

## DECEPTION, DECISIONS, AND INVESTOR EDUCATION

Jayne W. Barnard

*Tens of millions of dollars each year are spent on investor education. Because older adults (those aged sixty and older) are disproportionately victims of investment fraud schemes, many educational programs are targeted at them. In this Article, Professor Barnard questions the effectiveness of these programs. Drawing on recent studies from marketing scholars, neurobiologists, social psychologists, and behavioral economists examining the ways in which older adults process information and make decisions, she offers a model of fraud victimization (the “deception/decision cycle”) that explains why older adults are often vulnerable to investment fraud schemes. She then suggests that many of the factors that contribute to fraud victimization are unlikely to be influenced by fraud prevention education. She also recommends alternative uses for the money now spent on fraud prevention education that would better achieve the goal of protecting older investors.*

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Professor Jayne Barnard is the Cutler Professor of Law and the Kelly Professor for Teaching Excellence at William & Mary Law School. She specializes in the fields of corporations, white collar crime, and securities regulation. Prior to joining the faculty at William & Mary, Professor Barnard was a partner at the Chicago office of Jenner & Block. Professor Barnard currently serves on the National Adjudicatory Council of the Financial Industry Regulatory Authority (FINRA), and is a member of the American Law Institute.

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### I. Introduction

Fraud schemes aimed at elderly investors are a commonplace American tragedy. Year after year, and in state after state, clever con artists extract hundreds of millions of dollars from old people by enticing them into fraudulent investment schemes.

Some of these investors are victims of traditional brokers or investment advisers who churn their accounts or misappropriate their funds.<sup>1</sup> This Article, however, focuses on different types of schemes: high-pressure telemarketing campaigns, “free lunch” seminars, Web sites promoting illusory securities, sales of products deliberately designed to look like they are *not* securities but instead are charitable contributions or probate-avoidance devices, and other inventive narrative structures that are created for the sole purpose of separating investors from their money.<sup>2</sup>

For years, the Securities and Exchange Commission (SEC) has made these types of schemes a focus of its enforcement efforts. Indeed, pursuit of “small-time” Ponzi schemers is alleged to have diverted the SEC enforcement staff from investigating some of the larg-

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1. *See, e.g.*, SEC v. Gross, SEC Litig. Release No. 20732, 2008 SEC LEXIS 2116 (Sept. 22, 2008) (claiming defendant collected \$700,000 in commissions and fees while his elderly customers suffered more than \$2.7 million in losses); SEC v. Dawson, SEC Litig. Release No. 20321, 2007 SEC LEXIS 2334 (Oct. 2, 2007) (detailing allegations that investment advisers had misappropriated more than \$2 million of clients' funds); SEC v. Ucherek, SEC Litig. Release No. 17618, 2002 SEC LEXIS 1816 (July 16, 2002) (detailing allegations that a broker had misappropriated \$3 million from his elderly clients by selling fictitious investments and pocketing the proceeds).

2. *See infra* Part II.

er, systemic problems in the mortgage-backed securities market, the banking industry generally, credit default swaps, the insurance industry, and credit rating agencies.

Alongside its enforcement initiatives, the SEC has allocated significant resources to the task of fraud prevention education, frequently focusing specifically on schemes aimed at elderly investors.<sup>3</sup> Dozens of other organizations have joined in this effort, including state regulators and brokerage firms. Though the financial details of these programs are not easily available, I estimate that these groups collectively spend at least \$10 million annually to fund fraud prevention education aimed at older adults.<sup>4</sup>

This Article asks whether that money is well-spent. Is an educational message, even a well-designed educational message, likely to insulate elderly investors from becoming fraud victims? Or do elderly investors exhibit certain characteristics that inhibit their ability to absorb the educational message? I suggest that several characteristics of older adults, including cognitive deficits, impulsiveness in decision making, a “truth bias” causing them to believe what they are told by someone who appears to be authoritative, a longing for intimacy, and an irrational but powerful excitation at the thought of ending up poor and dependent on their children frustrate the good intentions of fraud prevention education. By drawing together recent research into the decision-making styles of older adults, we can see why (1) they are

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3. See U.S. Securities and Exchange Commission, For Seniors, <http://www.sec.gov/investor/seniors.shtml> (last visited Nov. 11, 2009); see also *Protecting Senior Citizens from Investment Fraud: Hearing Before S. Spec. Comm. on Aging*, 110th Cong. 9 (2007) [hereinafter *Protecting Senior Citizens*] (statement of Christopher Cox, Chairman, Securities and Exchange Commission) (noting that more than 50,000 seniors have attended fraud prevention programs sponsored by the SEC).

4. One of the primary sources of fraud prevention education is the large brokerage firms that were party to the settlement with New York Attorney General Eliot Spitzer and the SEC in 2003. Under the terms of that settlement, more than \$80 million was earmarked by the brokerage firms for investor education. See Press Release, SEC, Ten of Nation’s Top Investment Firms Settle Enforcement Actions Involving Conflicts of Interest Between Research and Investment Banking, Apr. 28, 2003, <http://www.sec.gov/news/press/2003-54.htm>. According to the SEC, \$52.5 million of this amount was to be put into an Investor Education Fund that “will develop and support programs designed to equip investors with the knowledge and skills necessary to make informed decisions.” *Id.* The remaining \$27.5 million “will be paid to state securities regulators and will be used by them for investor education purposes.” *Id.*

disproportionately victims of fraud and (2) educational messages aimed at older adults are likely to fail.

This diagnosis rests on a wide range of research into the act of making decisions, including investment decisions. We now know quite a bit about the ways in which older adults process information and how they respond to promotional messages. We also are beginning to understand that many older adults, other cognitive deficits aside, may lose their capacity to appreciate risk. We also have identified some of the social factors that may influence “scamming vulnerability.”

Several threads of scholarship, such as marketing studies, neuroscience studies, and psychological studies of fraud victims, together with studies in finance and behavioral economics may help answer the question, “Can elderly investors be educated to avoid securities fraud, or is their intellectual understanding of the risk of fraud likely to be overtaken by other impulses?” In examining this question and proposing an answer, I will expand upon the existing literature by introducing what I call the “deception/decision cycle.” This construct illustrates the many factors that can lead to older investors’ victimization.

This Article will unfold as follows: In Part II, I will sketch out what we know about fraud schemes aimed at older investors, largely to emphasize the kinds of sales techniques and message strategies that have been successful with this population. In Part III, I will examine recent scholarship about information processing by older adults and studies concerning their receptivity to specific types of marketing messages. These studies suggest a strong neurobiological component, as well as a psychosocial component, in the making of consumer and investment decisions.

In Part IV, I will turn to the question of investment risk. It is well understood that people’s risk tolerance declines with age. Risk tolerance, however, is as much a factor of wealth as of age. That is, some older adults, especially those with discretionary funds, may affirmatively embrace risk. Unlike some fraud victims who may fail to recognize the risk that they are taking, victims with an appetite for

risk may see their aggressive investment choices as part of their “character” or as a mark of their manhood.<sup>5</sup>

Part V will consider additional influences that may cause an older adult to respond to sales claims promising implausible investment returns. These influences include grandiosity, greed, pride, and a desire to please others. Still other influences, from diet to mood, also contribute to older investors’ scamming vulnerability.

Part VI will consider the content of current fraud prevention education efforts. It will offer both some obvious and less obvious criticisms of these efforts. The fact is, much of today’s fraud prevention education may totally miss its mark. Part VII recommends some alternative strategies that might better advance the objective of fraud prevention, especially among older adults.

## II. Schemers and Their Victims

Con artists are endlessly imaginative when it comes to crafting securities fraud schemes. They invoke current buzzwords,<sup>6</sup> offer compelling wealth scenarios,<sup>7</sup> present their products as “guaranteed”

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5. The word choice here is deliberate. Securities fraud victims are far more frequently men than women. See *infra* note 106 and accompanying text.

6. See, e.g., SEC v. Homeland Safety Int’l, Inc., SEC Litig. Release 20645, 2008 SEC LEXIS 1626 (July 15, 2008) (detailing allegations that the defendants had promoted stock in a company whose product, a hand-held bomb detector, was described as “a critical breakthrough in the global war against terrorism”); SEC v. Gibbs, SEC Litig. Release No. 20503, 2008 SEC LEXIS 630 (Mar. 19, 2008) (detailing allegations that the defendant had raised \$21 million in a scheme premised on the assertion that he was an experienced currency trader who would pool investors’ funds and trade on the Foreign Exchange Market (Forex)).

