided with legal protection.

- **Sale of low cost basis shares or other tax advantaged investments.** Low cost basis shares are holdings of concentrated positions with large unrealized gains. A sale of such a position could harm the investor in multiple ways. First, the investor would never be able to recreate or retake the lost (rather valuable) position, and second, the investor could incur a severe capital gains tax, especially if sold within a year of purchase where the tax rate is the same as ordinary income (and, as of 2017, can be as high as 39.6%). If induced to sell low cost basis shares, the saver could incur destructive economic loss, despite funds never leaving the account. Low cost basis shares are just one example – the sale of annuities and other similar products can have similar consequences.

- **Sales from retirement accounts.** Similar to the above, investors prematurely selling securities contained in 401(k) or IRA accounts may be subject to additional fees – some quite significant.

- **Buying of an investment product for the benefit of the wrong-doer.** One of the more common exploitative scenarios is when an adult child with a Power of Attorney attempts to transact business on their parents' account with only their own investment objectives in mind. For instance, an adult child may sell off high-yield bonds (that perhaps pay for the parents' ongoing care) to begin day-trading in penny stocks. This premature use of the child's prospective inheritance can put the investor at unnecessary risk.

Of the 16 states with Report & Hold statutes as of December 2017, roughly 40% have extended their law's investor protections to include exploitative transactions, as well as disbursements.[14] Moreover, while FINRA's new Rule 2165 only applies to disbursements, it has expressed interest in expanding the rule to include transactions on multiple occasions.[15] FINRA staff have stated that they had identified disbursements as the immediate concern and are choosing to address that issue before possibly expanding their safe harbor to transactions in a future round of rulemaking.[16]

Due to the immense scope and danger of financial exploitation, regulators should not limit this important investor protection tool to only a sub-category of exploitative actions.

TARGETED CONCERNS AROUND PAUSES ON SUSPICIOUS TRANSACTIONS

Any hesitation around extending Report & Hold laws to encompass transactions generally comes from two separate concerns: (1) that a hold on transactions may conflict with existing securities laws (including best execution requirements); and (2) that there may be a risk of unintended consequences.

Addressing existing laws, the most oft-cited concern relates to a broker-dealer's duty of best execution, or a broker-dealer's general obligation (usually at common law) to effect a client's orders with all due speed.

On the policy front, regulators have voiced the need to consider how placing a temporary hold on transactions could negatively affect investors – especially if the concern turns out to be false (for example, a client having a viable but extremely unlikely reason to transfer their life savings to Nigeria). Specifically, consideration has been voiced about the pause preventing investors from taking advantage of the price of a security at a given time.[17]

A review of best execution and other legal obligations present no clear legal conflict or impediment to laws that permit a temporary pause on transactions. Moreover, there are compelling policy reasons to aggressively protect investors from financial exploitation.

[14] Delaware, Mississippi, New Mexico, North Dakota, Texas and Washington State.

[15] See FINRA Regulatory Notice 17-11, FN 18; See also Iacurci, G. "Finra could consider allowing holds on transactions if elder fraud suspected," Investment News, September 13, 2017.

[16] Iacurci, G. "Finra could consider allowing holds on transactions if elder fraud suspected," Investment News, September 13, 2017.

[17] Iacurci, G. "Finra could consider allowing holds on transactions if elder fraud suspected," Investment News, September 13, 2017.

CONSIDERATION OF EXISTING SECURITIES LAWS

A Brief Overview of Best Execution:

When individuals refer to a duty of "Best Execution," they are generally referring to a broker-dealer's obligations under FINRA Rule 5310 and Securities Exchange Act Releases 37619A ("Order Execution Obligations release") and 43590 ("Disclosure of Order Execution and Routing Practices release"), as well as applicable common law (e.g., *Newton v. Merrill Lynch, et al.*).[18] These obligations are commonly explained as the duty for a broker-dealer to execute a customer's transaction at the best price under the circumstances. This obligation primarily applies to broker-dealers with respect to trading, and requires a broker-dealer to seek the most favorable terms reasonably available under the circumstances for a customer's transaction.[19] This is a subjective standard, so regulators tend to look at the facts and circumstances to determine whether the broker meets this duty.

