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DODD–FRANK'S PROTECTIONS FOR SENIOR CITIZENS: AN IMPORTANT, YET INSUFFICIENT STEP

*Julie Goldsmith Reiser** & *Michael B. Eisenkraft***

President Obama signed the Dodd–Frank Wall Street Reform and Protection Act[1] (Dodd–Frank or the Act) into law on July 21, 2010. Dodd–Frank, the full title of which is, "An Act [t]o promote the financial stability of the United States by improving accountability and transparency in the financial system, to end 'too big to fail,' to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes," is 848 pages long and filled with numerous important regulations for America's financial system—many of which have attracted widespread notice and debate in popular media. For instance, according to Wikipedia:

> In addition to the headline regulatory changes covering capital investment by banks and insurance companies, the Act introduces new regulation of hedge funds and private equity funds, alters the definition of accredited investors, requires reporting by all public companies on CEO to median employee pay ratios and other compensation data, enforces equitable access to credit for consumers, and provides incentives to promote banking among low- and medium-income residents.[2]

This Article is about none of these important and prominent provisions of Dodd–Frank. Instead, it is about one of the "other purposes," referenced in the full title of Dodd–Frank—a few provisions buried amongst Dodd–Frank's 848 pages that touch ever so lightly on an issue that seems at first glance both noncontroversial and modest in comparison to the more publicized problems tackled by Dodd–Frank, but in fact represents one of the most important and potentially thorny issues facing the American economy: how to protect the financial assets

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1. Dodd–Frank Wall Street Reform and Protection Act, Pub. L. No. 111-203, 124 Stat. 1376.

2. *Dodd–Frank Wall Street Reform and Consumer Protection Act*, WIKIPEDIA (June 22, 2012, 11:19 AM), http://en.wikipedia.org/w/index.php?title=Dodd%E2%80%93Frank_Wall_Street_Reform_and_Consumer_Protection_Act&oldid=498816065 (accessed from Dodd–Frank Wall Street Reform and Consumer Protection Act page by clicking "View history" tab near search bar then clicking on the June 22, 2012, 11:19 version).

of senior citizens from the potentially deleterious effects of age and those who would take advantage of their condition.

Specifically, this Article describes the shape and scope of the problem that inspired the elder protection portions of the legislation, details what Dodd–Frank did to protect the elderly from financial peril, analyzes the weaknesses of the steps Congress has taken, examines the potential pitfalls to be aware of when developing protections for seniors, and advocates for three additional steps that should be taken to adequately combat this problem.

Specifically, in order to effectively tackle the problem of elderly financial abuse, a problem of large and rapidly increasing scope, the following policies should be put into place: (1) bank officials, health professionals, brokers, and insurance agents should all become mandatory reporters of elder financial abuse—a step that would bring thousands of trained eyes to bear on a problem which has grown large and monstrous in the shadows; (2) brokers and insurance agents should owe a fiduciary duty to their customers, making them responsible for recommending products that will benefit their customers, not just their employers; and (3) there should be a license required to sell financial products to senior citizens which would require a short course on the special needs of the elderly and a criminal background check.

I. FINANCIAL FRAUD AND THE ABUSE OF SENIORS: THE ORIGINS OF DODD–FRANK'S SENIOR-SPECIFIC PROTECTIONS

Most of the senior-specific provisions of Dodd–Frank did not originate with Senator Dodd, Congressman Frank, or the finance committees.[3] Instead, these provisions originated in the Senior Investment Protection Act of 2008,[4] a bill proposed by Senator Herb Kohl (D-WI) in his role as Chairman of the U.S. Senate Special Committee on Aging.[5] This bill stemmed from a hearing held in September 2007 by the Senate's Special Committee on Aging.[6] Eventually Senator Kohl, who was also a member of the Senate Finance Committee, got some of the provisions of the Senior Investment Protection Act enacted into law as part of Dodd–Frank. While it is difficult or even impossible to know what exactly motivated Senator Kohl, the Senate, or the House to include these specific provisions in

3. Telephone Interview with Ken Willis, Commc'ns Dir., Senate Special Comm. on Aging (Apr. 20, 2012).

4. Senior Investment Protection Act of 2008, S. 2794 (2008).

5. Telephone Interview with Ken Willis, *supra* note 3.

6. *Id.*

Dodd–Frank or even to advocate for their passage,[7] the testimony given at the September 2007 hearing held by the U.S. Senate Committee on Aging provides a very good clue. Published discussions and analyses of the problem offer further clues.

A. The Size of the Problem

The most striking facts presented during the September Hearings concern the scope of the financial assets at stake. The size of the senior population and the assets seniors do or will control is nothing short of astounding. In 2006, according to census data, there were more than thirty-seven million Americans age sixty-five and older, accounting for 12% of the total population.[8] There were five million people age eighty-five and older, nearly two million in their nineties, and more than 73,000 Americans age 100 or older.[9] While seniors make up a very substantial minority of this country, seniors control a majority of this country's financial assets. As of 2007, seniors owned 80% of all the money in U.S. savings and loan institutions, and 77% of all financial assets in America.[10] As of 2007, it was estimated that Americans sixty-five or older held $15 trillion of assets.[11] These numbers are continuing to grow as the baby boom generation ages. Americans aged fifty-five to sixty-four have the highest income and net worth of any age group, and households led by people over forty own more than 91% of the nation's wealth.[12]

The size of the senior population and its wealth has an enormous effect on public policy decisions designed to help seniors. It means that any restriction on or privilege accorded to seniors will affect a majority of the country's financial assets. This has enormous implications. For instance, if Congress decided that a financial product was inappropriate for seniors and prohibited its sale to those sixty-five or older, that financial product would find its potential market shrunk by more than half, because seniors control a majority of financial assets.

Despite their strength in numbers, on an individual basis, seniors are

7. *Cf.* Zedner v. United States, 547 U.S. 489, 511 (2006) (Scalia, J., concurring) ("[T]he use of legislative history is illegitimate and ill advised in the interpretation of any statute . . . .").

8. *Protecting Senior Citizens from Investment Fraud*: *Hearing Before the S. Spec. Comm. on Aging*, 110th Cong. 21 (2007) [hereinafter *Protecting Senior Citizens*] (statement of Christopher Cox, Chairman, United States Securities and Exchange Commission).

9. *Id.*

10. *Senior Fraud and the Sale of Annuities*: *Hearing Before the S. Spec. Comm. on Aging*, 110th Cong. 33 (2007) [hereinafter *Senior Fraud*] (statement of Lori Swanson, Attorney Gen., State of Minnesota).

11. *Protecting Senior Citizens*, *supra* note 8, at 21.

12. *Id.*

extremely vulnerable. According to a 2008 medical study, one third of people over the age of seventy-one suffer from cognitive impairment—meaning that approximately 8.8 million seniors have mild cognitive impairment, dementia, or changes in executive cognitive functions.[13] Cognitive impairment, in turn, makes people "more likely to make financial errors and more willing to gamble with their money."[14] Chairman Cox of the U.S. Securities and Exchange Commission (SEC) testified that one reason that seniors are victimized is the "declining mental faculties of senior investors which negatively impacts their personal financial management."[15] This victimization also causes disproportionate harm to seniors because "when seniors lose their life's savings, they lack the time to rebuild a nest egg."[16] Seniors themselves are well aware of their vulnerability. Though a statistic does not generally trigger an emotional response, it is hard not to find heartbreaking the fact that surveys conducted by the American Association for Retired Persons (AARP) found that "[t]hree out of five older Americans fear death less than they fear running out of money before they die . . . ."[17]

Unfortunately, this fear is well-founded, as the scope of the victimization of seniors is striking. According to a 2011 report by MetLife Inc., the annual loss by victims of elder abuse is $2.9 billion, up $300 million in just four years.[18] This large loss number corresponds to a large number of victims. According to estimates, at least one in five Americans over the age of sixty-five has been a victim of financial fraud.[19] Even more dramatically, the Elder Financial Abuse Task Team Report to the California Commission on Aging found that over 70% of

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13. *See* Elizabeth Olson, *When Abuse of Older Patients Is Financial*, N.Y. TIMES, Mar. 3, 2011, at F11 (quoting Dr. Robert E. Roush, Director of the Texas Consortium Geriatric Education Center at the Baylor College of Medicine); *see also* Brenda L. Plassman et al., *Prevalence of Cognitive Impairment Without Dementia in the United States*, 148 ANNALS INTERNAL MED, 6, 427–34 (2008) (cited in ROBERT E. ROUSH & AANAND NAIK, PREVENTING ELDER INVESTMENT FRAUD: ASSESSING FOR VULNERABILITY TO FINANCIAL EXPLOITATION, *available at* http://www.americangeriatrics.org/files/documents/annual_meeting/2012/handouts/thursday/R0730-5305_Robert_E._Roush.pdf).