7. See, e.g., SEC v. Gibbs, SEC Litig. Release No. 20503, 2008 SEC LEXIS 630 (Mar. 19, 2008) (detailing allegations that the defendant had raised \$21 million by selling interests in a currency trading fund promising to pay investors interest of 3–5% per month (up to 60% annually)); *In re Nadel*, Exchange Act Release No. 57123, 2008 SEC LEXIS 51 (Jan. 10, 2008) (detailing allegations that the defendant had raised \$15 million through the sale of “promissory notes” with returns ranging from 10% to 75% annually); SEC v. Secure Inv. Servs., Inc., SEC Litig. Release No. 20255, 2007 SEC LEXIS 1897 (Aug. 24, 2007) (detailing allegations that the defendant had raised \$25 million by selling “safe, secure, and profitable” interests in life insurance policies with potential annual returns of up to 125%); SEC v. Credit First Fund, L.P., SEC Litig. Release No. 19952, 2006 SEC LEXIS 3011 (Dec. 20, 2006) (detailing allegations that the defendant had sold securities promising a monthly return of 1–3%); *United States v. Reeder*, SEC Litig. Release No. 18933, 2004 SEC LEXIS 2389 (Oct. 15, 2004) (noting that the defendant had pleaded guilty to orchestrating a Ponzi scheme that raised over \$16 million by promising 120% annual returns).

or “can’t lose” propositions,<sup>8</sup> and befuddle their victims by using fancy “finance speak.”<sup>9</sup> Most fraud schemes offer promises of quick riches. Many of them are classic Ponzi schemes.<sup>10</sup> Investors of any age can succumb to dreams of easy money.<sup>11</sup> Investors over age sixty disproportionately do so.<sup>12</sup>

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8. See, e.g., SEC v. Rennie, SEC Litig. Release No. 20865, 2009 SEC LEXIS 166 (Jan. 23, 2009) (detailing how the defendant raised at least \$2 million through the sale of “risk free federal housing certificates” that paid up to 12% per year, tax free); People v. Heath, SEC Litig. Release No. 20753, 2008 SEC LEXIS 2155 (Sept. 29, 2008) (noting that the defendant was convicted in state court for a scheme that raised \$187 million through the sale of “secured” notes that paid a “guaranteed” return); SEC v. IDPM Group, Inc., SEC Litig. Release No. 20354, 2007 SEC LEXIS 2533 (Oct. 31, 2007) (noting that the defendants were alleged to have raised \$3.6 million through the sale of certificates of deposit described as “insured by the FDIC”); SEC v. AmeriFirst Funding, Inc., SEC Litig. Release No. 20236, 2007 SEC LEXIS 1781 (Aug. 9, 2007) (noting that the defendants were alleged to have marketed a product called “Secured Debt Obligations” (SDOs) that carried “little or no risk” because they were “guaranteed by a commercial bank, protected by many layers of insurance coverage and fully secured by collateral”); State v. Pace, 677 N.W.2d 762, 765 (Iowa 2004) (noting that the defendant assured his elderly victim that his products were “fully insured by Lloyds of London”); Sterling Trust Co. v. Adderley, 168 S.W.3d 835, 838 (Tex. 2005) (noting that the promoter told his victims that investing in his company carried “no risk” and that “any principal invested would be protected”).

9. See, e.g., SEC v. W Fin. Group, LLC., SEC Litig. Release No. 20515, 2008 SEC LEXIS 764 (Apr. 3, 2008) (noting that the defendant was alleged to have raised \$17.9 million through the sale of “Secured Debt Obligations” purportedly secured by automobile financing receivables); SEC v. Premium Income Corp., SEC Litig. Release No. 20235, 2007 SEC LEXIS 1771 (Aug. 9, 2007) (noting that the defendant was alleged to have raised more than \$11 million through the sale of securities in a company that promised to write covered options in the foreign currency market).

10. See, e.g., SEC v. Stringer, SEC Litig. Release No. 20857, 2009 SEC LEXIS 126 (Jan. 21, 2009) (noting that the defendant was alleged to have raised \$8.5 million from elderly investors in a Ponzi scheme promoted as a hedge fund); SEC v. Unlimited Cash, Inc., SEC Litig. Release No. 19640, 2006 SEC LEXIS 754 (Apr. 4, 2006) (noting that the defendant was alleged to have raised \$18 million in a Ponzi scheme marketed through insurance agents and “estate planning” seminars aimed at older people); SEC v. Cook, SEC Litig. Release No. 18217, 2003 SEC LEXIS 1580 (July 7, 2003) (noting that the defendant was sentenced to seventeen and a half years in prison for orchestrating a \$45 million Ponzi scheme aimed at elderly citizens and religious groups); United States v. Cossey, SEC Litig. Release No. 17620, 2002 SEC LEXIS 1818 (July 17, 2002) (noting that the defendant was sentenced for a scheme that raised over \$150 million from mostly elderly investors).

11. See Mitchell Zuckoff, *The Perfect Mark: How a Massachusetts Psychotherapist Fell for a Nigerian E-Mail Scam*, NEW YORKER, May 15, 2006, at 36.

12. See Jeremy Grant, *Rich Seniors of US Become Ideal Victims for Fraudsters*, FIN. TIMES, July 22, 2006, at 2 (noting that according to the North American Securities Administrators Association, fraud against seniors accounts for almost half of all complaints received by state securities regulators); Sid Kirchheimer, *Scam Targets: What’s Age Got to Do with It?*, [http://www-static-w3-ca.aarp.org/money/consumer/articles/scam\\_targets\\_what.html](http://www-static-w3-ca.aarp.org/money/consumer/articles/scam_targets_what.html) (last visited Nov. 11, 2009) (noting

Many of the securities fraud schemes aimed at older investors involve high-pressure telephone or spam e-mail campaigns.<sup>13</sup> A recent popular scheme features “free lunches,” in which salesmen holding themselves out as “senior specialists” exhort the assembled diners to invest in the sponsor’s proprietary investment products.<sup>14</sup> Victims often are persuaded to liquidate their retirement funds in order to exploit these investment “opportunities.”<sup>15</sup> Often the promoters enlist local senior community leaders to act as “hosts” for their free lunch offerings.<sup>16</sup> These people, proud to be recognized, unwittingly are seen as vouching for the promoter’s integrity and reliability.<sup>17</sup>

Many of these fraud schemes contain misrepresentations or promises that are so implausible that most reasonable investors “would dismiss [them] as absurd.”<sup>18</sup> Still, many smart and well-educated older investors fall for these investment schemes. What accounts for this troubling scenario? The answer may be found in a combination of factors that collectively result in a pernicious cycle of fraud.

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that people over age sixty make up only one-eighth of the U.S. population but represent one out of three scam victims).

13. *See, e.g.*, SEC v. Empire Dev. Group, SEC Litig. Release No. 20122, 2007 SEC LEXIS 1052 (May 18, 2007) (noting that the defendants employed “high pressure sales tactics and cold-calling to sell unregistered securities of bogus real estate development companies, to unsuspecting investors, including elderly people with limited means”); SEC v. Discover Capital Holdings Corp., SEC Litig. Release No. 18988, 2004 SEC LEXIS 2827 (Dec. 1, 2004) (noting that the defendants used spam e-mail and “misleading, high-pressure sales calls” to sell shares).

14. *See, e.g.*, California v. Heath, SEC Litig. Release No. 20438, 2008 SEC LEXIS 145 (Jan. 24, 2008) (noting the felony conviction of promoters who raised more than \$187 million mostly from elderly investors by providing “free lunch” seminars and inducing guests to purchase so-called secured notes); *see also* OFFICE OF COMPLIANCE INSPECTIONS & EXAMINATIONS, SEC, N. AM. SEC. ADM’RS ASS’N & FIN. INDUS. REGULATORY AUTH., PROTECTING SENIOR INVESTORS: REPORT OF EXAMINATIONS OF SECURITIES FIRMS PROVIDING “FREE LUNCH” SALES SEMINARS (2007), <http://www.sec.gov/spotlight/seniors/freelunchreport.pdf> [hereinafter PROTECTING SENIOR INVESTORS] (describing the “free lunch” marketing approach, which includes door prizes, free books, and vacation deals to encourage attendance, and the terminology used to advertise these programs (“Senior Financial Safety Workshop” or “Senior Financial Survival Seminar”).

15. SEC v. Grabarnick, SEC Litig. Release No. 18833, 2004 SEC LEXIS 1781 (Aug. 16, 2004) (noting that many of the victims had rolled over money from IRA and 401(k) accounts in order to purchase investments in unregistered LLCs).

16. *See* PROTECTING SENIOR INVESTORS, *supra* note 14, at 15.

17. *See id.*

18. Margaret V. Sachs, *Materiality and Social Change: The Case for Replacing “the Reasonable Investor” with “the Least Sophisticated Investor” in Inefficient Markets*, 81 TUL. L. REV. 473, 476 (2006).

As a result of some important research based on voice recordings of securities fraud schemers interacting with their elderly victims, we now know a great deal both about the schemers' methods and the behaviors of people who fall victim to their schemes.<sup>19</sup>

First, consider the perpetrators' trick bag. Investment fraud schemes often are carefully designed to employ influence tactics known to be effective with older adults.<sup>20</sup> These tactics include "source credibility" (claiming to be from a known legitimate business); "scarcity" (making the product offered seem rare or unattainable unless an immediate decision is made); "social consensus" (suggesting that many others already have invested in the product so the victim ought not to forego this opportunity to join a winning group); and "phantom fixation" (dangling the prospect of wealth and riches).<sup>21</sup>

Good con artists know how to customize their sales pitch to play to their victims' psychological needs.<sup>22</sup> They often "profile" their victims through lengthy or repeated conversations in order to identify the precise "hot buttons" that will lead to a positive investment decision.<sup>23</sup> Indeed, these con artists have learned "to find out all they can

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19. NASD INVESTOR EDUC. FOUND., INVESTOR FRAUD STUDY FINAL REPORT 5 (2006), <http://www.finrafoundation.org/web/groups/foundation/@foundation/documents/foundation/p118422.pdf> [hereinafter INVESTOR FRAUD STUDY].