A broker-dealer's duty of best execution derives from common law agency principles and is incorporated both in SRO rules and, through judicial and Commission decisions, in the antifraud provisions of the federal securities laws.[20] In *Newton v. Merrill Lynch*,[21] the court defined best execution as the requirement for a broker-dealer to "use reasonable efforts to maximize the economic benefit to the client in each transaction."[22] Similarly, FINRA describes the best execution obligation as using reasonable diligence to ascertain the best market for the security and buying or selling in such market so that the resultant prices are as favorable as possible under market conditions.[23] Per the SEC, price has been the predominant factor in determining whether a broker-dealer satisfied its best execution obligations when executing a customer's trade.[24] Therefore, in satisfying best execution, a broker must execute securities transactions for clients in such a manner that the clients' total cost or proceeds in each transaction is the most favorable under the circumstances.

Under best execution, when actively processing an order, the broker-dealer must conduct "reasonable diligence" to determine the best market for the security and to trade at a price to the customer as favorable as reasonably possible under prevailing market conditions.[25] Reasonable diligence includes considering: the character of the market for the security (e.g., price, volatility, relative liquidity, and pressure on available communications); the size and type of transaction; the number of markets checked; accessibility of the quotation; and terms and conditions of the order which result in the transaction.[26] In conducting reviews of the quality of broker-dealers' executions,

[18] Newtown v. Merrill Lynch, et al., 259 F.3d 154 (2001).

[19] Order Execution Obligations, Exchange Act Release No. 37619A (Sept. 6, 1996) at 171.

[20] Order Execution Obligations, Exchange Act Release No. 37619A (Sept. 6, 1996) at 171

[21] Newton v. Merrill Lynch, Pierce, Fenner and Smith, Inc., 259 F.3d 154, 162 (3d Cir. 2001) (Newton II), as amended (Oct. 16, 2001); Newton v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 135 F.3d 266, 271 (3d Cir. 1998) ("Newton I").

[22] Newton II at 173.

[23] FINRA Rule 5310 "Best Execution and Interpositioning."

[24] The Commission has stated that "[i]n its purest form, best execution can be thought of as executing a customer's order so that the customer's total cost or proceeds are the most favorable under the circumstances." Exchange Act Release No. 34902 (Oct. 27, 1994). See also Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 135 F.3d 266, 270 ("the broker-dealer is expected to use reasonable efforts to maximize the economic benefit to the client in each transaction")

[25] FINRA Regulatory Notice 15-46.

FINRA will look to ensure that the broker-dealer has policies and procedures for determining when to use electronic versus manual liquidity in executing a customer order, and will compare the quality of executions obtained for customers with the current execution arrangements to the quality of those that could be obtained from competing markets.[27] The Court in *Newton* states that the broker-dealer's best execution duty is multi-dimensional, requiring a broker to take into account best price (when effecting the transaction), but also "order size, trading characteristics of the security, speed of execution, clearing costs, and the cost and difficulty of executing an order in a particular market."[28]

Each of these sources of law – FINRA Rule 5310, the SEC's Order Execution Obligations Release, the SEC's Disclosure of Order Execution and Routing Practices Release and federal common law (through *Newton v. Merrill Lynch*) – focus exclusively on the methods a broker-dealer must employ to execute a transaction once it accepts a client's order, as opposed to whether it must accept a client's order in the first place.

The Applicability of Best Execution to Statutory Transaction Holds:

As noted above, the best execution requirements provide no guidance or regulatory obligations on whether a broker-dealer must accept a client's order. In fact, when a broker-dealer receives an order, it must first determine whether an order is a 'valid order'[29] before deciding how to execute that order per its best execution obligations. Similar to placing a temporary pause on exploitative transactions, there are numerous situations where customer-ordered transactions are not executed that never give rise to a best execution analysis. The following examples are illustrative, but by no means exhaustive:

- **Violation of a Power of Attorney:** The Uniform Power of Attorney Act,[30] which has been enacted across dozens of states[31] (with even more enacting similar laws), specifically enumerates six instances in which a power of attorney, or an order from someone holding a power of attorney, may be rejected. One of these situations is when an individual has made or has knowledge of a report to APS stating a good faith belief, "that the principal may be subject to physical or financial abuse, neglect, exploitation or abandonment by the agent or person acting for or with the agent."[32] As noted above, power of attorney abuse is one of the most common forms of financial exploitation seen by the brokerage industry, and state statutes – for over a decade – have permitted the outright refusal of certain transactions (much less temporary pauses), without ever giving rise to a best execution concern.

[26] FINRA Rule 5310(a)(1)(A)-(E).