14. Olson, *supra* note 13.

15. *Protecting Senior Citizens*, *supra* note 8, at 22 ("A recent study by a researcher from the Federal Reserve and a professor at the University of Texas is only the most recent of many to suggest that one reason is the declining mental faculties of senior investors, which negatively impacts their personal financial management.").

16. *Id.*

17. Olson, *supra* note 13.

18. *See* David Crary, *Scams Targeting the Elderly on the Rise*, CHARLOTTE OBSERVER, Mar. 4, 2012, www. charlotteobserver.com/2012/03/04/3066742/scams-targeting-the-elderly-on.html.

19. Luis A. Aguilar, Comm'r, U.S. Sec. and Exch. Comm'n, Speech by Commisioner: Why seniors Are More Vulnerable Now As Targets for Financial Abuse, (Mar. 15, 2012) (delivered by Smeeta Ramarathnam, Comm'r Aguilar's Chief of Staff).

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people over the age of fifty had been fraudulently solicited.[20]

This reality was discussed extensively at the 2007 hearing. According to the testimony of Joseph P. Borg, Director of the Alabama Securities Commission and President of the North American Securities Administrators Association (NASAA),[21] preliminary results from a 2007 study of NASAA's members revealed that 44% of investor complaints came from seniors.[22] This significantly understates the scope of senior financial victimization because senior complaints are generally underreported due to issues of shame or ignorance.[23] In fact, it is estimated that only one in twenty-five cases of elder financial abuse is reported.[24] Furthermore, these are not bogus complaints. Since 2004, more than 75% of the annuity complaints reported by state regulators to NAIC have been resolved in favor of the consumer.[25] Even without taking into account underreporting, however, it is clear that seniors are disproportionately victimized by financial fraud, and that there is a poisonous combination of mentally vulnerable seniors with vast financial resources being preyed upon by unscrupulous people.

B. The Shape of the Problem: How Seniors Are Victimized

Financial scams vary widely, but there are some patterns and common practices. One common practice is the sale of inappropriate financial products, especially certain types of annuities. According to the testimony of Director Joseph Borg, a massive "thirty-four percent of all cases of senior exploitation involved variable or equity index annuities."[26] According to the Testimony of Minnesota Attorney General Lori Swanson, some insurance companies offer large commissions and other incentives especially to salesmen who sell long-

20. RICHARD RYDER & CHERI JASINSKI, ELDER FINANCIAL ABUSE TASK TEAM REPORT TO THE CALIFORNIA COMMISSION ON AGING (2005), *available at* http://www.ccoa.ca.gov/res/docs/pubs/Elder_Financial_Abuse.pdf.

21. The oldest international organization devoted to investor protection, the North American Securities Administrators Association, Inc., was founded in 1919. Its membership consists of the securities administrators in the 50 states, the District of Columbia, Canada, Mexico, Puerto Rico and the U.S. Virgin Islands. *See About Us*, NASAA, www.nasaa.org/about-us/ (last visited Feb. 16, 2013).

22. *See Advising seniors About Their Money: Who Is Qualified—and Who Is Not?: Hearing Before the S. Spec. Comm. on Aging*, 110th Cong. 56 (2007) [hereinafter Borg, *Advising Seniors*] (statement of Joseph P. Borg, Director, Alabama Securities Commission and President, North American Securities Administrators Association). *See Senior Fraud*, *supra* note 10, at 39.

23. *See Senior Fraud*, *supra* note 10, at 39.

24. Leslie Callaway & Jerry Becker, *Stopping the Financial Abuse of seniors*, ABA BANK COMPLIANCE, July–Aug. 2011, at 12.

25. *Hearing Before the S. Spec. Comm. on Aging*, 110th Cong. 75 (2007) (statement of Sandy Praeger, Kansas Insurance Commissioner and National Association of Insurance Commissioners President–Elect).

26. Borg, *Advising Seniors*, *supra* note 22, at 56 (emphasis added).

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term deferred annuities (a product generally not appropriate for seniors), to senior citizens.[27] Attorney General Swanson also described in detail the workings of the so-called "Million Dollar Academy" at "Annuity University," which trains agents how to be a "success in the senior market." According to Swanson, an investigative journalist for the Wall Street Journal attended "Annuity University" at which the following advice was given to insurance agents about how to "push annuities on senior citizens":

> Treat them like they're blind twelve-year-olds.
>
> There's the technical answer, and there's the senior answer. Tell them it's like a CD—it's safe, it's guaranteed.
>
> You're there to solve their problems, but you have to create those problems first. No problem, no sale. So at the seminars, you're creating problems, and you tease them with the solutions . . . .
>
> They thrive on fear, anger and greed. Show them their finances are all screwed up so they think, 'Oh, no, I've done it all wrong.' This will make you money.
>
> Tell them you can protect their life savings from nursing home and Medicaid seizure of assets. They don't know what it is, but it sounds scary. It's about putting a pitchfork in their chest.[28]

In addition to certain types of financial products, there are certain types of scams that are used over and over again. According to a study by the NASD Investor Foundation, fraudsters use "social influence tactics to get their victims to sign on."[29] Among the most common "social influence tactics" are dangling the prospect of wealth or prizes to tempt seniors; convincing seniors that peers, neighbors, and other respected people in the community are all making this particular investment; describing the investment as a rare opportunity to force the senior to act quickly; and creating reciprocity, e.g., providing the senior a small favor, like a free lunch, to induce the senior to feel obligated to return the favor by buying the investment. More recently, some of the most "popular" scams used to target seniors are fraudsters claiming to be calling from the government (often the Social Security Administration or the IRS), the Grandparent Scam (impostors posing as a grandchild in need of cash to cope with an emergency), the homecoming fraud (con artists pose as soldiers serving in Afghanistan needing money for their homecoming), the ever-popular lottery scam (telling seniors they won the lottery or another prize, but need to pay

27. *Senior Fraud*, *supra* note 10, at 34.

28. *Id*. at 35–36.

29. *Protecting Senior Citizens*, *supra* note 8, at 23.

some money to receive it), and the amusingly titled, but unfortunately no less painful Toilet Paper Scam, where fraudsters persuade seniors to pay exorbitant sums of money for goods and services (e.g., special toilet paper to comply with new regulations and not destroy their septic tanks).[30]

There are also patterns to victimization. In August of 2009, the U.S. Administration on Aging described to Congress four common scenarios by which a senior can become a victim: (1) seniors are a "financial prisoner," as they are physically and perhaps psychologically dependent on their caregiver; (2) seniors are losing their ability to handle their financial affairs due to physical or cognitive impairment and a "new best friend" gradually assumes responsibility for handling the senior's affairs and abuses that trust; (3) a widow or widower does not know how to handle the financial affairs which his or her deceased spouse took care of, and gets taken advantage of by someone offering assistance; and (4) seniors, perhaps out of fear or paranoia, refuse help or financial advice from reliable, responsible relatives or other individuals and instead turn to strangers.[31]

In an effort to illustrate the problem, a number of witnesses at the 2007 hearing shared heart-wrenching stories of the victimization of specific seniors. Chairman Cox, of the SEC, told the Committee about his parents. Despite the fact that his mother was suffering from throat cancer and could barely speak, and his father was in the throes of Alzheimer's disease, they received repeated unsolicited pitches (both over the phone and in person) for an endless amount of annuity schemes and mortgage offers. The products pushed by these brokers were affirmatively harmful to people in circumstances like Chairman Cox's parents. The annuity products locked away savings with huge penalties for withdrawal and the mortgages were equally bad if not worse. Chairman Cox cited the example of one salesman who called over a dozen times pushing his mother to refinance her safe, low-rate thirty-year mortgage with a short-term loan that had a balloon and a teaser rate—a deal that would have cost his parents their home when it came due. Even though Chairman Cox personally warned him never to call her again, he continued.[32]

Nicholas A. Nicolette, President of the Financial Planning

30. David Crary, *Scams Targeting Older Americans Enriching Con Artists and Law Enforcement Find the Crimes Among the Toughest to Prosecute*, NBCNEWS.COM (Mar. 4, 2012, 11:32 AM), http://www.msnbc.msn.com/id/46574273/ns/business-personal_finance/t/scams-targeting-older-americans-enriching-con-artists/#.T-hri3km-YI.