20. *Id.* at 6.

21. *Id.* at 10. Other influence tactics include comparison (suggesting that the victim is getting a discount); friendship (appearing to be the victim's friend); commitment (extracting a commitment from the victim early in the relationship and then reminding the victim he has already made a purchase decision from which he should not consider retreating); reciprocity (doing a small favor for the victim that makes the victim feel a need to reciprocate); fear (intimidating the victim); authority (playing the role of an authority figure so as to suggest the victim should do what he is told); and dependency (playing the role of a young, inexperienced person in order to induce the victim to try to help him out by buying whatever he is selling). *Id.* at 10–11.

22. *Id.* at 10; see also Jayne W. Barnard, *Securities Fraud, Recidivism, and Deterrence*, 113 PENN. ST. L. REV. 185, 206–07 (2008) (detailing the ways in which con men identify their victims, develop a "fraud script," adapt to their victims' changing emotional temperature level, and exploit their victims' psychological needs).

23. INVESTOR FRAUD STUDY, *supra* note 19, at 12; see also *Old Scams-New Victims: Breaking the Cycle of Victimization, Hearing Before the Spec. Comm. on Aging, 109th Cong. 20* (2005) [hereinafter *Old Scams-New Victims*] (statement of Zane M. Hill, Acting Assistant Chief Inspector, United States Postal Inspection Service). Searches of telemarketers' places of business have turned up files the fraudsters have maintained on their victims. "The files contained intimate details of the victims' health, the names of their children, vacation and travel memories, and even information on deceased spouses." *Id.*



about their customer and then match that customer profile with just the right influence tactic for maximum effect.”<sup>24</sup>

Good con artists are also good businessmen.<sup>25</sup> They often purchase “mooch lists” of people who have previously been victims of others’ fraud schemes in order to minimize their search costs for new victims.<sup>26</sup> They also can “reload” their existing crop of victims.

When fraud operators are successful in obtaining money from a victim, they often make an attempt to gain even more money. This is the reload. In a typical reload, the fraud operator contacts the victim again and alters the original sum or represents a new scam sweepstakes. Winners may be told that their prize has been increased but that additional fees are necessary to claim the new prize, and then starts the cycle of the reload. Victims in fraudulent investment schemes may be convinced to invest more money or to convert their investment to another market product that invariably is worth even less than what they initially had been sold before.<sup>27</sup>

Con artists are agile communicators, too. In dealing with their victims, they will assume different roles—“authorities, friends, even dependents—to create a platform of trust.”<sup>28</sup> They also traffic in charm.<sup>29</sup> They understand that “niceness” and “respect” or “deference” are disproportionately valued by older adults.<sup>30</sup> Sometimes, however, they can turn off the charm. In closing a sale, they may become insistent, menacing, and even physically threatening.<sup>31</sup> Con artists are just that: masterful manipulators of their victims’ emotions, skillful persuaders, and talented crooks.

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24. INVESTOR FRAUD STUDY, *supra* note 19, at 13.

25. See Barnard, *supra* note 22, at 199. The use of the male gender here is appropriate. The con artist universe is overwhelmingly male.

26. *Old Scams-New Victims*, *supra* note 23, at 20–21 (statement of Zane M. Hill, Acting Assistant Chief Inspector, United States Postal Inspection Service).

27. *Id.*

28. See *id.* at 40 (statement of Anthony R. Pratkanis, Ph.D., Professor of Psychology, University of California at Santa Cruz).

29. See, e.g., *id.* at 54 (statement of Denise C. Park, Ph.D., Co-Director, National Institute on Aging, Roybal Center for Healthy Minds, University of Illinois, Urbana-Champaign).

30. See *id.* (“[W]hen older adults meet a charming charlatan, they are going to be biased towards processing the positive information about the individual: his niceness, attractiveness, and warmth towards them, and be less likely to note the inconsistency of his story, or his tendency to gloss over specifics, which would make him seem untrustworthy to a younger adult.”).

31. Audio tape: Real Life Sales Pitches, recorded by FINRA Investor Education Foundation, <http://www.finrafoundation.org/resources/research> (last visited Nov. 12, 2009).

Who are the victims of securities fraud schemes? In a nutshell, the older adults who are victimized by securities fraud schemes are male, married, college-educated, and financially comfortable.<sup>32</sup> They have a personality that is “very self-reliant and self-deterministic.”<sup>33</sup> They feel competent, not helpless, to make investment decisions.<sup>34</sup> They often rely on their own judgments, rather than on accountants or financial planners, in identifying their investment objectives and selecting investment targets.<sup>35</sup> They are significantly more likely than nonvictims to have previously invested in high-risk products such as penny stocks, promissory notes, and foreign currency.<sup>36</sup>

Importantly, securities fraud victims do not meet the stereotype of the “frail or lonely victim . . . . While some victims are indeed lonely, others are quite active in their communities and can be leaders in their communities.”<sup>37</sup> They generally also are more optimistic about their financial futures than a demographically similar group of nonvictims asked the same questions.<sup>38</sup>

In addition, and perhaps surprisingly, securities fraud victims are more financially literate than nonvictims or victims of other types of fraud.<sup>39</sup> Researchers have offered three explanations for this phenomenon: (1) securities fraud victims may have an abstract understanding of investment products but do not employ that knowledge when it is needed the most (“the knowing-doing gap”); (2) they may be unwilling to admit the limits of their knowledge when dealing with an aggressive promoter of an investment opportunity (“the expert snare”); and (3) they may be overborne by the powerful persuasion tactics employed by con artists seeking their money.<sup>40</sup> In any event, these victims are generally familiar with investment concepts and vo-

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32. INVESTOR FRAUD STUDY, *supra* note 19, at 20.

33. *Id.* at 7.

34. *Id.*

35. *Id.* at 15.

36. FINRA INVESTOR EDUC. FOUND., SENIOR FRAUD RISK SURVEY 2 (2007), [http://www.finra.org/web/groups/sai/documents/sai\\_original\\_content/p036702.pdf](http://www.finra.org/web/groups/sai/documents/sai_original_content/p036702.pdf).

37. *Old Scams-New Victims*, *supra* note 23, at 42 (statement of Anthony R. Pratkanis, Ph. D., Professor of Psychology, University of California at Santa Cruz).

38. INVESTOR FRAUD STUDY, *supra* note 19, at 15.

39. *Id.* at 17.

40. *Id.* at 19–20.

cabulary.<sup>41</sup> They often have enjoyed success in their business life and in previous investment decisions.<sup>42</sup> Securities fraud victims are also more likely than nonvictims to have experienced events in the recent past that have made their life more difficult, such as problems with transportation, problems with health, or problems with mobility.<sup>43</sup> In short, they are eager to hear some good news.

What can we make of this picture? On the one hand, we have sophisticated schemers with a deep understanding of their victims' character and susceptibility to influence tactics. On the other, we have stubborn, self-reliant victims who are reluctant, for a variety of reasons, to question a promoter's description of his product and, when asked to commit to an investment decision, to assert themselves and ask for more time or simply to "just say no." Many of the reasons they do not resist their defrauders are outside the victims' conscious knowledge.

### III. Older Adults' Receptivity to Promotional Messages

In thinking about the role that education might play in averting some of the kinds of frauds targeted at older investors, we must begin with a brief excursion into the brain. We know that, in reaching decisions, *all* adults are guided by cognitive biases, such as anchoring to initial impressions, reluctance to retreat from decisions previously made, overconfidence generally, and a sense of competence and personal agency.<sup>44</sup> They also are subject to a "truth bias," meaning a tendency to evaluate a statement as truthful rather than deceitful.<sup>45</sup> But are there additional cognitive biases, or cognitive processes, that are present in older adults, but not present in younger and midlife adults,

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41. Karen Blumenthal, *Fraud Doesn't Always Happen to Someone Else*, WALL ST. J., Aug. 12, 2009, at D1.

42. *Id.*

43. INVESTOR FRAUD STUDY, *supra* note 19, at 21.

44. See Donald C. Langevoort, *Selling Hope, Selling Risk: Some Lessons for Law from Behavioral Economics About Stockbrokers and Sophisticated Customers*, 84 CAL. L. REV. 627, 639 (1996) ("A fair body of research suggests that people (perhaps especially those high in social and economic status) exhibit a predictable overconfidence in their ability to control future events and avoid risks."); Robert A. Prentice, *Chicago Man, K-T Man, and the Future of Behavioral Law and Economics*, 56 VAND. L. REV. 1663, 1758–61 (2003) (enumerating common adult cognitive biases).

45. Max Minzner, *Detecting Lies Using Demeanor, Bias, and Context*, 29 CARDOZO L. REV. 2557, 2570 (2008).

that might account for their disproportionate attraction to fraudulent investment schemes? The answer is a qualified “yes.”