[27] FINRA Regulatory Notice 15-46.

[28] Newton I at 271.

[29] For example, a client that is known to be suffering from a neurological condition may not have the capacity to issue an order.

[30] "Uniform Power of Attorney Act," Uniform Law Commission, 2016.

[31] Enactment Status Map, Uniform Law Commission, available at: http://www.uniformlaws.org/Act.aspx?title=Power%20of%20Attorney.

[32] Uniform Power of Attorney Act, Sec. 120(b)(6).

- **Prevention of Criminal Activity:** It is commonly held that financial institutions may prevent criminal activity from occurring. The PATRIOT Act[33] and the Bank Secrecy Act[34] have required financial institutions to become watchdogs for certain criminal activity, requiring these institutions to report suspicious activity – much of which is stopped by the institution. Make no mistake: financial exploitation is a crime. 36 states have specific language in their statutes criminalizing financial exploitation, while 14 states prosecute financial exploitation under their existing criminal codes (e.g., theft, conversion, assault).[35] The best execution requirements discussed above do not require a broker-dealer to process a transaction that – in and of itself would constitute a criminal act by a bad actor.

- **Competing Duties of Care:** There are other sources of law that place additional duties on a broker-dealer's duty of care towards their clients. For example, investment advisers, by law, owe their clients a fiduciary duty and are required to act in their customer's best interest.[36] Similarly, state and federal courts have placed various duties of care on financial institutions at different times.[37] It is clear that processing exploitative transactions would violate some of the various duties, regardless the duty of best execution. This can be evidenced by the many cases brought against financial institutions for failing to stop a particular transaction.

It must also be reiterated that Report & Hold laws can only be triggered when there is a belief of financial exploitation. This usually requires facts and circumstances that are considered out of the ordinary or that would be harmful to the investor.[38] A run-of-the-mill transaction to take advantage of the pricing of a certain security that would be of a benefit to the client is unlikely to give rise to a suspicion of financial exploitation.

Common Law Duties of Financial Institutions:

The second, less specific objection to Report & Hold laws is that it would violate the general obligations of financial advisors (whether broker-dealers or investment advisers) to execute orders at their client's behest.[39] While there are documented exceptions to this general requirement,[40] this discussion will not explore those exceptions in depth. With few exceptions, such older, general obligations – especially those found in common law – can be overcome by the creation of newer, more specific statutes or regulations.[41] As such, there is no need at present to further explore whether such general obligations would preempt a state's ability to enact a statute providing safe harbor for financial institutions that place a temporary hold on suspicious transactions.

[33] "The Uniting and Strengthening American by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act," Public Law 107-56 (2001).

[34] 31 U.S.C. 5311, et. seq.

[35] Hansen, K., Hampel J., Reynolds, S., Freeman, I. "Criminal and Adult Financial Exploitation Laws in the United States: How Do the Statutes Measure Up to Existing Research?" Mitchell Hamline Law Review, Vol. 42, Issue 3, Article 3.

[36] Investment Advisers Act of 1940.

[37] See Gochnauer vs. A.G. Edwards & Sons, Inc., 810 F.2d 1042, 1049 (11th Cir. 1987).

[38] "The Red Flags of Financial Exploitation and Cognitive Decline," SIFMA and AARP, 2016.

[39] See Robinson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 337 F. Supp. 107, 112 (N.D. Alabama 1971).

[40] See Voss v. S.E.C., 222 F.3d 994, 1004 (D.C. Cir. 2000) (holding that a broker-dealer acted with extreme recklessness in aiding and abetting a securities violation).

[41] See American Elec. Power Co., Inc. V. Connecticut, 564 U.S. 410; See also Commonly Applied Rules of Statutory Construction: Harmonizing to Avoid Conflicts & Resolving Conflicts," Office of Legislative Legal Services, Colorado General Assembly, available at: https://leg.colorado.gov/agencies/office-legislative-legal-services/commonly-applied-rules-statutory-construction; See also, "Statutory Construction," Wex, Legal Information Institute, Cornell University, available at: https://www.law.cornell.edu/wex/statutory_construction.

