# Protecting Older Adults from Financial Exploitation: Proposed Federal Laws and Regulations

Financial abuse of the elderly is rampant in our community and across our nation. Among the fastest growing forms of elder abuse, financial abuse costs our country $2.6 billion per year.[1] Sen. Gordon Smith, observed "… [N]o matter your age, finances or social status, none of us are beyond potential abuse or neglect, and any one of us, at any time, could become incapacitated and in need of assistance."[2]

*As the burgeoning number of individuals over 65 embark upon late life and the disability associated, protections are necessary to assure the care and comfort of our most vulnerable citizens.*

Why are older adults more susceptible to financial exploitation? "A 'typical' victim is between 70 to 89, white, female, frail, cognitively impaired, trusting, and often lonely or isolated."[3] She may have dementia, which affects not just her memory, but her ability to judge, reason, and problem solve, and thus the ability to manage finances. She may be socially isolated or may have recently lost a spouse who handled the couple's financial affairs. The vulnerable elder may not trust family members who will truly put the older adult's needs first. Perhaps the older adult is fiercely independent and does not want anyone to know her business. These are only a few of the reasons that older adults are extremely vulnerable to financial abuse and exploitation.

Family members are the most likely to financially exploit an older adult. According to the AARP, 60 percent of all financial abuse and exploitation cases reported nationwide to Adult Protective Services (APS) occurred at the hands of a family member. For example, son moves in with Mom to "take care of her." He takes her to the family attorney to draft a power of attorney naming himself as the agent.

Using this power of attorney, the son moves all of Mom's savings into an account titled in his name and then quits his job and embarks on a spending spree. This son's exploitation is not limited to financial matters. While posing as her primary caregiver, he steals his mother's pain medication, refuses to prepare meals for her, or to assist her with bathing, dressing and grooming. He uses her car but refuses to take her to the grocery store, movies or pharmacy. He responds to any protests or complaints by threatening her with nursing home placement. When his financial abuse is finally reported to the police and/or Adult Protective Services, the mother is interviewed. She is unwilling to prosecute her son. In fact she may cover for him by stating that she gave the money to him.

Employees of financial institutions, especially banks, often see their long-term elderly clients being financially exploited by a family member or other person. However, because of privacy laws and the fear of bearing a financial liability if they report the suspected exploitation, there is a reluctance to intervene. Sen. Susan Collins (R-Maine) (for herself and co-sponsor Sen. Claire McCaskill (D-Missouri)) introduced "The Senior$afe Act of 2015" on Oct. 28, 2015. The purpose of this act is to provide immunity to those employees of covered financial institutions who report suspected financial exploitation of senior citizens. The act was referred to the Committee on Banking, Housing and

Urban affairs. Senators McCaskill and Collins jointly chair the Senate Committee on Aging, and this act was the result of research and hearings held by the committee. This act remains in committee.

Unfortunately, in my practice, I have observed that a high percentage of offenders are investment advisors. They may be housed in banks, knock on an older adult's door, or be a trusted insurance agent. For example, Mr. Smith had banked at the same location for 40 years. One day, one of the employees struck up a conversation with him about his retirement investments, which included $100,000 invested in a low-cost Vanguard index fund.

She suggested changing his investment to an annuity, which would provide him with guaranteed income for life. By the time Mr. Smith left the bank, he had signed all the documents necessary for this investment advisor to liquidate his Vanguard retirement account and invest in a non-qualified annuity. Obviously, there were immediate costs to him in the form of income tax on the $100,000 and the high commission earned by the employee. Annuities have associated high costs, including a healthy commission paid to the investment advisor who sells the annuity.[4]

In an effort to address this type of financial exploitation and abuse, President Obama stated: "Today, I'm calling on the Department of Labor to update the rules and requirements so that retirement advisors put the best interests of their clients above their own financial interests. It's a very simple principle: You want to give financial advice, you've got to put your client's interests first." The administration says that new advice rules for 401(k) and individual retirement accounts are needed to protect workers and retirees from high-fee products that erode their savings. This statement was made Feb. 2, 2016.