Gerontologists, psychologists, and neuroscientists today know a great deal about both the physical and cognitive declines associated with aging.<sup>46</sup> We know, for example, that human brains shrink as they age and that, in some portions of the brain, shrinkage may accelerate as a person passes midlife.<sup>47</sup> This shrinkage, however, need not lead to cognitive deficits.<sup>48</sup> In fact, studies show that older adults often are able to “recruit” different brain regions than those utilized by younger adults in order to perform many cognitive tasks.<sup>49</sup> While they may process information or perform those tasks in different ways (or by utilizing more brain regions), older adults can achieve the same result as younger adults. Importantly, though, they are likely to reach that result more slowly.<sup>50</sup>

A lot of what we know about older adults’ information processing comes from marketing studies.<sup>51</sup> Long before gerontology emerged as a specialty and long before functional magnetic resonance imaging (fMRI) became commonplace in psychological research, marketers wanted to know how to induce older adults to purchase their products. Thus, there is a rich lode of research into the receptivity of older adults to certain types of advertising messages and ancillary information about how these consumers process novel ideas.<sup>52</sup>

Much of this research has focused on memory. Memory involves two separate activities, encoding and retrieval.<sup>53</sup> Older adults

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46. See Naftali Raz et al., *Regional Brain Changes in Aging Healthy Adults: General Trends, Individual Differences and Modifiers*, 15 *CEREBRAL CORTEX* 1676 (2005).

47. *Id.* at 1680.

48. *Id.* at 1685.

49. See Trey Hedden & John D.E. Gabrieli, *Insights into the Ageing Mind: A View from Cognitive Neuroscience*, 5 *NATURE REVIEWS: NEUROSCIENCE* 87, 88 (2004) (“One possibility is that older adults use preserved knowledge and experience to form more efficient or effective strategies when performing tasks in which younger adults rely on processing ability.”).

50. Deborah Roedder John & Catherine A. Cole, *Age Differences in Information Processing: Understanding Deficits in Young and Elderly Consumers*, 13 *J. CONSUMER RES.* 297, 306 (1986); Catherine Cole et al., *Decision Making and Brand Choice by Older Consumers*, 19 *MARKETING LETTERS* 355, 361 (2008).

51. See, e.g., John & Cole, *supra* note 50, at 297.

52. See Gary J. Gaeth & Timothy B. Heath, *The Cognitive Processing of Misleading Advertising in Young and Old Adults: Assessment and Training*, 14 *J. CONSUMER RES.* 43, 45 (1987).

53. John & Cole, *supra* note 50, at 299 tbl.1.

may have problems with both activities.<sup>54</sup> They often “fail to use organizational strategies” that would permit them to encode useful information.<sup>55</sup> And even when they have encoded a memory, they may “fail to use efficient retrieval strategies.”<sup>56</sup> Thus, they may not recall or apply useful information to which they have previously been exposed.<sup>57</sup>

For marketers, these two problems are a source of consternation. Older consumers may not be able to recall advertisements or distinguish among brand names.<sup>58</sup> “By using fewer processing strategies, and by processing at slower speeds, the elderly can be expected to exhibit problems with information loads that pose little difficulty for younger adults.”<sup>59</sup>

Older adults are particularly challenged by tasks that:

- (1) contain large amounts of information;
- (2) convey the information in formats that make encoding difficult;
- (3) fail to include prompts or instructions to guide processing and evaluation; and
- (4) require difficult response formats.<sup>60</sup>

All of these factors can be manipulated by marketers to facilitate product preference decisions,<sup>61</sup> but all of them also can be manipu-

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54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 304.

58. *Id.*

59. *Id.* at 302.

60. *Id.* at 305. A simple example of this problem is making a left-hand turn at a busy intersection. Barbara Freund & Freddi Segal-Gidan, *The Older Adult Driver: Issues and Concerns for the Geriatric Clinician*, 11 *ANNALS LONG-TERM CARE* 37, 37 (2003):

A person waiting to make a left-hand turn, for example, is processing, storing, retrieving, and then making decisions based on constantly changing information or environmental queues from oncoming traffic, the driver's own vehicle, what their speed is, zero to 60 in how many seconds, acceleration capability, etc. Because elderly drivers generally exhibit slower processing of that information, they are not as efficient as younger drivers.

61. See George P. Moschis, *Marketing to Older Adults: An Updated Overview of Present Knowledge and Practice*, 20 *J. CONSUMER MARKETING* 516, 523 (2003) (recommending that advertisements aimed at elderly consumers should “focus only

lated by con artists in order to bamboozle their victims.<sup>62</sup> For example, a promoter can provide long, complex offering documents that set out the terms of investment in impenetrable language and exotic mathematical formulae.<sup>63</sup> The promoter can require a quick decision without permitting the victim the time required to consider his options, calculate rate of return, or acknowledge his confusion about what is being offered.<sup>64</sup>

There are three additional important conclusions from the marketing literature applicable to our inquiry. First, older adults are likely to retain information from and prefer advertisements that speak to their emotional needs.<sup>65</sup> That is, in experiments older adults *remembered* a relatively higher proportion of information from advertisements with emotionally meaningful content than from knowledge-based advertisements.<sup>66</sup> They also *preferred* advertisements with emotionally meaningful content.<sup>67</sup> These findings may help explain why the idea of building wealth for their grandchildren's education or to finance family vacations seems to have so much power with older investors.

Second, older adults do not like to be reminded that they are old. They resist ads that feature infirm characters or wrinkly spokesmen.<sup>68</sup> Rather, "the aging person wants to maintain his or her youthful self-concept, so messages that reinforce the perception of being the 'same person,' and the notion that a person of a certain age is like a person of any age," are likely to be more effective than messages that emphasize

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on few, key points," "present information at a slow pace," "keep the message short and simple," and "keep the background/environment simple and uncluttered").

62. See SID KIRCHHEIMER, SCAM PROOF YOUR LIFE 316-17 (2006).

63. See INVESTOR FRAUD STUDY, *supra* note 19, at 10.

64. *Id.* at 11.

65. Helene H. Fung & Laura L. Carstensen, *Sending Memorable Messages to the Old: Age Differences in Preferences and Memory for Advertisements*, 85 J. PERSONALITY & SOC. PSYCHOL. 163, 164 (2003).

66. *Id.* at 168.

67. *Id.* at 173. These findings, of course, drive advertisers to create marketing campaigns like the "my grandson" ads for Werther's Candies or the ads for Rascal Scooters that reflect older consumers' desire for family closeness. It also may explain why fraud victims are more likely to respond to emotionally robust "get rich—build a nest egg for your family" messages than to colder, fact-based "look out for con artists" messages delivered by the government. See *id.* at 175. The relative appeal of these messages is a topic to which we will return in Part V.

68. See Moschis, *supra* note 61, at 523-24.

age.<sup>69</sup> That is, messages that encourage an older consumer to see himself as his younger, virile, masterful self are likely to be far more effective than messages that encourage him to see himself as deficient or disempowered.<sup>70</sup> These findings may help explain why appeals to an investor's financial acumen and impressive market savvy seem to be so effective in inducing a risky investment decision.

Third, older adults sometimes respond to their changing social identity by engaging in compulsive consumer behavior.<sup>71</sup> That is, some "role transitions," such as retirement, grandparenthood, onset of chronic medical conditions, or loss of one's spouse are so stressful for some consumers that they initiate behaviors designed to reassert a sense of control.<sup>72</sup> This behavior may include compulsive buying, shoplifting, substance abuse, or binge eating.<sup>73</sup> It may also include compulsive gambling.<sup>74</sup> This is not behavior that is transient or harmless. It is "inappropriate, typically excessive, and clearly disruptive to the lives of individuals who appear [compulsively] driven to consume."<sup>75</sup>

Importantly, even if they are not compulsive consumers, older adults are often *impulsive* consumers. Researchers have found that "older consumers are less likely than young people to carefully evaluate an advertisement or consider alternatives before making pur-

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69. *Id.* at 523.

70. *Id.* at 523–24. These findings drive advertisers to build campaigns showing men in their forties, rather than men in their seventies, enjoying the benefits of erectile dysfunction drugs. They also may explain why ads for Centrum Silver vitamins feature healthy models riding bicycles or why ads for the nutritional supplement Ensure feature a fifty-year-old woman using the product and then going dancing rather than an eighty-year-old woman sitting in a nursing home chair. *Id.* at 523.

71. Anil Mathur et al., *Compulsive Consumer Behaviors of Older Adults*, in PROCEEDINGS OF THE THIRD INTERNATIONAL RESEARCH SEMINAR ON MARKETING COMMUNICATIONS AND CONSUMER BEHAVIOR 379, 383–84 (Yves Evrard et al. eds., 1999).

72. *Id.* at 383.

73. *Id.* at 380–81, 383–84.

74. Dennis P. McNeilly, *Minding the Mind in Older Gamblers: Gambling in Older Adults Might Signal Cognitive Declines*, ADDICTION PROF., Nov. 2007, <http://www.entrepreneur.com/tradejournals/article/172176734.html> (showing that approximately 5% of older adults in the adult general population exhibit problem or pathological gambling behavior).