CONSIDERATION OF POTENTIAL UNINTENDED CONSEQUENCES AND LIKELY BENEFITS

Risk: Consumer Autonomy:

Lawmakers tend to voice two concerns about placing a temporary pause on suspicious transactions. The first is that they do not want a broker-dealer to substitute its own discretion for that of the investor. This is generally a concern about Report & Hold laws as a whole, whether they permit placing a temporary pause on disbursements or transactions. However, it must be reiterated that these laws have robust protections built in – including multiple mandatory reports to regulators and account holders and the ability of an investigative agency or a court to end the pause at any time. Moreover, the pause itself is only temporary and can only be placed when there is sufficient information to give rise to a reasonable or good faith suspicion of financial exploitation. Should a broker-dealer place a hold prior to that time, they could be subject to regulatory action and civil liability.

Risk: Consumer Control over Timing of Transactions:

The second transaction-specific concern that is often raised revolves around a single hypothetical: what happens if a financial institution places a temporary pause on a transaction and changes in the market lead to a client losing out on some economic benefit or taking a loss. This is an inherent risk when placing a pause on transactions, given the nature of the capital markets in the United States. However, similar to the above concern, certain statutory elements mitigate such risks. For example, a reasonable move to cut losses or attempt to realize a gain would not give rise to the suspicion of financial exploitation – even an unreasonable move would not give rise to the suspicion of financial exploitation – without additional aggravating factors.[42] More importantly, these concerns are far outweighed by the benefits of placing a temporary pause on transactions.

Benefit: Protecting Senior Investors and Our Most Vulnerable Citizens:

As discussed above, due to the high concentration of wealth among older adults (or the vulnerability of vulnerable adults), as well as certain factors that tend to make both populations increasingly exposed to exploitation,[43] they make exceptional targets for bad actors and fraudsters. While anyone may be exploited or scammed, older and vulnerable Americans are particularly heavily targeted with millions of older Americans being targeted each year.[44]

[42] "The Red Flags of Financial Exploitation and Cognitive Decline," SIFMA and AARP, 2016.

[43] See Denburg, N., Hedgcock, W., "Age-Associated Executive Dysfunction, the Prefrontal Cortex, and Complex Decision Making," Aging and Decision Making: Empirical and Applied Perspectives, Ch. 5, 2015; See also Gutchess, A., "Hiding in Plain Sight: Age-Associated Cognitive Decline," Pennsylvania + Wall, June, 2017, Han, D., "Financial Literacy: A Way to Address the Problem of Financial Exploitation?" Pennsylvania + Wall, Feb. 2017, DeLiema, M., "Risk Factors for Fraud & Financial Exploitation," Pennsylvania + Wall, November 2016, Morrison, C., "Cognitive Decline: Biological, Psychological and Environmental Factors Influencing the Aging Brain," Pennsylvania + Wall, June 2016, and Denburg, N., "The Neurology of Financial Decision-Making," Pennsylvania + Wall, October 2015.

[44] Burnes, D., Henderson, Jr., C., Sheppard, C., Zhao, R., Pillemer, K., Lachs, M., "Prevalence of Financial Fraud and Scams Among Older Adults in the United States: A Systematic Review and Meta-Analysis," American Journal of Public Health, July 2017.

Moreover, older and vulnerable adults are unlikely to be able to earn back any of their losses – especially those older adults who have already entered into retirement. These losses can have a drastic effect on people's lives, their ability to afford medical care and even their life expectancy.[45] Financial exploitation is also generally accompanied by other forms of abuse. One study found that, in Virginia, roughly 35% of financial exploitation victims also experienced other forms of neglect or abuse.[46]

Given the permanence of these losses, the underlying threat of other forms of abuse and the dire consequences exploitation can have on its victims, these individuals deserve the robust protections. In fact, according to a survey by AARP, people overwhelmingly prefer to engage with financial institutions that offer robust protections.[47]

Benefit: Preventing Criminal Activity:

Financial exploitation is a crime. As noted above, 36 states explicitly recognize it as such,[48] while 14 others incorporate financial exploitation into their existing statutes. In many of these states, requesting/processing the transaction itself would rise to criminal activity by the bad actor as no money must leave an account for significant harm to be caused, as previously discussed. Moreover, the World Health Organization has even dubbed financial exploitation an act of financial violence, and some have pointed out that the WHO's definition of "financial violence" is remarkably similar to the U.S. Elder Justice Act's definition of exploitation.[49] States and the Federal Government have a long-standing, vested interest in preventing crime and protecting its citizens. Unfortunately, with many financial crimes, the damage can be two-fold. Not only is direct and indirect harm caused to the victim, but the proceeds of financial crime are often used to fund terrorism or organized crime.[50] In this particular case, a jurisdiction which limits its temporary pause to disbursements would hinder a broker-dealer's ability to stop the flow of money to such entities if such funds are being released from certain Mutual Fund or Annuity accounts. (and over $16T is invested in mutual funds alone in the United States).[51]