31. *See* Callaway, *supra* note 24, at 12–13 (citing U.S. ADMIN. ON AGING, FINANCIAL EXPLOITATION OF OLDER PERSONS: REPORT TO CONGRESS (2009)).

32. *Protecting Senior Citizens*, *supra* note 8, at 22.

Association, shared the story of a 79-year-old Pennsylvania man who was victimized by an unscrupulous annuity salesman.[33] The 79-year-old man was persuaded by the agent to sign a power of attorney, giving the agent access to the victim's CDs, cash and mutual funds. The salesman put all of these assets in "unsuitable annuities." After learning that he had been wiped out, the man went into a deep depression and died. The insurance company tried to remedy the wrong committed by the salesman by offering the man his money back. The offer was received by the man's family via a letter, which arrived on the day of the funeral, and his family buried him with the letter in his pocket. Mr. Nicolette concluded by revealing that the salesman in question was still in business, despite being sanctioned several times by state officials.[34]

C. The Stubbornness of the Problem: Why We Haven't Stopped Senior Financial Abuse

Senior financial abuse is not going away; in fact, it is rapidly growing into a bigger and bigger problem. As mentioned above, according to a 2011 report, the annual loss by victims of elder abuse is at $2.9 billion, up dramatically from $2.6 billion in 2008.[35] This is despite the fact that the problematic behavior at issue (the scams or sales of inappropriate financial products) is generally criminalized, or at least universally strongly disapproved of, and there is heightened awareness of the problem. So why is financial abuse of seniors going up instead of down?

There are a number of reasons for this. First, from a law enforcement perspective, seniors are nightmare victims for three reasons: (1) as discussed above, they are reluctant to come forward and report the crime, which makes awareness of the crime, much less catching criminals, extraordinarily difficult; (2) even if a crime is reported, a senior may not have all of his or her mental facilities, which may make her a very problematic witness—especially in a he-said-she-said case ("Mr. Smith told me he wanted to buy this structured annuity," "Mr. Smith gave me the money," etc.); and (3) seniors, by definition, are elderly, and cases take a long time to be resolved—there is a real danger that a senior may not be around or capable of testifying at a trial even if she was mentally and physically healthy when victimized. All three of these reasons make it very difficult for traditional law enforcement

33. *Advising seniors About Their Money: Who's Qualified—and Who's Not?: Hearing Before the S. Spec. Comm. on Aging*, 110th Cong. 66 (2007) (statement of Nicholas A. Nicolette, President of the Financial Planning Association).

34. *Id*.

35. Crary, *supra* note 30.

efforts to effectively target senior fraud.

Second, regulation of insurance companies and most fraud crimes occurs at the state level. This is problematic because much of the fraud that goes on is often by out-of-state or even international actors. Everyone is familiar with the internet fraudsters from Nigeria and the computer hackers of the former Soviet Union, but there are other hotbeds of senior fraud too. For instance, so many recent lottery scam calls have come from Jamaica that its 876 area code is now cited as a warning sign by experts.[36] The 2007 hearing included testimony that it was difficult for state regulators to go after fraudsters like sponsors of deceptive marketing materials because many of those entities are located outside the investigating state and questioned the jurisdiction of the state agency.[37]

Moreover, the states simply do not have the resources—whether measured in finances, knowledge, or manpower—to effectively deal with this enormous and rapidly growing problem. A study by the General Accounting Office (GAO) found that state Adult Protective Services programs' "challenges" included growth in caseloads and an increase in the complexity of those cases.[38] These programs deal with these increasing challenges with decreasing resources. The GAO found that twenty-five of the thirty-eight states surveyed had total Adult Protective Services funding remain static or decrease over the past five years and "program officials . . . ranked insufficient funding for program operations as the most significant challenge they faced."[39]

Third, many key actors do not know how to deal with seniors or their special needs. Mr. Edwin J. Pittock, President of the Society of Certified Senior Advisors, testified that "[t]here is only a one in six chance that an American university offers one or more courses in gerontology" and "[f]ew companies who have seniors as customers require any education for their employees."[40] Furthermore, according to Mr. Pittock, he is:

> unaware of any state or federal requirement that anyone working with

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36. *Id.*

37. *Hearing Before the S. Spec. Comm. on Aging*, 110th Cong. 50 (2007) (statement of William Francis Galvin, Secretaryy of the Commonwealth of Massachusetts) ("Our investigation into many of the sponsors of the marketing materials described above proved quite difficult, because many of those sponsors are located outside of The Commonwealth of Massachusetts and were not forthcoming in their responses to our requests for information. Moreover, a number of them questioned our jurisdiction over entities not based in Massachusetts.").

38. Aguilar, *supra* note 19.

39. Id. (emphasis added).

40. *Educating Professionals to Serve seniors Better: Hearing Before the S. Spec. Comm. on Aging*, 110th Cong. 104 (2007) (statement of Edwin J. Pittock, President, Society of Certified senior Advisors).

> seniors gain even a minimal amount of knowledge (unless it is within their own discipline) about how seniors are different and the optimal ways to work with them, such as determining whether a client has dementia and being able to recognize factors that can lead to abuse.[41]

II. DODD–FRANK: A FIRST STEP TOWARD PROTECTING SENIORS' FINANCIAL SECURITY

Many of the problems and solutions discussed at the 2007 Hearing were reflected in those provisions of Dodd–Frank that safeguard the elderly. Section 989A of Dodd–Frank defines a "senior citizen" or "senior" as anyone 62 years or older.[42] This age was chosen because it corresponds to the lowest age at which an individual can begin to collect Social Security.[43] Dodd–Frank mentions "senior," in reference to those 62 years of age or older, in a scant four provisions scattered amongst its 848 pages.

A. Section 911 of Dodd–Frank: The Investor Advisory Committee

Section 911 of the Act modifies the Securities Exchange Act of 1934 in order to create an "investor advisory committee," which must include a "representative of the interests of senior citizens." The Act requires that the other members of the "investor advisory committee" consist of the Investor Advocate,[44] a representative of state securities commissions, and between ten and twenty individuals who:

> (i) represent the interests of individual equity and debt investors, including investors in mutual funds; (ii) represent the interests of institutional investors, including the interests of pension funds and registered investment companies; (iii) are knowledgeable about

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41. *Id.* at 108.

42. Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376, § 989A(7) (2010).

43. Telephone Interview with Ken Willis, *supra* note 3. Today, at the age of sixty-two, a person can collect a reduced social security benefit. This is actually a relatively new option, introduced in 1956 for women and for men in 1961. *See* Lenore A. Epstein, *Early Retirement and Work–Life Experience*, BULLETIN, Mar. 1966, *available at* http://www.ssa.gov/policy/docs/ssb/v29n3/v29n3p3.pdf. Originally, social security was only available at age sixty-five, an age selected based on the fact that prevailing retirement ages for the pension system available at the time were either sixty-five or seventy. Roughly half the state pension systems used sixty-five, as did the federal Railroad Retirement System, passed by Congress earlier in 1934. *Frequently Asked Questions: The Origins of the Retirement Age in Social Security*, SOCIAL SECURITY ONLINE, http://www.ssa.gov/history/age65.html (last visited Feb. 16, 2013).

44. The Investor Advocate, a position created by Section 915 of the Act, reports directly to the Chairman of the Securities & Exchange Commission and his assignment is to protect the interests of investors. Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376, § 915 (2010).

investment issues and decisions; and (iv) have reputations of integrity.[45]

The purpose of the "investment advisory committee" is to advise and consult with the Commission on: (1) regulatory priorities of the Commission; (2) issues relating to the regulation of securities products, trading strategies, and fee structures, and the effectiveness of disclosure; (3) initiatives to protect investor interest; and (4) initiatives to promote investor confidence and the integrity of the securities marketplace.[46] The Commission must, each time the "investment advisory committee" submits a finding or recommendation, promptly issue a public statement assessing it and disclosing what action, if any, the Commission will take in response.[47]

The existence of a single, guaranteed seat on the "investor advisory committee" reveals a great deal about the attitude of Congress, as expressed in Dodd–Frank, about senior citizen finances. First, the presence of a dedicated seat to represent senior interests shows that Congress believes that senior citizens have special interests and needs that are distinct from those of the interests of individual debt and equity investors.[48] Second, the fact that only a single seat is reserved for senior

45. *Id.* Interestingly, while the statute specifically provides for the appointment of the between ten and twenty members of the "investment advisory committee" who represent the investing public by the Commission and there are specific statutory provisions governing the selection of the Investor Advocate there is no specific provision for appointing the representative of the interests of senior citizens or the representative of State securities commissions. In practice, however, all members of the investment advisory committee were nominated by all five sitting SEC Commissioners. *See id.* § 911(b)(1)(D), § 915; *see also* Press Release, Sec. and Exch. Comm'n, SEC Announces Members of New Investor Advisory Comm. (Apr. 9, 2012), *available at* http://www.sec.gov/news/press/2012/2012-58.htm.

46. Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376, § 911(a)(2)(A) (2010).

47. *Id*. § 911(g).

48. The current members of the investment advisory committee are: Darcy Bradbury, Managing Director and Director of External Affairs, D.E. Shaw & Co., L.P.; J. Robert Brown, Jr., Law Professor, University of Denver; Joseph Dear, Chief Investment Officer, California Public Employees' Retirement System; Eugene Duffy, Partner and Principal, Paradigm Asset Management Co. LLC; Roger Ganser, Chairman of the Board of Directors of BetterInvesting; James Glassman, Executive Director, George W. Bush Institute; Craig Goettsch, Director of Investor Education and Consumer Outreach, Iowa Insurance Division; Joseph Grundfest, William A. Franke Professor of Law and Business, Stanford Law School; Mellody Hobson, President and Director of Ariel Investments, LLC; Stephen Holmes, General Partner and Chief Operating Officer, InterWest Partners; Adam Kanzer, Managing Director and General Counsel of Domini Social Investments and Chief Legal Officer of the Domini Funds; Roy Katzovicz, Partner, Investment Team Member and Chief Legal Officer, Pershing Square Capital Management, L.P.; Barbara Roper, Director of Investor Protection, Consumer Federation of America; Kurt Schacht, Managing Director, CFA Institute; Alan Schnitzer, Vice Chairman and Chief Legal Officer, The Travelers Companies, Inc.; Jean Setzfand, Director of Financial Security for the AARP; Anne Sheehan, Director of Corporate Governance, California State Teachers' Retirement System; Damon Silvers, Associate General Counsel for the AFL-CIO; Mark Tresnowski, Managing Director and General Counsel, Madison Dearborn Partners, LLC; Steven Wallman, Founder and Chief Executive Officer, Foliofn, Inc.; Ann Yerger, Executive Director, Council of Institutional Investors. *See* Press Release, Sec. and Exch. Comm., *supra* note 45. Though the SEC press release did not specifically identify which

interests, while between ten and twenty are for institutional and individual investors, indicates that Congress believes senior interests are either less important than, or generally not in conflict with, the interests of individual and institutional investors.[49]

B. The Model Rules: Sections 989A & 989J of Dodd–Frank

Section 989A of the Act, entitled senior Investor Protections, is one of the most detailed provisions of Dodd–Frank addressing fraudulent schemes that target seniors. Subsection 989A(b) establishes a grant program under which Grants may be made to:

> (1) hire staff to identify, investigate, and prosecute cases involving misleading or fraudulent marketing; (2) fund law enforcement efforts to identify salespersons and advisers who target seniors through the use of misleading designations; (3) increase funding for the successful prosecution of salespersons and advisers who target seniors with the use of misleading designations; (4) provide educational materials and training to regulators on the appropriateness of the use of designations by salespersons and advisers in connection with the sale and marketing of financial products; (5) provide educational materials and training to seniors to increase awareness and understanding of misleading or fraudulent marketing; (6) develop comprehensive plans to combat misleading or fraudulent marketing of financial products to seniors; and (7) enhance provisions of State law to provide protection for seniors against misleading or fraudulent marketing.[50]

This aspect of Section 989A is revelatory because of the financial danger to seniors it identifies and targets—misleading or fraudulent marketing of financial products and the con artists and fraudsters who target seniors with these methods—and the proposals it puts forward in response. Section 989A takes two approaches to these dangers—six out of the seven clauses play offense by spending money to encourage more effective law enforcement efforts to catch and deter fraudsters who target seniors.[51] Section 989A(b)(5) plays defense against these fraudsters by permitting funds to be applied to educate seniors to

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member of the investment advisory council represents senior interests, it is presumably Jean Setzfand, Director of Financial Security for the AARP.

49. If there was ever a conflict between senior interests and those of individual/institutional investors, the single senior vote would be overwhelmed by the ten to twenty votes of those representing individual/institutional investors. Congress must not have been concerned about this outcome either because they did not care if senior interests were outvoted or, perhaps more likely, because they believed that institutional/individual and senior interests would usually be compatible, and at the very least, rarely be in conflict.

50. Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376, § 989A(b)(1)–(7) (2010).

51. *See id.*

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increase their awareness and understanding of misleading or fraudulent marketing.

Section 989A also has a second prong for effecting change. The maximum amount of these 989A grants ($500,000 for three consecutive fiscal years) is available only if a state has adopted rules that: (1) meet or exceed the minimum requirements of the NASAA model rule on the Use of Senior-Specific Certifications and Professional Designations (or any successor thereto), (2) regulate the sale of insurance of products in a way that conforms to the minimum requirements of the National Association of Insurance Commissioners (NAIC) model regulation on the Use of Senior-Specific Certifications and Professional Designations in the Sale of Life Insurance and Annuities (or any successor thereto), and (3) regulate fiduciary or suitability requirements in the sale of annuities that meet or exceed the minimum requirements established by the Suitability in Annuity Transactions Model Regulation (SATMR) of NAIC (or any successor thereto).[52] States are only eligible for grants of $100,000 if they meet the first or the second and third of these requirements, and are presumably ineligible for grants if they fall below these minimum requirements.[53]

The approach taken in this portion of Section 989A can be characterized in three ways. First, with its use of the various model rules and regulations cited above as baselines, it is pushing standardization across the fifty states. This one size fits all states approach indicates that Congress believes that the victimization of seniors by fraudsters is both a nationwide problem and one that can benefit from relative uniformity of laws over all states. Second, it is a very gentle push towards standardization. The federal government is not enacting or creating its own federal law or regulation, instead it is encouraging the adoption of standards that meet or exceed minimum requirements created by groups of state regulators.[54] This is a very flexible and deferential approach by the federal government.

Furthermore, the grants, at a maximum of $500,000 a year, are very modest. This is not the federal government using its power of the purse to coerce states to do its bidding; instead this is, at most, a tiny nudge to go a certain direction or take action. This either reflects the fact that the goal of the federal government is to encourage and standardize a growing consensus amongst the states, not to browbeat states in doing what they don't want, or that the adoption of the model rules and regulations or their equivalent is not particularly important to Congress. The first interpretation is borne out by the facts as they currently exist,

52. *Id.* § 989A(e)(1).
53. *Id.* § 989A(e)(2).
54. *Id.* § 989A(e)(1).

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because, as of February 2012, twenty-eight states and the District of Columbia had enacted the NAIC model regulation, and thirty states and the District of Columbia have enacted the NASAA model regulation.[55] Evidencing a similarly broad consensus, as of March 6, 2011, the National Conference of Insurance Legislators endorsed NAIC's SATMR.[56]

Third, the substance of the model rules and regulations Dodd–Frank endorses reflect distinctive approaches to protecting seniors. The NASAA model rule, adopted on March 20, 2008, prohibits the use of a senior-specific certification or designation in selling securities in a misleading way which includes:

> (a) use of a certification or professional designation by a person who has not actually earned or is otherwise ineligible to use such certification or designation; (b) use of a nonexistent or self-conferred certification or professional designation; (c) use of a certification or professional designation that indicates or implies a level of occupational qualifications obtained through education, training, or experience that the person using the certification or professional designation does not have; and (d) use of a certification or professional designation that was obtained from a designating or certifying organization that: (i) is primarily engaged in the business of instruction in sales and/or marketing; (ii) does not have reasonable standards or procedures for assuring the competency of its designees or certificants; (iii) does not have reasonable standards or procedures for monitoring and disciplining its designees or certificants for improper or unethical conduct; or (iv) does not have reasonable continuing education requirements for its designees or certificants in order to maintain the designation or certificate.[57]

The model rule also creates a rebuttable presumption that a designating or certifying organization is not disqualified solely for purposes of paragraph 1(d) above when the organization has been accredited by: (i) The American National Standards Institute; or (ii) The National Commission for Certifying Agencies; or (iii) an organization that is on the United States Department of Education's list entitled

55. *NAIFA Supports NCOIL Resolution on senior-Specific Designations*, NAIFA BLOG (Feb. 29, 2012, 11:34 AM), http://www.naifablog.com/2012/02/index.html.

