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VIA EMAIL
Ms. Vanessa Countryman, Secretary
Securities and Exchange Commission
100 F. Street, N.E.
Washington, D.C. 20549-1090

Re: File Number 4-749, Release No. 2019-134, SEC Retail Strategy Task Force to Host Roundtable on Combating Elder Investment Fraud

Dear Ms. Countryman,

I am submitting the following comment, in conjunction with my Fraud & Consumer Protection Division,[1] in response to Release No. 2019-134, entitled SEC Retail Strategy Task Force to Host Roundtable on Combating Elder Investor Fraud. My office is intensely focused on efforts to combat the financial exploitation of seniors and I recently joined the National Association of Attorneys General Elder Justice Committee. I appreciate the opportunity to offer my comment in advance of the roundtable.

[1] The Delaware Department of Justice's Fraud & Consumer Protection Division encompasses four units, all of which are combatting elder fraud and abuse. Our Consumer Protection Unit handles criminal cases of elder exploitation, investigates and responds to consumer fraud targeting seniors, and houses our Senior Protection Initiative, which focuses on outreach events to educate consumers about fraud and scams targeted at seniors and serves as the connector of state agencies that service older Delawareans. Our Investor Protection Unit passed legislation in 2018 intended to prevent financial exploitation of senior and vulnerable adults by requiring certain financial professionals to report to the Unit when it believes a senior is being or has been exploited, and also permits firms to delay a disbursement under certain circumstances. Our Medicaid Fraud Control Unit investigates and prosecutes resident abuse, neglect, mistreatment, financial exploitation and medication diversion occurring in statewide facilities accepting Medicaid, in addition to providing outreach to the facilities by educating staff about resident abuse and statutory reporting requirements. Our newly formed White Collar Crimes Unit will criminally prosecute elder exploitation and currently has a large criminal racketeering prosecution predicated on a home improvement fraud scheme targeting older adults.

Senior financial exploitation is the "the illegal or improper use of an older adult's funds, property or assets."[2] Though actual total loss is hard to determine for many reasons, estimated financial loss to older adults due to exploitation is anywhere from $2.9 billion to $36.5 billion annually.[3] Our experience as the chief law enforcement entity in Delaware indicates that seniors are exploited by family members and caregivers, through affinity fraud, and by scam artists who target them over the phone, through the mail, and via the internet. Alarmingly, we are seeing an increasing number of seniors serving as unwitting money mules; being duped into depleting their retirement savings and then further roped in to serving as conduits of ill-gotten gains. Too many elder Delawareans continue to fall victim to sweetheart and romance scams perpetrated on social media and to the grandparent scam conducted over the phone.

Our office is often on the front lines when a financial institution or family member reports the exploitation of an older adult. But we need help. Financial institutions are well positioned to prevent, report, and respond to financial exploitation of seniors. Accordingly, several states have implemented "report and hold" laws to provide a means for investment professionals and financial institutions to report suspected financial exploitation of older and vulnerable investors to government agencies, and to allow institutions and securities regulators to place a hold on transactions when exploitation of a senior is suspected.[4] While the implementation of such laws has resulted in a significant increase in the reporting of suspected exploitation of senior investors at the state level, efforts to investigate such matters are often frustrated by the state's limited resources combined with a failure to coordinate efficiently at the interstate and federal level.

This comment letter identifies several challenges facing the states in our efforts to combat the financial exploitation of seniors. There are a number of gaps in our law enforcement arsenal that need to be addressed in order for us to most effectively and efficiently prevent and redress the financial exploitation of seniors.

1. States Need Access to Federal Tools and a Partnership with Federal Agencies to Effectively Combat Exploitation at the State Level

Law enforcement agencies at both the state and federal level are often overwhelmed with reports of senior financial exploitation and need to make difficult choices in determining which matters to investigate and prosecute. One metric frequently considered in determining whether to

[2] Stephen Deane, *Elder Financial Exploitation - Why it is a concern, what regulators are doing about it, and looking ahead*, U.S. Securities and Exchange Commission Office of the Investor Advocate, June 2018, available at https://www.sec.gov/files/elder-financial-exploitation.pdf (last visited September 10, 2019).

[3] *Suspicious Activity Reports on Elder Financial Exploitation: Issues and Trends*; Consumer Financial Protection Bureau, Office of Financial Protection for Older Americans (February 2019), available at https://files.consumerfinance.gov/f/documents/cfpb_suspicious-activity-reports-elder-financial-exploitation_report.pdf (last visited September 10, 2019) (hereinafter "*Suspicious Activity Reports*"). "Estimates vary significantly, largely due to definitional and methodological differences." *Id*. at p. 8 n. 6, citations omitted.

[4] *See*, *e.g.*, 6 Del. C. §73-307, 31 Del. C. § 3910.

pursue a matter is the amount of money at issue. Federal agencies may have a monetary threshold that far exceeds the amount at stake in many senior exploitation cases, even though the monetary loss significantly impacts the quality of life of the older victim who has been defrauded. The federal government also has direct access to law enforcement tools that can be integral to identifying wrongdoers and tracking money that has been transferred overseas. State law enforcement agencies tend to have lower monetary thresholds to investigate and prosecute matters, but may have limited access to the tools available to federal agencies. This lack of parity too often allows elder victims who have lost smaller dollar amounts to fall through the cracks. A partnership between state and federal authorities that allows for the efficient sharing of resources can increase the number of state-level elder fraud prosecutions.