[45] See "Non-Traditional Costs of Financial Fraud, Report of Survey Findings," Prepared for FINRA Investor Education Foundation by Applied Research & Consulting LLC, March 2015, and Dong, X., Simon, M., Mendes de Leon, C., Fulmer, T., Beck, T., Hebert, L, Dyer, C., Paveza, G., Evans, D., "Elder Self-Neglect and Abuse and Mortality Risk in a Community-Dwelling Population," Journal of the American Medical Association, August 2009 (examining the effects of all types of abuse and neglect, not just financial).

[46] "Financial Exploitation of the Elderly," National Institute of Justice, available at: https://www.nij.gov/topics/crime/elder-abuse/pages/financial-exploitation.aspx.

[47] Gunther, J., "AARP's BankSafe Initiative: A Comprehensive Approach to Better Serving and Protecting Consumers," AARP Research Report, February 2016.

[48] AL, AZ, AR, CA, DE, FL, GA, ID, IL, IN, IA, KS, KY, LA, MD, MN, MS, MO, MT, NE, NV, NM, NC, ND, OK, OR, RI, SC, SD, TN, TX, UT, VT, WV, WI, WY. See Hansen, K., Hampel J., Reynolds, S., Freeman, I. "Criminal and Adult Financial Exploitation Laws in the United States: How Do the Statutes Measure Up to Existing Research?" Mitchell Hamline Law Review, Vol. 42, Issue 3, Article 3.

[49] Price, T., King, P., Dillard, R., Bulot, J., "Elder Financial Exploitation: Implications for Future Policy and Research in Elder Mistreatment," West Journal of Emerging Medicine, July 2011, available at: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3117613/.

[50] Brenoff, A., "How A Billion-Dollar Internet Scam is Breaking Hearts and Bank Accounts," Huffpost, July 2017; See also "Ringleader of global network behind thousands of online scams arrested in Nigeria," Interpol Press Release, August 2016.

[51] "2017 Investment Company Fact Book," Investment Company Institute, 57th Edition.

Benefit: Preserving State and Federal Budgets:

Losses due to financial exploitation have serious ramifications for victims, many of which are forced to rely on state and federal programs to a greater degree than they would have if they were not victimized, which puts a strain on a resource-scarce system. As noted above, the New York State study estimated an annual cost of up to $600M per year to the state due to financial exploitation,[52] and even this could be an underestimate. Reports place the average loss for senior victims between $30,000 and $50,000,[53] more than enough to financially cripple millions of Americans. By allowing a temporary pause to be placed on suspicious, exploitative transactions, states can take additional steps – at relatively little to no cost – to ensure that the money saved for retirement is intended for its original purpose, and that many victims won't have to rely solely on social security and other programs for their care. Such a move could be a significant money-saver over the long run for states that are struggling financially (for example, states have collectively underfunded their pension systems by more than $1T as of 2015).[54]

CONCLUSION

Granting statutory authority to permit financial institutions to place a temporary pause on suspicious transactions is not only allowable under the law (as evidenced, in part, by the nearly 40% of state Report & Hold laws that apply to transactions), it is good policy. There are no identifiable, direct legal conflicts to prevent such laws from taking effect (as evidenced, in part, by the dearth of regulatory enforcement actions occurring on this issue despite many financial institution's longstanding practice of holding or refusing suspicious transaction requests), and any legal obstacle that may exist could be addressed by a newer, more specific statute. Not only that, permitting a temporary pause on suspicious transactions would provide older and vulnerable investors with vital, robust protections, help stop criminal activity (and the financing of criminal activity), and lift some financial burden from state programs – all at relatively little to no cost to the state.

[52] "The New York State Cost of Financial Exploitation Study," NYS Office of Children and Family Services, June 15, 2016.

[53] See Hicken, M., "Seniors lose average of $30,000 to financial scammers," CNN Money, October 2014 and "Senior Financial Exploitation Study," Certified Financial Planner Board of Standards, August 2012.

[54] "The State Pension Funding Gap: 2015," The PEW Charitable Trusts Issue Brief, April 2017.

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