56. Press Release, Nat'l Conference of Ins. Regulators, NCOIL Supports NAIC Suitability Model, Recommends to States (Mar. 6, 2011), *available at* http://www.ncoil.org/HomePage/2011/03092011AnnuitySuitability.pdf. A current, state-by-state list of the adoption of the Annuity Transactions Model Regulation has been compiled by the National Association of Insurance Commissioners. NAT'L ASS'N INS. COMM'RS, SUSTAINABILITY IN ANNUITY TRANSACTIONS MODEL REGULATION: 2012 LEGISLATION/RULEMAKING (2012), *available* at http://www.naic.org/documents/committees_a_leg_prog_suitability_120420.pdf.

57. NORTH AM. SEC. ADM'RS ASS'N, NASAA MODEL RULE ON THE USE OF SENIOR-SPECIFIC CERTIFICATIONS AND PROFESSIONAL DESIGNATIONS (2008), *available at* http://www.nasaa.org/wp-content/uploads/2011/07/3-senior_Model_Rule_Adopted.pdf.

"Accrediting Agencies Recognized for Title IV Purposes" and the designation or credential issued therefrom does not primarily apply to sales and/or marketing.[58]

The NAIC model for insurance regulation is almost identical in substance to the NASAA model rule for securities as it has essentially the same prohibitions and also creates a rebuttable presumption in favor of the same three organizations.[59]

In other words, NAIC (and thus Dodd–Frank), advocated for at most a middle-of-the-road approach with regard to senior certifications. By giving preferences, but not exclusivity, to organizations approved by the American National Standards Institute, the National Commission for Certifying Agencies, and the Department of Education, NAIC created a safe harbor for organizations and, in some ways, perhaps a gold standard for knowledgeable people evaluating certifications. At the same time, however, the vagueness of the standards and their refusal to create a centralized list of qualifying organizations (or even a central list of disqualified organizations) permitted the continued proliferation of senior-certifying organizations and did not, by any stretch of the imagination, eliminate confusion.

The SATMR is similarly weak. To its credit, this model regulation does impose some significant duties on insurers and insurance producers. Section six of the SATMR has a suitability requirement that states: (1) that an insurance producer or insurer "shall have reasonable grounds for believing that the recommendation is suitable for the consumer on the basis of the facts disclosed by the consumer as to his or her investments and other insurance products and as to his or her financial situation and needs, including the consumer's suitability information," (2) that the customer has been "reasonably informed of various features of the annuity," (3) that the "consumer would benefit from certain features of the annuity," (4) that "[t]he particular annuity as a whole" is suitable based on the consumer's suitability information, and various similar recommendations for replacement annuities.[60] The SATMR also requires insurers to "make reasonable efforts to obtain the consumer's suitability information."[61] In addition, the SATMR requires the memorialization of any recommendation to purchase an annuity, the

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58. *Id.*

59. *See* NAT'L ASS'N OF INS. COMM'RS, NAIC MODEL REGULATION ON THE USE OF SENIOR-SPECIFIC CERTIFICATIONS AND PROFESSIONAL DESIGNATIONS IN THE SALE OF LIFE INSURANCE AND ANNUITIES (2008), *available at* http://www.acli.com/Events/Documents/0356d2f9b6f84c3ca3140d5d5dd50b4fPagesfromWed072209ChronologicallyChallengedLeiferD.pdf.

60. *See* NAT'L ASS'N OF INS. COMM'RS, SUITABILITY IN ANNUITY TRANSACTIONS MODEL REGULATION (2010), *available at* http://www.limra.com/pdfs/compliance/AnnuityStability.pdf.

61. *Id.* § 6(B).

establishment of supervision systems, and certain minimal training requirements.[62]

All of these are good and relatively uncontroversial steps. The flaw in the Annuity Rule, however, is that it only goes halfway. There are a number of industry-friendly exceptions and provisions that make the Annuity Rule more of a strongly worded suggestion than a fierce command. First, Subsection (D) of Annuity Rule six exempts any insurer or insurance company from the strictures of the model rules if the insurer did not make a "recommendation," if the consumer provided inaccurate data, if the consumer refuses to provide suitability information, or if the consumer decides to purchase an annuity not based on the recommendation of the insurer. These all sound sensible, but an unscrupulous agent could drive a truck through this exception by claiming that he was not providing a recommendation when he was, in fact, pushing a particular product. In short, these exceptions run the risk of swallowing the rule for those who would take advantage of seniors.

Second, the penalties for not obeying the Annuity Rule are vague and forgiving. If a violation occurs,

> the commissioner *may* order: (1) An insurer to take reasonably appropriate corrective action for any consumer harmed by the insurer's, or by its insurance producer's, violation of this regulation; (2) A general agency, independent agency or the insurance producer to take reasonably appropriate corrective action for any consumer harmed by the insurance producer's violation of this regulation; and (3) Appropriate penalties and sanctions.[63]

Moreover, there is a mercy exception to even these discretionary penalties. According to the Annuity Rule, any penalty "may be reduced or eliminated . . . if corrective action for the consumer was taken promptly after a violation was discovered or the violation was not part of a pattern or practice."[64] Moreover, the Annuity Rule explicitly eliminates the possibility of private actions to enforce the law, stating baldly that "[n]othing herein shall be construed to create or imply a private cause of action for a violation of this regulation."[65]

In addition to encouraging the adoption of the model rules discussed above via grants, Dodd–Frank also utilizes other carrots for state adoption. Section 989J of the Act encourages the use of the model rules of the National Association of Insurance Commissioners by giving substantial advantages to insurance companies who issue policies

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62. *See id.* §§ 6–7.
63. *Id.* § 8 (emphasis added).
64. *Id.*
65. *Id.* § 1(B).

subject to the laws of states who have adopted the NAIC model regulations.[66]

Specifically, 989J mandates that the SEC "treat as exempt securities described under section 3(a)(8) of the Securities Act of 1933," and any insurance or endowment policy or annuity contract or optional annuity contract so long as it has certain characteristics *and* is issued on or after June 26, 2013 in a state or issued by an insurance domiciled in a state that: (1) adopts rules which substantially meet or exceed the minimum requirements established by the suitability in Annuity Transactions model regulation adopted by the National Association of Insurance Commissioners in March 2010; and (2) adopts rules that substantially meet or exceed the minimum requirements of any successor modifications to the model regulations or is issued by an insurance company that implements practices on a nationwide basis that meet or exceed the minimum requirements established by the National Association of Insurance Commissioners Suitability in Annuity Transactions Model Regulation (Model 275), and any successor thereto, and is therefore subject to examination by the State of domicile of the insurance company, or by any other state where the insurance company conducts sales of such products, for the purpose of monitoring compliance under this section.[67]

This is a different, and far more muscular, approach to encourage the adoption of NAIC model rules than that taken by 989A. By giving insurance companies who issue policies under the laws of states who adopt NAIC model rules a competitive advantage by exempting them from liability under the Securities Act of 1933, 989J of Dodd–Frank may give those states a substantial boost in attracting insurance companies. Conversely, it penalizes the states who do not adopt the NAIC model rules. The 1933 Act exemption, moreover, in providing a reward to insurance companies who issue policies in states compliant with the NAIC model rules, acts in concert with 989A by eliminating, or at least reducing, the possibility that states who adopt the NAIC model rules will lose insurance business because of it.

Interestingly, 989J also gives a great deal of power, sight unseen, to the future acts of NAIC by making the adoption of future rules promulgated by NAIC a requirement to keeping the 1933 Act exemption—without any caveats or restrictions on what those future rules might say.[68] This is an extraordinary delegation of federal authority to a collection of state agencies as it gives them the power to

66. *See* Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376, § 989J (2010).

67. *See id.*

68. *See id.* § 989J(a)(3)(A)(ii).

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exempt a large swathe of financial products from a core federal statute.