75. Mathur et al., *supra* note 71, at 380 (quoting Ronald J. Faber et al., *Compulsive Consumption*, ADVANCES IN CONSUMER RES. 132, 132 (1987)).

chases.”<sup>76</sup> This may be the result of information overload or lack of adequate time in which to make a reasoned decision.<sup>77</sup> Or, it may be the result of brain changes in the part of the brain that regulates com-  
partment, insight, and reasoning.

Recent neurological studies suggest that shrinkage in the pre-frontal region of the brain may account for some older adults’ inability to process information necessary to make good financial judgments.<sup>78</sup> In experiments first conducted at the University of Iowa, subjects (including a cohort of subjects over fifty-five years of age) were asked to play a computerized card game (the Iowa Gambling Task or IGT) in which players had to select cards from among four decks.<sup>79</sup> When turned face up, each card would reveal a dollar value, sometimes positive (+\$50) and sometimes negative (-\$75).<sup>80</sup> Two of the decks were preprogrammed to deliver more positive dollar cards than negative dollar cards (“winning decks”), and two were preprogrammed to be “losing decks.”<sup>81</sup> The object of the game was to emerge from the game with a positive dollar score. A key finding was that “[s]ome participants learned to stay away from the high-risk decks and won easily.

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76. Gary Kuhlmann, *The Business and Biology of Consumer Fraud*, ILLUMINE, Fall 2004, at 31, 32, available at <http://www.uiowa.edu/~illumine/issues-2004/fall-2004/PDFs/fraud.pdf>.

77. George Fein et al., *Older Adults Make Less Advantageous Decisions Than Younger Adults: Cognitive and Psychological Correlates*, 13 J. INT’L NEUROPSYCHOLOGICAL SOC. 480, 481 (2007).

78. Kuhlmann, *supra* note 76, at 33. The primary source for the information discussed in Kuhlmann’s article is Natalie L. Denburg et al., *The Ability to Decide Advantageously Declines Prematurely in Some Normal Older Persons*, 43 NEUROPSYCHOLOGIA 1099, 1099–1106 (2005).

79. Kuhlmann, *supra* note 76, at 32.

80. JONAH LEHRER, *HOW WE DECIDE* 45–46 (2009).

[T]he cards weren’t distributed at random. The scientists had rigged the game. Two of the decks were full of high-risk cards. These decks had bigger payouts (\$100), but also contained extravagant punishments (\$1,250). The other two decks, by comparison, were staid and conservative. Although they had smaller payouts (\$50), they rarely punished the player. If the gambler drew only from those two decks, he would come out way ahead.

At first, the card-selection process was entirely haphazard. There was no reason to favor any specific deck, and so most people sampled from each pile, searching for the most lucrative cards. On average, people had to turn over about fifty cards before they began to draw solely from the profitable deck. It took about eighty cards before the average experimental subject could explain *why* he or she favored those decks.

81. *Id.*



Others seemed unable to distinguish between the good and the bad decks and lost the game because they continued to choose from decks that put them into greater and greater debt.”<sup>82</sup>

Researchers believe the latter subgroup of subjects suffered from a risk assessment deficit caused by an early-onset atrophy of the pre-frontal lobe.<sup>83</sup> Even though these subjects exhibited “normal” cognitive skills on tests evaluating their ability to recall words or to add up a column of numbers, they were not able to assemble and process information about financial risk.<sup>84</sup> Thus, they were not able to shift their selection strategy in order to maximize their performance in the IGT “game.”

The subjects exhibiting this impairment in card selection also lacked the physiological response to risk exhibited by the subjects who mastered the game.<sup>85</sup> In addition, and significantly for this Article, the “losing” subjects in the Iowa Gambling Task were also unable to detect misleading claims in advertisements later presented to them.<sup>86</sup> “[P]articipants who had shown impaired decision-making skills in the Iowa Gambling Task were fooled by ads on everything from mutual funds to car deals to herbal pain relievers.”<sup>87</sup> They were also “more likely to indicate an intention to buy the article advertised in the misleading advertisement.”<sup>88</sup>

The Iowa studies are important for three reasons: (1) the percentage of older adults who had difficulty identifying risk was not trivial; in the initial study, *thirty-five percent* of the sample population exhibited the risk assessment deficit;<sup>89</sup> (2) the risk assessment deficit could

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82. Kuhlmann, *supra* note 76, at 32.

83. *Id.*

84. *Id.*

85. When the “winning” subjects selected a card from one of the high-risk decks, their bodies signaled recognition of the risk-taking decision as measured by a skin-conductance response (SCR); when the “losing” subjects selected a card from one of the high-risk decks, there was no bodily recognition.

86. Kuhlmann, *supra* note 76, at 32.

87. *Id.*

88. Randall Parker, *Brain Aging Makes Elderly Easier Prey for Con Artists*, FUTUREPUNDIT, Jan. 14, 2008, [www.futurepundit.com/archives/004925.html](http://www.futurepundit.com/archives/004925.html).

89. Denburg et al., *supra* note 78, at 1102–04. Two follow-up studies by the same research team have now replicated the results of the first study. In the second study, *twenty-five percent* of the subjects fifty-six years old or older showed decision making impairment. Natalie L. Denburg et al., *Psychophysiological Anticipation of Positive Outcomes Promotes Advantageous Decision-Making in Normal Older Persons*, 61 INT’L J. PSYCHOPHYSIOLOGY 19, 22 (2006) [hereinafter *Anticipation of Pos-*

not be explained as a function of overall cognitive decline;<sup>90</sup> and (3) the deficit appeared to have physical origins.<sup>91</sup> Researchers currently are trying to identify the precise location in the brain of the “risk assessment” function.<sup>92</sup>

One final study may offer an additional insight into how older adults process information and make decisions. Recently, neuroscientists showed subjects a series of negative images, such as dead animals, and positive images, such as bowls of ice cream, and observed the subjects’ brain activity through fMRI.<sup>93</sup> The older subjects (ages fifty-six to eighty-five) were much less responsive to negative or unpleasant images than they were to the positive images.<sup>94</sup> In effect, they screened out the information they did not want to contemplate.<sup>95</sup> This hard-wired resistance to negative messages “[may make older adults] happier people [than younger adults], but also mak[es] them more likely to miss the ‘red flags’ of a skilled fraudulent telemarketer.”<sup>96</sup> It is not coincidental that older consumers are far more predisposed to

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*itive Outcomes*]. In the most recent study, *thirty-five to forty percent* of the subjects fifty-six years old or older showed decision making impairment. Natalie L. Denburg et al., *The Orbitofrontal Cortex, Real World Decision Making, and Normal Aging*, 1121 ANNALS N.Y. ACAD. SCI. 480, 480 (2007). These studies have also been replicated by other researchers. Fein et al., *supra* note 77, at 487 (describing how *fifteen percent* of the subjects fifty-five years old or older showed decision making impairment).

90. As between impaired decision makers and unimpaired decision makers, “there were no significant differences in age, gender and handedness distribution, estimated verbal intellect, memory, language, attention and concentration skills, executive function abilities, or emotional status.” *Anticipation of Positive Outcomes*, *supra* note 89, at 22.

91. The Iowa study is not without its critics. A group of British scholars have suggested that the “losing” subjects in the Iowa study may not have a risk assessment deficit at all, but may simply have taken longer than others to learn the rules of the game. Julia Deakin et al., *Risk Taking During Decision-Making in Normal Volunteers Changes with Age*, 10 J. INT’L NEUROPSYCHOLOGICAL SOC. 590, 591 (2004).

92. See Natalia S. Lawrence et al., *Distinct Roles of Prefrontal Cortical Subregions in the Iowa Gambling Task*, 19 CEREBRAL CORTEX 1134 (2008); Joshua A. Weller et al., *Neural Correlates of Adaptive Decision Making for Risky Gains and Losses*, 18 PSYCHOL. SCI. 958 (2007).

93. Michael A. Kisley et al., *Looking at the Sunny Side of Life: Age-Related Change in an Event-Related Potential Measure of the Negativity Bias*, 18 PSYCHOL. SCI. 838, 839 (2007).

94. *Id.* at 841.

95. *Id.* at 842.

96. *Elder Fraud: Exploiting the Aging Human Brain*, SENIOR J., June 23, 2005, <http://seniorjournal.com/NEWS/Alerts/5-06-23ExploitingElderly.htm>.

believe the claims of salesman than younger consumers.<sup>97</sup> Nor is it coincidental that older adults are more trusting generally than people under fifty.<sup>98</sup>

All of these studies—the marketing studies, the game-playing studies, the brain scanning studies, and the “trust” studies—offer some useful tools in addressing the troubling questions, “Which of the millions of older adults are likely to be vulnerable to securities fraud schemes and what types of interventions are most likely to protect them?” It is still necessary, however, to consider some additional factors that may play a role in older adults’ investment decisions, such as attitude toward risk, decline in financial judgment, emotional needs, environmental factors, and the very human desire to give pleasure to others.