One important tool available to combat senior financial exploitation is the suspicious activity report ("SAR"). The Bank Secrecy Act requires a financial institution to file a SAR when the institution detects a known or suspected violation of federal law meeting certain reporting criteria, including the dollar amount threshold. [5] These reports can be useful in identifying trends, locating bad actors, linking seemingly disparate crimes, and increasing prosecutions.[6] SAR filings on senior financial exploitation quadrupled from 2013 to 2017, with 63,500 such SARs filed in 2017.[7] Yet, less than one-third of SARs reporting senior financial exploitation "specify that filers reported the activity to adult protective services, law enforcement, or other authorities."[8]

SARs are filed with the U.S. Department of the Treasury's Financial Crimes Enforcement Network ("FinCEN") and are accessible by FinCEN, bank supervisory agencies, and some law enforcement via secure database. However, many state law enforcement agencies do not have direct access to the SAR database. FinCEN permits those law enforcement agencies to make requests for SARs and other Bank Secrecy Act information. The turnaround time for such requests varies but can be quite lengthy, hindering state law enforcement from moving their investigations along. Law enforcement agencies without direct access to the SAR database may obtain SARs through a state point of contact. However, this does not permit access to SARs with the ease and efficiency necessary to most effectively combat senior financial exploitation when time is of the essence. While the process to access reports indirectly may differ from agency to agency, for our office to obtain a SAR, we must make a written request to a police agency, which in turn may take several days to respond. This process creates delays during which fraudulently obtained funds can change hands, perhaps a number of times, or be sent overseas, thus becoming exceedingly difficult to track and nearly impossible to recover. Lack of direct access to SARs also inhibits state law

[5] 31 CFR § 103.18. FDIC Rules and Regulations (12 CFR § 353) set forth SAR filing requirements for state chartered nonmember banks.

[6] "SARs play a critical role in exposing the financial links to illicit activities, on both a case-by-case and industrywide basis." *Id*. *See also Suspicious Activity Reports*, p. 5 ("[U]se of SARs by law enforcement can trigger new investigations, enhance ongoing inquiries, and increase prosecutions").

[7] "Financial Institutions Report Widespread Elder Financial Abuse," Naomi Karp and Hector Ortiz, Consumer Financial Protection Bureau, Feb. 27, 2019, available at https://www.consumerfinance.gov/about-us/blog/financial-institutions-report-widespread-elder-financial-abuse/

[8] *Suspicious Activity Reports*, p. 6.

enforcement from possibly identifying patterns that may link multiple victims to a single wrongdoer or crime ring, or provide other useful information to prevent and redress financial exploitation of seniors. Allowing state law enforcement direct access to SARs, or setting up a means of timely providing SARs to state law enforcement when investigating financial crimes, is the type of coordination that is imperative if states are to successfully combat senior financial exploitation in matters where the monetary threshold is insufficient for a federal agency to pursue the case on its own.[9]

2. Financial Institutions Need to Increase Efforts to Identify and Report Fraud

Financial institutions are critical partners in the fight against elder exploitation. The financial institution is part of the crime scene and is uniquely positioned to maintain a record for their clients, many of whom are not able to do so on their own, detailing the circumstances surrounding interaction with the financial institution, the day and time of deposits and withdrawals, and details regarding any statements made by victims regarding specific transactions. A victim's interaction with a financial institution may be the first or only record of critical evidence of financial exploitation.

While financial institutions are more frequently filing SARs regarding senior financial exploitation, they may not be reporting the potentially criminal conduct to law enforcement or social service agencies.[10] Appropriate reporting by the financial institution is critical for a number of reasons. First, it furthers the goal of connecting the potential victim with needed resources, including social services and Adult Protective Services. Secondly, early intervention through reporting can prevent an older adult from losing an entire life's savings. Accounts are typically not depleted all at once, but rather are drained over the course of time through multiple transactions. Early intervention by law enforcement and social service agencies can thus minimize the monetary loss to the victim. Finally, appropriate reporting increases law enforcement's ability to investigate and prosecute criminal activity. Law enforcement must prove both intent and victim state of mind *beyond a reasonable doubt*, a challenging standard that can make prosecution difficult. When financial institutions report *every* suspected incident, they help build a record that might otherwise not exist, which can serve as an important law enforcement tool and increase the likelihood of successful prosecution. It is also critical that financial institutions recognize a consumer's atypical spending patterns and address it directly with the consumer and, if circumstances dictate, the consumer's trusted contact. Detailed notes should be made in the consumer's account history, including observations by financial institution staff as to the potential victim's state of mind, appearance, and surrounding circumstances, such as who accompanied the potential victim to the financial institution.