In early April 2016, the Employee Benefits Security Administration, an agency within the Department of Labor, introduced the rule[5] titled *Definition of the term Fiduciary; Conflict of Interest Rule — Retirement Investment Advice*. The rule's executive summary provides that "[u]nder ERISA and the Code, a person is a fiduciary to a plan or IRA to the extent that the person engages in specified plan activities, including rendering 'investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan … [.] ERISA safeguards plan participants by imposing trust law standards of care and undivided loyalty on plan fiduciaries, and by holding fiduciaries accountable when they breach those obligations. In addition, fiduciaries to plans and IRAs are not permitted to engage in "prohibited transactions," which pose special dangers to the security of retirement, health, and other benefit plans because of fiduciaries' conflicts of interest with respect to the transactions. Under this regulatory structure, fiduciary status and responsibilities are central to protecting the public's interest in the integrity of retirement and other important benefits, many of which are tax-favored."

More Americans are relying on retirement savings to supplement their income because their pensions may be reduced or even eliminated due to the high cost to the companies that once promised retirement pensions. Most Baby-Boomers do not have the good fortune of a solid pension income. Both corporate America and our federal government encourage each American to save for retirement. This is tough for the middle class. Sometimes, they are barely able to pay monthly bills, even on a frugal budget. "Middle class economics means that Americans should be able to retire with dignity after a lifetime of hard work. But loopholes in the retirement advice rules have allowed some brokers and other advisers to recommend products that put their own profits ahead of their clients' best interests, hurting millions of America's workers and their families. A system where firms benefit from back-door payments and hidden fees, often buried in fine print when they talk responsible Americans into buying bad

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retirement investments — instead of recommending quality investments — isn't fair. An analysis by the White House Council of Economic Advisers found that these conflicts of interest result in annual losses of about 1 percentage point for affected investors — or about $17 billion per year in total."[6]

The final rule will be effective June 7, 2016, and the rule is applicable on April 10, 2018. This delay in application is to accommodate financial services and advisors, providing them the opportunity to submit additional concerns or recommended changes to these regulations and to have sufficient time to change their systems and processes from non-fiduciary to fiduciary status.

However, some members of Congress oppose the DOL's conflict of interest regulation in its current form because it would increase the liability of investment advisors and regulatory costs for brokers. They argue that this would make investing more expensive; therefore, investors with small retirement accounts would be priced out of the investment advice market.

In December 2015, Rep. David Roe introduced H.R. 4293, the "Affordable Retirement Advice Protection Act." The act was referred to the House Committee on Education and the Workforce. On April 20, 2016, the committee filed a report along with the edited bill. The pundits predict that the bill will pass the House and Senate, but that President Obama will veto the act. It is also predicted that there will not be enough Senate votes to override the veto.

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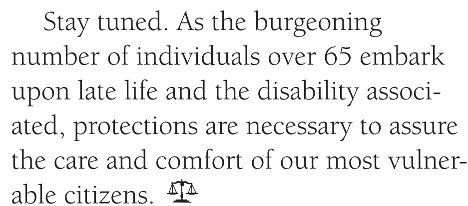

Stay tuned. As the burgeoning number of individuals over 65 embark upon late life and the disability associated, protections are necessary to assure the care and comfort of our most vulnerable citizens. ⚖

MONICA J. FRANKLIN is a certified elder law specialist. She has assembled a multi-disciplinary team to serve east Tennessee's elderly and disabled clients through: Life Care Planning, Estate Planning and Conservatorships. Email: Monica@MonicaFranklin.com or www.MonicaFranklin.com.

## Notes

1. Wiser Nurse, "Protecting Your Mother from Financial Fraud and Abuse," https://www.wiserwomen.org/pdf_files/WISERNurseFraudAbuse.pdf.
2. At the time, Senator Smith was a member of the U.S. Senate Special Committee on Aging. This statement was made during a hearing on Exploitation of Seniors, Sept. 7, 2006.
3. "Broken Trust: Elders, Family, and Finances," MetLife Mature Market Institute, the National Committee for the Prevention of Elder Abuse, and the Center for Gerontology at Virginia Polytechnic Institute and State University. March 2009.
4. http://www.fool.com/retirement/annuities/annuities02.htm
5. Federal Register/Vol. 81, No. 68/ Friday, April 8, 2016, 29 CFR Parts 2509, 2510 and 2550.
6. Department of Labor Fact Sheet: "Department of Labor Proposes Rule to Address Conflicts of Interest in Retirement Advice, Saving Middle-Class Families Billions of Dollars Every Year," http://www.dol.gov/ebsa/newsroom/fsconflictsofinterest.html.