#### IV. Risk Seeking in Older Adults

We have now seen that there may be some—indeed many—older adults who are impaired in their capacity to identify and assess risk in financial matters. This impairment, taken together with cognitive biases linked to aging, makes these older adults susceptible to fraudulent offers.<sup>99</sup> But what of the majority of older adults who have no risk assessment deficit? These investors presumably have the capacity to fully appreciate risk and its consequences. Should we not expect that the risk aversion associated with age will counterbalance the cognitive biases associated with age and thereby help to protect these investors from fraud?

A more precise question is whether older adults’ risk aversion is sufficient to offset their cognitive biases: receptivity to emotional ap-

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97. Jinkook Lee & Horacio Soberon-Ferrer, *An Empirical Analysis of Elderly Consumers’ Complaining Behavior*, 27 FAM. & CONSUMER SCI. RES. J. 341, 356 tbl.2 (1999). There are two exceptions to these findings. Elderly consumers are less likely than younger consumers to believe the assertions of hearing aid salesmen and druggists. *Id.*

98. PEW RESEARCH CTR., AMERICANS AND SOCIAL TRUST: WHO, WHERE AND WHY 1 (2007), <http://pewresearch.org/assets/social/pdf/SocialTrust.pdf>. Trust also is positively associated with marital status, income, education, social class, and (for men) military service. *Id.* at 1, 5.

99. See *Old Scams-New Victims*, *supra* note 23, at 54 (statement of Denise C. Park, Ph.D., Co-Director, National Institute on Aging, Roybal Center for Healthy Minds, University of Illinois, Urbana-Champaign). Those lacking in financial literacy may have the capacity but lack the mental map with which to approach the task.

peals, receptivity to messages reinforcing the listener's sense of autonomy, receptivity to optimistic messages, etc. No studies yet have attempted to answer this question.

It may be, however, that the notion of risk aversion among older adults is overrated, especially regarding older adults with money. It is true that, as a general rule, risk aversion increases as adults reach retirement age.<sup>100</sup> Recent studies, however, have teased out the role of wealth, gender, marital status, education, and the existence of offspring, as well as age, on risk aversion.<sup>101</sup> One study of the investment portfolios of households in which at least one member was seventy years old or older found that risk aversion (as measured by the percentage of "risky assets" in the portfolio) can vary significantly, given these demographic factors.<sup>102</sup> That is, relative risk aversion tends to *increase* after age seventy at any given level of wealth.<sup>103</sup> However, relative risk aversion *decreases* as wealth increases.<sup>104</sup> So, for example, a single white female college graduate, in good health, and with one child, will decrease the percentage of risky assets in her portfolio as she ages from seventy to ninety, but her overall risk tolerance will also depend on her net wealth. According to Bellante and Green, this woman's portfolio as she ages should look like this:<sup>105</sup>

#### Estimated Proportion of "Risky Assets" in Portfolio

<u>Age</u>	<u>Net Worth</u>		
	\$100,000	\$500,000	\$1,000,000
70	0.255	0.416	0.503
90	0.231	0.390	0.475

Other demographic factors play a role as well: men are generally more risk tolerant than women;<sup>106</sup> married people are more risk tole-

100. See Deakin et al., *supra* note 91, at 591.

101. Don Bellante & Carole A. Green, *Relative Risk Aversion Among the Elderly*, 13 REV. FIN. ECON. 269, 275 (2004); Martin Halek & Joseph G. Eisenhauer, *Demography of Risk Aversion*, 68 J. RISK & INS. 1, 2 (2001).

102. See Bellante & Green, *supra* note 101, at 271.

103. *Id.* at 277.

104. *Id.*

105. *Id.* at 278 tbl.3.

106. Brad M. Barber & Terrance Odean, *Boys Will Be Boys: Gender, Overconfidence, and Common Stock Investment*, 116 Q.J. ECON. 261, 264-66 (2001); Gary Charness & Uri Gneezy, *Strong Evidence for Gender Differences in Investment* (Sept. 18, 2007), <http://www.econ.ucsb.edu/papers/wp24-07.pdf>.

rant than people living alone;<sup>107</sup> and college-educated people are more risk tolerant than those with only a high-school education.<sup>108</sup> Cultural factors, too, may influence risk tolerance.<sup>109</sup>

The Bellante and Green study is not the only one that reaches these conclusions. Another recent study took a different approach to the relationship between age, wealth, and risk tolerance, and reached essentially the same conclusion.<sup>110</sup> Looking at self-reports, the authors found that a person's Risk Tolerance Score on a scale of one to one hundred (with one representing low risk tolerance and one hundred representing high risk tolerance) rose with wealth.<sup>111</sup> For respondents over age sixty, the Risk Tolerance Scores looked like this:<sup>112</sup>

Net asset	<\$50,000	\$50,000-	\$150,000-	\$500,000-	>\$1,000,000
Band		\$150,000	\$500,000	\$1,000,000	
Mean	50.70	45.64	47.66	52.03	56.72

Another study of investors' allocation of funds in their Individual Retirement Accounts (IRAs) confirms this pattern.<sup>113</sup> The researchers, not surprisingly, found a general decline in risk tolerance with age, but looking at the IRAs of persons over sixty-five, they also found a positive relationship between risk tolerance and wealth.<sup>114</sup> "Higher

107. Bellante & Green, *supra* note 101, at 278.

108. *Id.*; John E. Grable & Ruth H. Lytton, *Investor Risk Tolerance: Testing the Efficacy of Demographics As Differentiating and Classifying Factors*, 9 FIN. COUNSELING & PLAN. 61, 68 (1998) (finding that risk tolerance rises with educational attainment); Govind Hariharan et al., *Risk Tolerance and Asset Allocation for Investors Nearing Retirement*, 9 FIN. SERVS. REV. 159, 167 (2000) (noting that educated people allocate more of their wealth to risky assets than less educated people); Halek & Eisenhauer, *supra* note 101, at 20 ("[A]t the margin, risk-taking rises with years of education.").

109. See Gongmeng Chen et al., *Trading Performance, Disposition Effect, Overconfidence, Representativeness Bias, and Experience of Emerging Market Investors*, 20 J. BEHAV. DECISION MAKING 425, 428 (2007) (citing studies that Asians are less risk averse and more confident than people in Western cultures).

110. Terrence A. Hallahan et al., *An Empirical Investigation of Personal Financial Risk Tolerance*, 13 FIN. SERVS. REV. 57, 67 (2004).

111. *Id.* at 60, 66.

112. *Id.* at 69 tbl.4.

113. Doug Waggle & Basil Englis, *Asset Allocation Decisions in Retirement Accounts: An All-or-Nothing Proposition?*, 9 FIN. SERVS. REV. 79, 90 (2000).

114. *Id.* at 84.

age groups invest[ed] less in equity, and higher net worth groups invest[ed] more."<sup>115</sup>

Net Worth Quartile	Lowest	Second	Third	Highest
Cash	78.6	71.3	55.1	34.4
Bonds	21.4	13.0	13.8	13.9
Equity	0	15.7	31.1	51.7

These studies suggest that, for at least some investors, and particularly investors with significant unencumbered assets, a decision to pursue a risky investment strategy may not reflect a failure to recognize risk, but instead a conscious (though perhaps flawed) decision to embrace risk.<sup>116</sup> These investors' receptivity to risk, moreover, may be a function not only of their wealth but of their own high self-regard. "[H]igh self-esteem individuals who engage in risky behaviors often use cognitive strategies that protect them from recognizing their susceptibility to negative consequences of their behavior."<sup>117</sup>

We must add to these conclusions recent evidence that, quite apart from risk tolerance or self-esteem, investment judgment "deteriorates sharply" at about age seventy.<sup>118</sup> Korniotis and Kumar have found that investors in this age bracket earn lower risk-adjusted annual returns than younger investors and exhibit worse stock selection ability and poorer diversification skills.<sup>119</sup> This is especially true for people with significant portfolios.<sup>120</sup> The authors attribute the difference to "cognitive aging,"<sup>121</sup> a catch-all category that may include

115. *Id.*

116. Risk seeking may reflect a personality trait that endures throughout the life span. "If a person engages in risky behaviors in his 30s, then he's more likely than others to engage in risky behavior as an older adult." *Old and Young Make Impulsive Decisions*, USA TODAY, Dec. 1999, at 13, available at [http://findarticles.com/p/articles/mi\\_m1272/is\\_2655\\_128/ai\\_58037927](http://findarticles.com/p/articles/mi_m1272/is_2655_128/ai_58037927).

117. Dwight Merunka et al., *Modeling and Measuring the Impact of Fear, Guilt and Shame Appeals on Persuasion for Health Communication: A Study of Anti-Alcohol Messages Directed at Young Adults 7* (Euromed Marseille, Working Paper No. 04-200, 2007), available at <http://ssrn.com/abstract=963593>.

118. George Korniotis & Alok Kumar, *Do Older Investors Make Better Investment Decisions?*, 92 REV. ECON. & STAT. (forthcoming 2010), available at <http://ssrn.com/abstract=767125>.

119. *Id.*

120. *Id.*

121. *Id.*

memory loss, processing problems, confusion, depression, distraction, and mental attitude. The fact is, older adults' brains may work against them as they contemplate making investment decisions.<sup>122</sup> And an appetite for risk, likely a lifelong characteristic, is only going to make the chance of fraud victimization grow.