C. Section 1013(g) of Dodd Frank: The Office of Financial Protection for Older Americans

Section 1013(g) provides for the establishment of the Office of Financial Protection for Older Americans (Office for Older Americans),

> the functions of which shall include activities designed to facilitate the financial literacy of individuals who have attained the age of 62 years or more . . . on protection from unfair, deceptive, and abusive practices and on current and future financial choices, including through the dissemination of materials to seniors on such topics.[69]

The Office for Older Americans is designed to focus on the financial education of seniors, to monitor the certification of those who provide financial advice to seniors, and to research best practices.

Specifically, the educational mandate of the Office for Older Americans is to:

> [D]evelop goals for programs that provide seniors financial literacy and counseling, including programs that—(i) help seniors recognize warning signs of unfair, deceptive, or abusive practices, protect themselves from such practices; (ii) provide one-on-one financial counseling on issues including long-term savings and later-life economic security; and (iii) provide personal consumer credit advocacy to respond to consumer problems caused by unfair, deceptive, or abusive practices.[70]

This mandate "to develop goals for programs" is fuzzy, but it seems to be encouraging the creation or adoption of a set of best practices to educate seniors about personal finances. Again, Dodd–Frank encourages coordination and standardization, but does not coerce it or determine the substance of what should be standardized.

The role of the Office for Older Americans regarding certifications is monitoring and recommendations. Specifically, the Office for Older Americans is tasked with monitoring "certifications or designations of financial advisors who advise seniors and alert the Commission and State regulators of certifications or designations that are identified as unfair, deceptive, or abusive" and the submission to Congress and the SEC

> any legislative and regulatory recommendations on the best practices for (i) disseminating information regarding the legitimacy of certifications of financial advisers who advise seniors; (ii) methods in which a senior can identify the financial advisor most appropriate for the senior's needs; and

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69. *Id* § 1013(g)(1).

70. *Id.* § 1013(g)(3).

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(iii) methods in which a senior can verify a financial advisor's credentials.[71]

This sets up the Office for Older Americans as a center for expertise on senior advisors and certifications, but without any independent power to exercise that expertise.

The research role of the Officer for Older Americans is similar. The Office for Older Americans is tasked with conducting "research to identify best practices and effective methods, tools, technology and strategies to educate and counsel seniors about personal finance management with a focus on—(i) protecting themselves from unfair, deceptive, and abusive practices; (ii) long-term savings; and (iii) planning for retirement and long-term care."[72] Again, the Office for Older Americans is a bastion of expertise without authority to implement or enforce best practices.

The Office for Older Americans is encouraged to share its expertise with other organizations with more clout and reach. Section 1013 directs the Office for Older Americans "coordinate consumer protection efforts of seniors with other Federal agencies and State regulators" and work with community organizations, non-profit organizations, and other entities that are involved with educating or assisting seniors.[73]

III. WHY DODD–FRANK FALLS SHORT: STEPS NECESSARY TO PROTECT SENIORS FROM FINANCIAL ABUSE

As discussed above, Dodd–Frank took some important steps towards combating the financial abuse of seniors, including most importantly, the recognition that seniors are at risk financially and in need of a multi-layered response to mitigate that risk. Ultimately, however, the steps it took, while in the right direction, are too timid to deal with a problem of this magnitude. This portion of the Article identifies some potential reasons for the caution exhibited by Congress when drafting Dodd–Frank and then advocates for three strong, additional steps that should be taken—namely, making health care workers and financial representatives mandatory reporters of senior financial abuse, mandating that brokers and insurance employees owe a fiduciary duty to their customers, and requiring a license to sell seniors financial products.

71. *Id.* §§ 1013(g)(3)(B)–(C).

72. *Id.* § 1013(g)(3)(D).

73. *Id.* §§ 1013(g)(3)(E)–(F).

A. Reasons for Caution

As discussed above, Dodd–Frank took a cautious, deferential, and incremental approach to combating elder abuse. There are a number of reasons for Congress's tentativeness. First, one of the main avenues for elder financial abuse, the sale of inappropriate insurance policies to seniors, falls squarely within a domain that has long been reserved for the states. While it has long been recognized that the federal government can regulate insurance,[74] Congress has imposed limitations on itself in this area. Specifically, the McCarran–Ferguson Act,[75] exempts insurance from much federal regulation and law. Of course, what Congress giveth, Congress can take away, and the historic reservation of this area for the States does not mean that Congress cannot change its mind and put federal laws or regulations in place to protect seniors from inappropriate insurance contracts. This does, however, probably make Congress more reluctant to legislate in this area.

Second, the sheer size of the senior population and its wealth makes the problem of senior financial abuse difficult to deal with. As discussed above, seniors control a majority of the financial assets of this country. Therefore, any limitation forbidding seniors from purchasing certain assets (e.g., certain types of annuities generally inappropriate for seniors) would decimate the potential market for those securities. Similarly, any "special" protection afforded to seniors would cover most of the financial assets in this country. This magnifies the impact of any general protection for seniors, however small. For instance, if the federal government enacted a law requiring that any financial advisor take certain steps before selling securities to seniors, that would slow down the entire financial market. In other words, the large effect of any regulation or law that affected seniors and their assets means that Congress likely (and rightly) wanted to tread carefully and slowly.

Third, while the definition of "senior" adopted by Dodd–Frank provides a bright-line demarcation exclusively based on age, the population of seniors is actually very diverse. On the one hand, there could be a sixty-year-old with early onset dementia who does not count as a senior under Dodd–Frank, though he could certainly use protection. On the other hand, there could be luminaries like Warren Buffett (born in 1930, and the third wealthiest person in the world with the reputation as the world's greatest investor)[76] and Senator Kohl himself (born in

74. *See* United States v. South–Eastern. Underwriters Assoc., 322 U.S. 533 (1944).

75. 15 U.S.C. §§ 1011–15 (2012).

76. *Warren Buffett*, WIKIPEDIA, http://en.wikipedia.org/wiki/Warren_Buffett (last visited Feb. 16, 2013).

1935 and, with a net worth of over $250 million, one of the wealthiest senators)[77] who are certainly not financially vulnerable or in need of special protection by the state at the moment.

To make matters more complicated, both the population of seniors and the needs of individual seniors are by definition fluid. As people are constantly getting older, the population of seniors is rapidly changing, expanding as people age and contracting as they pass away. Being a senior is not an immutable characteristic like gender or race. Instead, it is a state of being, which, if one lives long enough, will be achieved. This makes it less susceptible to certain kinds of protection as the vulnerable population itself is a moving target as a group. This is also true on an individual level where one day a senior may be completely capable and not in need of protection, but a few years down the road he or she may desperately need the protection of the state. This was illustrated vividly in the recent prosecution and conviction of Brooke Astor's son for grand larceny for stealing money from his wealthy, but incapacitated mother.[78] Brooke Astor, the reigning doyenne of New York society for many years, was one of the world's most admired and influential women for decades—certainly well past the age of sixty-two.[79] At a certain point, however, this dynamic, capable, and powerful woman became vulnerable because of her age. It is inherently difficult to design legislation that gives vulnerable seniors the protection they need without hamstringing seniors who need no protection at all.

All of these factors likely explain Congress's reluctance to take bolder steps to protect seniors and prevent financial abuse of the elderly.

B. Additional Steps that Should be Taken

Despite the difficulties described above, there are additional significant steps that can and should be taken, either by the states or the federal government, that would likely greatly assist in combating the scourge of senior financial abuse without having an adverse effect on financial instruments that are regularly sold. Specifically, laws or regulations should be enacted to: (1) make certain professionals, specifically doctors, financial advisors, stock brokers, and insurance salesmen mandatory reporters for elder financial abuse; (2) establish that insurance salesmen, insurance companies, stock brokers, and brokerage houses should all have the responsibilities of a fiduciary to their

77. *Herb Kohl*, WIKIPEDIA, http://en.wikipedia.org/wiki/Herb_Kohl (last visited Feb. 16, 2013).

78. *See Anthony D. Marshall*, N.Y. TIMES, Dec. 21, 2009, http://topics.nytimes.com/top/reference/timestopics/people/m/anthony_d_marshall/index.html.

79. *See Brooke Astor*, WIKIPEDIA, http://en.wikipedia.org/wiki/Brooke_Astor (last visited Feb. 16, 2013).

customers, and potential customers should have the usual private rights of action if that duty is breached; and (3) mandate that a license to sell financial products to seniors should be required. As explained below, if enacted and implemented properly, each of these approaches could curb those who might otherwise be inclined to prey on seniors whose mental capacity and sensibilities are diminished.

