



## **PROTECTING SENIOR INVESTORS: ANATOMY OF AN INVESTIGATION**

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NEW YORK, FEBRUARY 2019

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# Federal Laws to Consider When Working with Investigative Agencies

## Privacy

- Securities and Exchange Commission Final Rule: Privacy of Consumer Financial Information (Regulation S-P): <https://www.sec.gov/rules/final/34-42974.htm>
- Interagency Guidance on Privacy Laws and Reporting Financial Abuse of Older Adults: [http://documents.sifma.org/State\\_Gov\\_Relations/StatE\\_News/2014/interagency\\_guidance/](http://documents.sifma.org/State_Gov_Relations/StatE_News/2014/interagency_guidance/)
- Gramm-Leach-Bliley Act (GLBA) on disclosure of nonpublic personal information: <https://www.congress.gov/106/plaws/publ102/PLAW-106publ102.pdf>
- Patriot Act 314(b), on voluntary information sharing among financial institutions: [http://documents.sifma.org/State\\_Gov\\_Relations/StatE\\_News/2014/314b/](http://documents.sifma.org/State_Gov_Relations/StatE_News/2014/314b/)

# New Federal Laws to Consider

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- Senior Safe Act (S. 2155)
  - New law provides broader protections for firms that report suspicions of elder financial exploitation to certain State and Federal regulators and investigators
- Elder Abuse Prevention & Prosecution Act (S. 178)
  - Increases training for federal investigators and prosecutors, equips each judicial district with one prosecutor having expertise with elder abuse cases (Elder Justice Coordinators), supports state efforts and interstate initiatives to combat elder abuse, and overall strengthens the ability of our justice system to respond when abuse is identified – including when B-Ds report suspected abuse.

# Local Laws of Importance

- New York State Criminal Statutes: Penal Law Sec. 155.00-155.50 & 260.32-260.34
  - In New York City, most financial exploitation cases are prosecuted through either the larceny statutes (155.00 – 155.50) or the vulnerable individuals statute (260.32 – 260.34).
  - These crimes include inchoate (“attempt”) offenses.
  - Despite being more difficult to prosecute, the fact that these crimes do exist can provide broker-dealers with greater comfort in holding a potentially criminal transaction or disbursement.
- Sec. 473 of the NYS Social Services Code
  - Sets out the scope and jurisdiction of adult protective services, including requiring the alleged victim to be someone who, “because of mental or physical impairments, [is] unable to manage their own resources, carry out the activities of daily living, or protect themselves from [...] financial exploitation or other hazardous situations without assistance from others and have no one available who is willing and able to assist them responsibly.”

# Other Legal Considerations

## Form U-4 Complaint Risk

- Form U-4: [http://documents.sifma.org/State Gov Relations/StatE News/2014/U-4 Complaints/](http://documents.sifma.org/State_Gov_Relations/StatE_News/2014/U-4_Complaints/)

## Reporting Requirements

- Suspicious Activity Report: <http://sdtmut.fincen.treas.gov/news/FinCENBSAR.pdf>
- FINRA Rule 4530, Consolidated FINRA Rule Governing Reporting Requirements: [http://finra.complinet.com/en/display/display.html?rbid=2403&record\\_id=16260&element\\_id=9819&highlight=4530#r16260](http://finra.complinet.com/en/display/display.html?rbid=2403&record_id=16260&element_id=9819&highlight=4530#r16260)

## Interplay with State Laws

- Sample State Law – New Mexico: [http://documents.sifma.org/State Gov Relations/StatE News/2014/NM R H/](http://documents.sifma.org/State_Gov_Relations/StatE_News/2014/NM_R_H/)