## V. Other Factors Predisposing Older Adults to Believe Fraudulent Claims

What makes someone succumb to an investment offer that seems incredible? Does the buyer, as suggested in Part III, lack the capacity to recognize risk? Does he, as suggested in Part IV, seek out risk but then discount or misjudge it? One theory that explains the success of securities fraud and other fraud schemes is that con artists appeal to their victims' "visceral needs" such as greed, fear, and the need for companionship or intimacy.<sup>123</sup> Importantly, decisions made in an environment of "visceral influences" are "nearly devoid of cognitive deliberation."<sup>124</sup> When making a purchase decision, for example, "rational, considered deliberation is [only] a small part of the decision process. Instead, action is driven by instinct and gut feelings, and careful analysis is abandoned."<sup>125</sup>

Con artists, of course, understand the power of visceral needs.<sup>126</sup> They often consciously appeal to their victims' greed, loneliness, and fantasies of empowerment.<sup>127</sup> They also know, or appear to know, that appeals to visceral needs can be enhanced by making the reward seem right around the corner (this is known as "reward proximity"), "vivid," and achievable.<sup>128</sup>

Several other psychological factors also may play a role in making a purchase decision. One is conformity to others' expectations, meaning an instinct for pleasing people, including people who are urgently trying to sell the listener a product. "In the realm of scams,

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122. *See id.*

123. *See* Jeff Langenderfer & Terence A. Shimp, *Consumer Vulnerability to Scams, Swindles, and Fraud: A New Theory of Visceral Influences on Persuasion*, 18 *PSYCHOL. & MARKETING* 763, 768–70 (2001).

124. *Id.* at 769.

125. *Id.*

126. *Id.* at 769–70.

127. *Id.* at 768.

128. *See id.* at 773–74.

perhaps no other personality trait is as likely to affect scamming vulnerability.<sup>129</sup> Another factor is self-control: the ability to substitute prudence for desire.<sup>130</sup> “For individuals facing a scam offer, part of the decision process is whether to carefully examine the message or to indulge their fantasies and accept the swindler’s version of how the transaction will proceed.”<sup>131</sup> The ability to master and suppress one’s desire for immediate gratification can play an important role in decisions to resist securities fraud schemes.

Still other factors that may influence the investment decision-making process include alcohol or drug use,<sup>132</sup> the decision maker’s sense of command or dominance over his environment,<sup>133</sup> the decision maker’s state of overall happiness or unhappiness,<sup>134</sup> the decision maker’s sense that a decision must be made quickly,<sup>135</sup> hormonal influences,<sup>136</sup> dietary factors,<sup>137</sup> and even the time of day when the investment decision is made.<sup>138</sup>

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129. *Id.* at 779.

130. *Id.* at 781.

131. *Id.*

132. Fein et al., *supra* note 77, at 8.

133. Studies in the Netherlands have shown that “simply putting someone into a weak social position impairs his cognitive function. Conversely, ‘empowering’ him, in the dread jargon of sociology, sharpens up the mind.” *From He That Hath Not*, *ECONOMIST*, May 24, 2008, at 104. The research cited in this article may be found at Pamela K. Smith et al., *Lacking Power Impairs Executive Function*, 19 *PSYCHOL. SCI.* 441, 447 (2008).

134. Marieke de Vries et al., *In the Winning Mood: Affect in the Iowa Gambling Task*, 3 *JUDGMENT & DECISION MAKING* 42, 48 (2008) (concluding that subjects in positive mood states made better decisions than subjects in a negative mood); *Misery Is Not Miserly: Why Even Momentary Sadness Increases Spending*, *SCIENCEDAILY*, Feb. 8, 2008, <http://www.sciencedaily.com/releases/2008/02/080208073436.htm> (reporting that experimental subjects feeling sad and self-focused spend more money to acquire the same commodities as subjects in a neutral emotional state).

135. Michael A. DeDonno & Heath A. Demaree, *Perceived Time Pressure and the Iowa Gambling Task*, 3 *JUDGMENT & DECISION MAKING* 636, 639 (2008) (reporting that research subjects informed that the time allotted for an activity would likely be inadequate made poorer decisions than subjects told that the time allotted would likely be sufficient).

136. Studies in Austria have shown that administration of oxytocin via nasal inhalation can cause subjects to be made to trust strangers. And, “researchers at the University of Zurich have shown that people who inhale [oxytocin] continue to trust strangers with their money, even after they have been betrayed.” *What the Scientists Are Saying*, *WEEK (UK)*, June 7, 2008, at 16. The research cited in this article may be found at Thomas Baumgartner et al., *Oxytocin Shapes the Neural Circuitry of Trust and Trust Adaptation in Humans*, 58 *NEURON* 639 (2008).

137. Studies in the Netherlands have shown that folic acid supplements can help subjects from fifty to seventy years old to ward off cognitive decline. Jane Durga et al., *Effect of 3-year Folic Acid Supplementation on Cognitive Function in Older*



Pulling these observations together, it would seem that the most likely target for a securities fraud scheme would be a man with at least several hundred thousand dollars of accumulated wealth, a hearty risk tolerance but also a risk assessment deficit, a strong sense (or at least a history) of personal autonomy, unexpressed but strong visceral needs, an instinct for pleasing people, a low capacity for self-control, and a recent, disempowering experience that has left him unhappy and feeling unfulfilled. This profile matches precisely the profile of actual victims of securities fraud schemes.

## VI. Fraud Prevention Education and Its Critics

So far in this Article, we have examined five ideas:

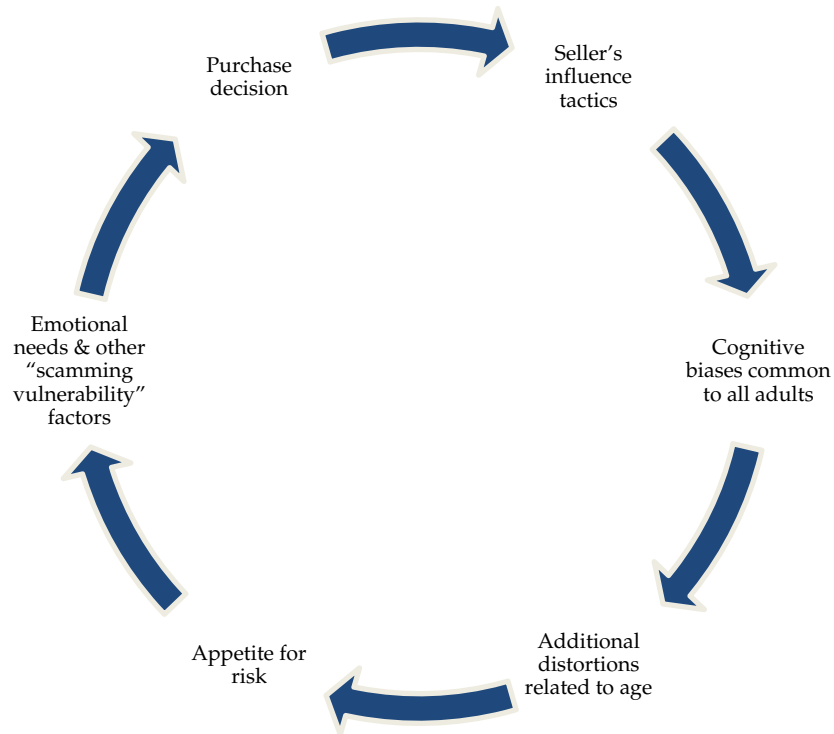
- The perpetrators of securities fraud schemes are innovative, clever, manipulative, and highly attuned to their victims' needs and aspirations;
- The ability of older investors to detect and avoid fraud schemes may be impaired, or at least shaped, by brain processes over which they have no conscious control;
- Older investors may be receptive to messages that promise them a chance at wealth and renewal, even if those messages clearly communicate risk;
- Older investors may be particularly susceptible to messages (or messengers) that activate their visceral needs or appeal to their sense of mastery and desire to be young;
- Older investors' susceptibility to fraud is exacerbated by a variety of environmental influences.

These ideas can be reflected schematically in what I call the "deception/decision cycle."

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*Adults in the FACIT Trial: A Randomised, Double Blind, Controlled Trial*, 369 LANCET 208 (2007).

138. William von Hippel, *Aging, Executive Functioning, and Social Control*, 16 CURRENT DIRECTIONS PSYCHOL. SCI. 240, 242 (2007) (noting that older adults typically show better inhibition earlier rather than later in the day); Carolyn Yoon, *Age Differences in Consumers' Processing Strategies: An Investigation of Moderating Influences*, 24 J. CONSUMER RES. 329, 332, 335-40 (1997) (noting that older adults are likely to perform cognitive tasks better in the morning than in the late afternoon).