Moreover, financial institutions are required to file SARs when activity exceeds a certain monetary threshold, but the institution may file SARs voluntarily if a transaction is below the

[9] Representatives of the Delaware Department of Justice have requested access to SARs and training on the appropriate use of SARs and the SARs database; that request has been denied.
[10] *Suspicious Activity Reports*, p. 5.

threshold.[11] This is an opportunity to open new investigations, identify wrongdoers, and prevent further loss to victims. Financial institutions should, as a matter of policy, be required to file such reports when illegal or exploitative activity is suspected, regardless of whether the incident meets the monetary threshold.

3. Financial Institutions Must Help Law Enforcement Identify Money Mules

Increasingly, law enforcement is identifying individuals serving as money mules to funnel funds overseas without detection. A money mule is someone who knowingly or unknowingly transfers illegally acquired money on behalf of or at the direction of another.[12] Law enforcement agencies around the country are finding citizens, many of whom are older, that may think they have legitimate at-home businesses when in fact they are being exploited as money mules as part of a larger scheme. Since October 2018, the United States Department of Justice and its law enforcement partners across the country have taken targeted actions to disrupt, investigate, and prosecute money mule activity.[13] In just one month, federal and state law enforcement took action to halt over 400 money mules spanning over 65 federal districts.[14]

Financial Institutions can help law enforcement identify money mules by looking for new accounts opened by customers with deposits and withdrawals that are not typical of the customer's behavior. Financial institutions should frequently be able to spot atypical behavior through proper implementation of the USA PATRIOT Act's Know Your Customer ("KYC") requirements.[15] Implementation of KYC guidelines should form a baseline for performing customer due diligence; financial institutions should supplement these efforts with internal assessments for each customer's profile. Law enforcement is not in a position to know that an account is being misused until the financial institution reports suspicious activity; as such, financial institutions need to serve as an early warning system by reporting promptly upon noting atypical or suspect behavior.

4. A Coordinated Response Will Increase the Likelihood of Prosecution and Recovery

The reality of senior financial exploitation investigations is that money crosses state and international borders far more easily than we as enforcers do. One challenge state and federal law

[11] *See, e.g.*, FinCEN Advisory No. FIN-2016-A005, Advisory to Financial Institutions on Cyber-Events and Cyber-Enabled Crime, Oct. 25, 2016, available at https://us.eversheds-sutherland.com/portalresource/CyberThreatsAdvisory-FINAL508_2.pdf ("FinCEN encourages, but does not require, financial institutions to report egregious, significant, or damaging cyber-events and cyber-enabled crime when such events and crime do not otherwise require the filing of a SAR").
[12] Federal Bureau of Investigation, Money Laundering, Forfeiture and Bank Fraud Unit, MONEY MULE AWARENESS, 1 (July 2019).
[13] Press Release, Department of Justice, Money Mule Initiative Fact Sheet (Nov. 14, 2018).
[14] *Id.*
[15] Financial institutions "shall establish appropriate, specific, and, where necessary, enhanced, due diligence policies, procedures, and controls that are reasonably designed to detect and report instances of money laundering through those accounts." Section 312(a) (i) (1) of the USA PATRIOT Act, Public Law 107-56.

enforcement faces is identifying (and ultimately proving) when a money mule knows he or she is part of an illicit scheme and when a money mule is an unknowing actor and potential victim. As law enforcement successfully identifies money mules, state and federal authorities should be issuing money mule letters putting the money mule on notice that his or her actions are a part of an illicit enterprise. The idea is that unknowing money mules either will stop participating in the fraud scheme or be held accountable for their role. For the knowing money mule, the issuance of the money mule letter is valuable evidence of intent in a criminal prosecution. A coordinated law enforcement response is necessary to increase the likelihood of monetary recovery, as well as to monitor compliance with money mule letters. Law enforcement agencies are organized differently from state to state and locality to locality, presenting a unique communication challenge. Some states have district attorneys responsible for senior financial exploitation prosecutions, while other states empower their attorneys general to handle such matters. There is no one organizing entity that various jurisdictions can contact to make necessary referrals expeditiously. A victim's money can be transferred quickly; law enforcement is less likely to successfully follow (and recover) the money in the absence of swift coordination with appropriate partners.

Conclusion

It is critical that federal authorities facilitate and support efforts to investigate and prosecute senior financial exploitation at the state and local level. There is also a need for strong and diverse interventions by financial institutions, which must take steps to identify attempted exploitation before a transaction occurs and to report suspicions to the appropriate law enforcement agencies. A coordinated approach, and cooperation between financial institutions and law enforcement at both the state and federal levels, would be a significant step toward providing much needed protection for senior investors and other adults vulnerable to financial exploitation.

Members of my team will be attending the roundtable on October 3—Jillian Lazar, Director of Investor Protection and Gina Schoenberg, Assistant Director of Consumer Protection and Chair of my Senior Protection Initiative. My staff remains ready, willing, and able to work with you on these or any other initiatives to coordinate our collective response to the scourge of elder exploitation affecting our seniors. Please contact Ms. Lazar [redacted]; [redacted]) or Ms. Schoenberg ([redacted]; [redacted]) with any questions. Thank you for your tremendously important efforts to protect older Americans against financial exploitation.

Respectfully submitted,

Kathleen Jennings

Kathleen Jennings
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