1. Mandatory Reporting of Potential Senior Abuse

One of the biggest obstacles to effectively combating the financial abuse of seniors is the difficulty in detecting it. As described above, 95% of senior financial abuse is never reported due, in large part, to the shame of senior victims or their inability to seek help.[80] Moreover, even the small fraction of senior financial abuse cases that are reported are brought to the attention of authorities after the crime has been committed—and, presumably in almost all cases, after the money is gone. For the financial scams, especially those involving international fraudsters, this means that the money of the senior victims are permanently gone—dealing them a financial blow from which they may never recover.

One potential solution to this severe reporting problem is to deputize sentries to keep an eye on seniors by making them mandatory reporters of potential elder financial abuse. This is already done for child abuse, with teachers, doctors and various other professionals required, by state law, to report any potential signs of child abuse to authorities.[81] The rationale for mandatory reporting of child abuse is that in many cases children are unable to understand abuse or bring it to the attention of authorities, both because of the limitations that their age imposes on their ability to independently communicate and because many times the abuser is a family member or family friend whom the child either cares about or is afraid of because of their constant proximity. The exact same concerns apply to elder abuse. Seniors suffering from cognitive impairment often cannot fully understand abuse (especially financial abuse) or bring it to the attention of authorities because of the limitations imposed by their mental state. Furthermore, even where seniors understand that they are the victim of financial abuse, they may be reluctant to report it when, as is true in many cases, the person who is

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80. *See supra* notes 23–24.

81. *See* Child Welfare Information Gateway, *Mandatory Reporters of Child Abuse and Neglect: Summary of State Laws*, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES (Apr. 2010), http://www.childwelfare.gov/systemwide/laws_policies/statutes/manda.cfm ("All States, the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands have statutes identifying persons who are required to report child maltreatment under specific circumstances.").

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victimizing them is a family member or family friend.[82]

Mandatory reporting by key sentries would help alleviate this under-reporting problem, because it would give objective, experienced people a duty to keep alert for, and report, elder financial abuse. Moreover, in addition to discovering more elder financial abuse, thus making it more likely to catch the perpetrators, mandatory reporting would also, in many cases, result in elder financial abuse being caught much earlier. In many cases this will allow the senior financial abuse to be detected before a great deal of irrevocable financial damage is caused.

The most effective sentries would be those in professions who have the most opportunity and ability to spot senior financial abuse. Two types of professionals fit this description best: (1) medical professionals who have the training and access to monitor seniors' mental health (e.g., doctors, nurses, and home health aides); and (2) financial professionals who have the training and access to monitor the financial health of seniors (e.g., bank officials, brokers, and insurers). Luckily, there are programs and laws in place that demonstrate how this mandatory reporting could work.

An article published in the *New York Times* in March of 2011 described a nascent program that uses doctors as a line of defense against senior financial fraud. Every doctor in the program receives a short, four page laminated pocket guide that lists signs of potential financial abuse, such as overly protective caregivers, changes in an ability to take medications, cognitive problems, and being fearful, distressed, or overly suspicious.[83] The packet also lists the names and websites for groups like the National Center on Elder Abuse and the National Academy of Elder Law Attorneys, as well as state securities regulators—all of which the doctors can turn to for advice or to which they can report their suspicions.[84] This program has attracted support from both NASAA and the National Adult Protective Services Association (a group for social workers who handle abuse cases)—and for good reason, as it shows signs of being highly effective.[85] One hundred and thirty doctors in Texas participated in the pilot program and they found that 55% of their patients "displayed signs of financial vulnerability and needed a follow-up by other professionals."[86] While this does not mean that those 55% of patients were being victimized or

82. *See* Crary, *supra* note 30 ("A federally funded study conducted for the National Institute of Justice in 2009 concluded that 5 percent of Americans 60 and older had been the victim of recent financial exploitation by a family member, while 6.5 percent were the target of a nonfamily member.").

83. Olson, *supra* note 13.

84. *Id.*

85. *Id.*

86. *Id.*

in danger of being victimized, it does identify as them as being potentially at risk for senior financial abuse—an incredibly valuable piece of information that could give regulators and other senior-protectors a head start in preventing senior financial abuse even before it occurs.

In the first instance, this pilot program should be expanded to all doctors—especially those doctors who specialize in treating seniors. Moreover, there is no reason why nurses and home health aides should not also be recruited to help. In a slide presentation, Dr. Robert E. Roush and Dr. Aanand Naik explained in a number of simple steps how a health professional can diagnose vulnerability to senior financial abuse.[87] Specifically, they put together a checklist of situations associated with high risk—namely social isolation, bereavement, dependence on another to provide care, being financially responsible for another adult, child, or spouse, alcohol or drug abuse, depression, and mental illness.[88] They also provided examples of red flags from clinical observations: changes in ability to perform activities of daily living, including self-care, daily finances, and medication management; a sense of being fearful or distressed; becoming suspicious or delusional; the development of cognitive problems; being accompanied by an overly protective caregiver who dominates the patient–client; and changes in appearance, including poor hygiene.[89] These are all signs that are easily observable by members of the medical community and, because members of the medical community are generally already mandatory reporters of child abuse,[90] they are already familiar with this type of reporting responsibility. Considering the fact that most seniors must regularly visit medical professionals, this makes health care providers ideally suited to keep watch for signs of senior financial abuse.

Financial professionals like bank officials, brokers, and insurance representatives are also particularly well-suited to detect senior financial abuse for two reasons. First, they generally monitor the senior's financial assets. For instance, a bank official would notice if large checks were suddenly being written to individuals, a broker would be aware if a senior suddenly started liquidating stocks or bonds and withdrawing money, and an insurance representative would know if a senior wanted to change a beneficiary on a policy or take money out of a

87. ROBERT E. ROUSH & AANAND NAIK, PREVENTING ELDER INVESTMENT FRAUD: ASSESSING FOR VULNERABILITY TO FINANCIAL EXPLOITATION, *available at* http://www.americangeriatrics.org/files/documents/annual_meeting/2012/handouts/thursday/R0730-5305_Robert_E._Roush.pdf).

88. *Id.*

89. *Id.*

90. *See, e.g.*, Child Welfare Information Gateway, *supra* note 81.

policy's cash value. This means that financial professionals would be the first to see signs of senior financial abuse. Second, most people are very reluctant to discuss their finances with anyone—financial professionals are one of the few exceptions to this rule, so they are most likely to have a sense of the senior's financial history and to be comfortable speaking with a senior about any changes they have noticed. Together, these factors mean that financial professionals have a very favorable vantage point from which to keep protective watch over seniors' finances.

As with the reporting by medical professionals described above, there is also a model that can be adapted and should be adopted widely. Specifically, California's SB 1018, the Financial Abuse Reporting Act, took effect on January 1, 2007.[91] California's Financial Abuse Reporting Act requires employees of banks and credit unions who suspect financial elder abuse to report their suspicions to adult protective services or law enforcement. It also requires bank tellers to undergo training to assist them in identifying elder abuse and navigating the reporting process. The Financial Abuse Reporting Act can and should be used as a model. It defines "suspected financial abuse" as when a bank employee observes behavior or transactions that would lead a person with similar training to form a reasonable belief that an elder is the victim of financial abuse, and it gives legal protection to those bank employees to report abuse.[92] There are also enforcement mechanisms. Under the Financial Abuse Reporting Act, employees have to report suspected financial abuse by telephone immediately, or as soon as possible, and file a written report within two working days with the local adult protective services or law enforcement agency. Failure to report an incident means that the bank is subject to a fine of up to $5,000.

This scheme, broadened to include the rest the country and other financial professionals like brokers and insurance agents, would have an enormously positive impact on preventing and stopping elder financial abuse. After all, the objective of the perpetrators of elder financial abuse is to take the financial assets of seniors. As the repository of those financial assets, financial institutions can play a hugely beneficial role in safeguarding them and preventing them from falling into the wrong hands. This would also benefit the financial institutions themselves as it would preserve these assets and keep them (and the fees they generate) with the financial institutions and out of the hands of fraudsters.

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91. *See* BRIAN H. FANT, THE CIVIL LITIGATION RESPONSE TO FINANCIAL EXPLOITATION, *available at* http://www.brianfantlaw.com/articles/FINANCIAL-EXPLOITATION.pdf.

92. *Id.* *See also* 2005 CAL. STAT. 94 (2005–2006), *available at* http://www.leginfo.ca.gov/pub/05-06/bill/sen/sb_1001-1050/sb_1018_bill_20050829_chaptered.pdf.