## State Report & Hold Laws

### Laws:

**Alabama** – Act No. 2016-141

**Alaska** – Chapter 65 SLA 2018

**Arkansas** – Act No. 668 (2017)

**Colorado** – Chapter 289, Session Laws of 2017

**Delaware** – Title 31 Chapter 39 & Title 6 Delaware Code (2015/2018)

**Indiana** – Act. No. 221 (2016)

**Kentucky** – Acts 2018, Ch. 127

**Louisiana** – Act No. 580 (2016)

**Maryland** – Ch. 838, 2017

**Minnesota** – Ch. 161, Laws of 2018

**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. 10-04-08.5, Code of ND (2017)

**Oregon** – Chapter 514, 2017 Laws

**Tennessee** – Pub. Ch. 424 (2017)

**Texas** – Art. 581-45 Vernon's TX Civil Statutes (2017)

**Utah** – Sec. 61-1-201 – 206 Utah Code Annotated

**Washington State** – Ch. 133, Laws of 2010

### Rules:

**Vermont** – Regulation S-2016-01



## Regulatory Notice 07-43

- Issued September 2007.
- Reg Notice 07-43 is guidance that launched a number a policy developments concerning senior investors, and encouraged firms to enhance related internal policies and procedures.

## Regulatory Notice 11-02

- Issued January 2011.
- Effective July 9, 2012.
- Reg Notice 11-02 provides know-your-customer guidance and suitability rules that are critical to ensuring investor protection and promoting fair dealing with customers and ethical sales practices.

## Regulatory Notice 11-25

- Issued May 2011.
- Implemented July 9, 2012.
- Reg Notice 11-25 provides additional guidance in response to industry questions regarding Reg Notice 11-02, and includes discussion relating to senior investors.

## Regulatory Notice 13-03

- Issued January 2013.
- Effective February 2013.
- Reg Notice 13-03 provides guidance on then-new rules concerning communications between financial institutions and the public. It is set in a question/answer format and provided as a response to a number of questions on Reg. Notice 12-29.

## Regulatory Notice 13-45

- Issued December 2013.
- Reg Notice 13-45 is guidance that focuses on expectations for policies and procedures related to rollovers of retirement assets to IRAs, with an emphasis on senior investors.



## Regulatory Notice 14-35

- Issued September 2014.
- Reg Notice 14-35 addresses the transfer of current NASD Rule 2340 (Customer Account Statements) and incorporated NYSE Rule 409 (Statements of Accounts of Customers) into the consolidated FINRA rulebook as FINRA Rule 2231 (Customer Account Statements). Includes a provision requiring statements to be sent to an account owner's residence, regardless of client instructions to the contrary.

# Sample Cases for Consideration

- *Edward D. Jones & Company v. Fletcher*, 975 S.W.2d 539, 545 (Tex. 1998)
  - In a non-discretionary account, “a stockbroker has no duty to determine a client’s competence before assisting the client with a transaction.”
- *Wasnick v. Refco, Inc.*, 911 F.2d 345, 349 (9th Cir. 1990)
  - No breach of duty, and hence no negligence claim under Washington law, where broker with knowledge does not prevent an emotionally or financially unsuitable client from trading commodities.
- *Lefkowitz v. Smith Barney, Harris Upham & Co.*, 804 F.2d 154, 155 (1<sup>st</sup> Cir. 1986)
  - Decedent's allegedly minimal investment knowledge and “blind reliance” upon broker did not establish fiduciary duty under Massachusetts law, citing earlier decision in which broker’s knowledge of client’s psychiatric treatment did not impose fiduciary duty regarding investments.
- *Gochnauer v. A.G. Edwards & Sons, Inc.*, 810 F.2d 1042, 1049 (11th Cir. 1987)
  - Identifying elements of common law “fiduciary duty” owed under Florida law for nondiscretionary transaction, but not identifying a duty to assess a client’s competence.
- *De Kwiatkowski v. Bear, Stearns & Company, Inc.*, 306 F.3d 1293, 1307 (2<sup>nd</sup> Cir. 2002)
  - Broker-dealer could be liable if evidence establishes that it undertook more than the limited duties applicable to a transaction in a non-discretionary account.
- *AXA Advisors v. Lee*, 2016 U.S. Dist. Lexis 10684 (D. Idaho Jan. 27, 2016)
  - FINRA member must arbitrate selling away case even if investors did not open account with member because investors were customers of member’s associated person who sold the investment to them and thus were customers within the meaning of FINRA Rule 12200.