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2. Treating Financial Professionals as Their Senior Customers' Fiduciaries

As discussed above, apart from outright fraud and theft, one of the biggest financial issues facing seniors is the sale of unsuitable financial products to seniors. While the discussion above focused on the sale of certain life insurance products like long-term deferred annuities, which generate high commissions but are generally inappropriate for seniors, there are doubtless numerous practices—like selling risky stocks to those on fixed incomes, churning securities frequently to generating commissions, or engaging in currency, derivatives, or options speculation on behalf of a senior who do does understand the activity or the risk—which are commonly engaged in, but are clearly inappropriate for the senior client.

There are a couple of potential avenues that can be used to cut off this problem or at least minimize its harm. One avenue would be to ban the sale of certain financial products to seniors. This approach is problematic, however, because it is simultaneously too broad and too narrow. It is too broad because it restricts seniors from financial products which may, in certain rare circumstances, be appropriate for them. It also infantilizes competent seniors by taking away the ability to choose certain financial products. If seniors on a fixed income want to take crazy risks by option-trading, they should be able to do so—so long as they are mentally competent and fully understand the risks. It is also too narrow because there are countless amounts of financial products out there, and more that are created every day. Banning one kind of financial product for sale to seniors would likely result in the creation of a slightly different product, with similar benefit to the broker or insurer. This would result in similar deleterious effects on seniors that the regulator or government has not had a chance to regulate yet. It is nearly impossible for regulators to keep current with, much less ahead of, financial product innovation. For both of these reasons, the ban of specific products for sale to seniors would be, at best, suboptimal.

A better way to attack this problem is at its source. A major reason these unscrupulous practices and those like them exist is a culture among financial institutions that does not respect customers. For instance, a recent *New York Times* editorial revealed that Goldman Sachs employees commonly referred to their institutional clients as "muppets."[93] One way to change that culture is to change the law. Unlike directors and executives at public companies who owe a

93. Greg Smith, *Why I Am Leaving Goldman Sachs*, N.Y. TIMES, Mar. 14, 2012, http://www.nytimes.com/2012/03/14/opinion/why-i-am-leaving-goldman-sachs.html?_r=2&pagewanted=all.

Reiser and Eisenkraft: Dodd-Frank's Protections for Senior Citizens: An Important, Yet I

fiduciary duty to their shareholders and companies, insurance agents and brokers[94] do not owe a fiduciary duty to their customers.[95] This is true even though all the characteristics of the relationship between a customer and a broker or insurer—e.g., a relationship characterized by asymmetric knowledge and expertise where the customer is relying on the other party for advice—are typical of client relationships where a fiduciary duty or its equivalent exists. Imposing a fiduciary relationship on brokers or insurers would make them duty-bound to look after the interests of their client. Thus, brokers or insurers would be prohibited by their fiduciary duty from suggesting or pushing inappropriate financial products on seniors.

This would be a much more flexible and effective solution than banning specific financial products. It would not suffer from the problem of being overly broad described above because it would allow brokers/insurers to recommend whatever products work for a particular senior's goals and risk tolerances. Similarly, if a senior of sound mind wanted to take risks that his or her broker/insurer recommended against, he or she could do so. A fiduciary duty would not restrict the senior in any way; it would simply insure that he or she were getting advice that looked after their own interests.

A fiduciary duty would also avoid the narrowness problem described above because it would cover all financial products and practices. In other words, a broker/insurer would be tasked with analyzing each product pitched to a senior and make sure that it made financial sense for that senior, or that the broker/insurer would handle his affairs similarly if in a comparable situation. This is something that people likely assume brokers/insurers already do, but in fact they are not required to by law. Establishing a fiduciary duty would fix that issue.

Enforcing and policing compliance with this fiduciary duty is simple—customers could sue brokers or insurers if they believe they breached their fiduciary duty to them. The law on fiduciary duty is long-standing and courts are familiar with analyzing the issue. It should be relatively simple to apply these long-standing common law principles to a new profession—especially one which has the characteristics of

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94. As required by Dodd–Frank, on Jan. 21, 2011 the SEC came out with the results of a study and recommended that brokers be required to have the same fiduciary duty to their clients as investment advisors. U.S. SEC. AND EXCH. COMM'N, STUDY ON INVESTMENT ADVISERS AND BROKER–DEALERS (Jan. 2011), *available at* http://www.sec.gov/news/studies/2011/913studyfinal.pdf. This recommendation has not been followed.

95. Most people are misinformed about this. *See* Alexis Leondis, *'Clueless' U.S. Investors Believe Brokers Have Fiduciary Duty, Survey Says*, BLOOMBERG, Sept. 15, 2010, http://www.bloomberg.com/news/2010-09-15/-clueless-u-s-investors-believe-brokers-have-fiduciary-duty-survey-says.html ("Sixty percent of respondents said they thought insurance agents had to uphold a fiduciary duty, which isn't true.").

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asymmetrical information and trust which usually accompany duties of this sort.

A third, narrower approach, is to create a specific civil cause of action for senior financial abuse. California is one state that has already gone down this path. California's Elder Abuse and Civil Protection Act provides a specific cause of action for financial exploitation of any resident sixty-five years or older or a person between the ages of eighteen and sixty-four with diminished capacity[96] "when a person takes, secretes, appropriates, obtains or retains real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud or both."[97] California also imposes additional penalties in civil cases where "senior citizens" or disabled persons are damaged by "deceptive acts or practices or unfair methods of competition."[98] Specifically, plaintiffs can be awarded treble damages if "the defendant knew or should have known that his or her conduct was directed to one or more senior citizens or disabled persons."[99]

California's approach, while helpful, is limited. First, it would not apply to the sale of inappropriate financial products to seniors, which is an enormous problem. Second, many of the conducts targeted by the California law are already common law torts (e.g., fraud, conversion, etc.), meaning that the California law applies increased scrutiny and penalties where the tort involves seniors, but does not make action that is currently permissible (e.g., selling inappropriate financial products to seniors) impermissible. It also does nothing to change the culture at insurers and brokerage houses. For all these reasons, the second approach, imposing a general fiduciary duty on brokers and insurers, would be the most efficacious.

3. Requiring a License to Sell Products to Seniors

This third solution is meant to solve the problem of ignorance. As discussed above, knowledge of seniors and their potentially special needs is neither generally taught in school, nor is it part of a Series Seven exam, a bar exam, or any other general professional licensing requirement. This is foolish because, as discussed above, there are numerous facts about seniors and tips about spotting senior financial abuse which are easy to understand and apply. That is why there should be a licensing exam to sell financial products or give financial advice to seniors. If a broker or insurance salesman wants to ply his or her trade

96. *See* CAL. WELF. & INST. CODE § 15610.30–.65.

97. *See* CAL. WELF. & INST. CODE § 15610.30.

98. FANT, *supra* note 91 (citing 2009 CAL. CIV. § 3345).

99. 2009 CAL. CIV. § 3345(b)(1) (2012).

among seniors, he or she should have to spend three to five hours learning about seniors, senior financial abuse, and signs of cognitive impairment, and pass a short test measuring what he or she learned. A criminal background check would also be required. After passing the test and the background check, a broker or insurance employee would be issued a license that he or she would be entitled to display. Additionally, brokers and insurance employees would be allowed to say that they are certified on their business cards and in advertisements.

The requirement should not be particularly onerous, but even this minimal knowledge will assist brokers and insurance salesmen in understanding the needs of their senior customers and, perhaps as importantly, make them much more effective reporters and legitimate financial advisors. Just as everyone looks for board-certified physicians, it would become an easily recognizable sign of legitimacy. Faking a certification, of course, would be a crime.

IV. CONCLUSION

Senior financial abuse is a problem that does, or will, affect all of us. We may be the victim, the victim could be a relative or a friend, or we could simply just feel the effect, through higher taxes or fees at financial institutions, of the billions of dollars lost to senior financial abuse every year. Dodd–Frank recognizes that problem, but the solutions it offers, while useful, are too small to stop or even retard the growth of a problem of this magnitude. We need to do more; we need to transform the relationship between financial service providers and their customers from wary antagonism to trusted, well-trained protectors and guardians. The three reforms suggested above should contribute significantly to bring that about—and they also enlist the medical profession, a set of trained eyes, to help see signs of trouble. It does not matter from where these reforms emanate. They could come from the federal governments, the states, or even perhaps the codes of conduct of professional organizations, but they should be enacted.

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