The potent dynamic reflected in this diagram may account for the fact that many older investors make bad investment decisions. The problem may be compounded when investors lack basic financial literacy. “Only four percent of Americans have sufficient quantitative literacy skills to compare and contrast credit card offers or to calculate the total amount of interest from a home equity loan.”<sup>139</sup> Probably even fewer Americans have the necessary skills to fully understand

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139. Deanne Loonin & Elizabeth Renuart, *The Life and Debt Cycle: The Growing Debt Burdens of Older Consumers and Related Policy Recommendations*, 44 HARV. J. ON LEGIS. 167, 197 (2007).

investment products, diversification, asset allocation, and age-appropriate strategies for investment management.<sup>140</sup>

So, there can be little doubt that we need more financial literacy education in the United States, beginning in elementary school and continuing well past retirement age.<sup>141</sup> But financial literacy does not seem to be the primary problem for many of the people who have been victimized by securities fraud schemes.<sup>142</sup> Many of them *are* financially literate in the sense that they could pass a paper-and-pencil test or articulate their line of reasoning in reaching an investment decision.<sup>143</sup> These people, though, for one or many of the reasons suggested above, may not appreciate the signals associated with fraud.

This brings us back to the issue of fraud prevention education. Can education effectively disrupt the deception/decision cycle portrayed here? If the answer is “yes,” at which point(s) in the cycle should education be offered and through which educational media? What should the fraud prevention message include? If the answer is “no,” then what should we do instead to interdict fraud?

To answer these questions, at least preliminarily, let us consider briefly the various types of fraud prevention education currently on offer. These include written brochures, videos and DVDs, web sites and podcasts, small-group workshops at senior citizen gathering places, elaborate town meetings, literature enclosed with home-delivered meals, and celebration of a “National Fraud Against Senior Citizens Awareness Week.”<sup>144</sup>

Sponsors of these programs include the SEC,<sup>145</sup> the North American Securities Administrators Association (NASAA),<sup>146</sup> the AARP,<sup>147</sup>

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140. See Annamaria Lusandi & Olivia Mitchell, *Financial Literacy and Retirement Preparedness: Evidence and Implications for Financial Education*, 42 BUS. ECON. 35, 35 (2007) (“Many [American] households are unfamiliar with even the most basic economic concepts needed to make saving and investment decisions. . . . [They] appear woefully under-informed about basic financial computations, with serious implications for saving, retirement planning, mortgages, and other decisions.”).

141. See, e.g., James A. Fanto, *We’re All Capitalists Now: The Importance, Nature, Provision and Regulation of Investor Education*, 49 CASE W. RES. L. REV. 105, 142–46 (1998); but see Lauren E. Willis, *Against Financial-Literacy Education*, 94 IOWA L. REV. 197 (2008) (casting doubt on the efficacy of financial literacy education).

142. See INVESTOR FRAUD STUDY, *supra* note 19, at 5.

143. See *id.*

144. See S. Res. 281, 107th Cong. (2002) (designating the week beginning Aug. 25, 2002, as “National Fraud Against Senior Citizens Awareness Week”).

145. See PROTECTING SENIOR INVESTORS, *supra* note 14, at 46.

the Federal Trade Commission,<sup>148</sup> the Postal Inspection Service,<sup>149</sup> the FINRA Educational Foundation,<sup>150</sup> state attorneys general and regulatory bodies,<sup>151</sup> some legal aid clinics,<sup>152</sup> and many large brokerage firms.<sup>153</sup> Organizations that serve the elderly, religious and community organizations, financial advisors seeking clients, and local lifelong learning groups also often offer some form of fraud prevention education. Ironically, the pervasiveness of fraud prevention advice and education may cause some older adults to feel safer from fraud than they really are.

The fraud prevention programs now in place typically feature several commonsense messages: (1) if an investment opportunity seems to be too good to be true, it probably is; (2) do not make hasty investment decisions; (3) check the credentials of people seeking your money; (4) beware cold-callers; and (5) do not be too embarrassed to

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146. See *Advising Seniors About Their Money: Who Is Qualified and Who Is Not: Hearing Before the Spec. Comm. On Aging*, 110th Cong. (2007) (statement of Joseph P. Borg, President, North American Securities Administrators Association, Inc.) available at <http://aging.senate.gov/events/hr179jb.pdf>.

147. AARP.org, *The Lure of Money: Before You Invest*, [http://www.aarp.org/money/consumer/articles/video\\_before\\_you\\_invest.html](http://www.aarp.org/money/consumer/articles/video_before_you_invest.html) (last visited Nov. 12, 2009); AARP.org, *Spotting the Signs of an Investment Scam*, [http://www.aarp.org/money/consumer/articles/scam\\_signs.html](http://www.aarp.org/money/consumer/articles/scam_signs.html) (last visited Nov. 12, 2009).

148. Federal Trade Commission, *Telemarketing Fraud Against Older Americans*, <http://www.ftc.gov/reports/Fraud/fraudcon.shtm> (last visited Nov. 12, 2009).

149. U.S. Postal Inspectors, *Crime Victim? Know Your Rights*, <http://postalinspectors.uspis.gov/radDocs/consumer/ncvrwmain.htm> (last visited Nov. 12, 2009).

150. See Press Release, FINRA Investor Educ. Found., *FINRA Investor Education Foundation Grants Exceed \$14M*, <http://www.finra.org/PressRoom/NewsReleases/2008NewsReleases/P038026> (last visited Nov. 12, 2009) (announcing the Investor Protection Campaign for Older Americans); SaveAndInvest.org, *Fighting Fraud 101: Smart Tips for Older Investors*, <http://www.saveandinvest.org/55Plus/Fraud/index.htm> (last visited Nov. 12, 2009).

151. See, e.g., California Department of Corporations, *Seniors Against Investment Fraud (SAIF) Program*, [http://www.corp.ca.gov/Education\\_Outreach/saif/default.asp](http://www.corp.ca.gov/Education_Outreach/saif/default.asp) (last visited Nov. 12, 2009); Florida Office of Financial Regulation, *FSAIF—Seniors Against Investment Fraud*, <http://www.flofr.com/director/fsaif.htm> (last visited Nov. 12, 2009); Iowa Insurance Division, *SAIF: Seniors Against Investment Fraud*, <http://www.iid.state.ia.us/saif/> (last visited Nov. 12, 2009); West Virginia State Auditor's Office, *Securities Commission*, <http://www.wvsao.gov/securitiescommission/education/saif.aspx> (last visited Nov. 12, 2009).

152. See, e.g., Stetson Law, *Elder Consumer Protection Program*, <http://elder.law.stetson.edu/elderconsumers> (last visited Nov. 12, 2009).

153. See, e.g., Merrill Lynch, *Protecting Yourself from Fraud*, [http://www.ml.com/index.asp?id=7695\\_7696\\_42133\\_42135\\_42237\\_14533](http://www.ml.com/index.asp?id=7695_7696_42133_42135_42237_14533) (last visited Nov. 12, 2009).

call the authorities if you believe you have been the victim of a crime.<sup>154</sup> All of it is good advice, of course, but it rarely addresses the core problem for some older investors: perhaps they ought not be making financially consequential decisions at all.

Critics of fraud prevention programs have been reluctant to speak too harshly of them. One critic has focused on the impenetrability of the prose or poor design employed in many of the informational brochures.<sup>155</sup> Barbara Black has decried the lack of resources and expertise devoted to the effort.<sup>156</sup> Lawrence Cunningham has argued that today's investor education materials generally "represent a hodgepodge of material culled from disparate sources and lacking coherence."<sup>157</sup> Donald Langevoort has suggested that educational materials may underplay the risks inherent throughout the investment market, in part because of their sponsors' obvious financial self-interest.<sup>158</sup>

Still other critics have focused on one of the ironies of cautionary educational literature: telling an older adult that some sorts of claims (e.g., magical medicine, weight-loss products, risk-free investments) are likely to be false may cause them to internalize that message in the short run but to recall *the opposite* message after a passage of time.<sup>159</sup>

This surprising conclusion derives from two experiments.

In the first study, when older adults were repeatedly told that a claim is false, repetition helped them remember the claim immediately thereafter as *false*. But paradoxically, after three days had passed, the more times older adults had been warned that a claim

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154. See LARRY R. ABRAHAMSON, ELDER FRAUD PREVENTION 4–6, [http://co.larimer.co.us/da/elder\\_fraud.pdf](http://co.larimer.co.us/da/elder_fraud.pdf) (last visited Nov. 11, 2009).

155. See *Old Scams-New Victims*, *supra* note 23, at 56–57 (statement of Denise C. Park, Ph.D., Co-Director, National Institute on Aging, Roybal Center for Healthy Minds, University of Illinois, Urbana-Champaign) (concluding that about 25% of government fraud prevention brochures had "serious problems").

156. Barbara Black, *Are Retail Investors Better Off Today?*, 2 BROOK. J. CORP. FIN. & COM. L. 303, 337 (2008) ("The SEC's efforts on behalf of investor education have been more of a slogan than regulatory action.").

157. Lawrence A. Cunningham, *Behavioral Finance and Investor Governance*, 59 WASH. & LEE L. REV. 767, 791 (2002).

158. Donald C. Langevoort, *Managing the "Expectations Gap" in Investor Protection: The SEC and the Post-Enron Reform Agenda*, 48 VILL. L. REV. 1139, 1165 (2003); see also Willis, *supra* note 141, at 259 (noting that financial services firms have little economic incentive to provide effective consumer education because they often profit from poor consumer choices).

159. Ian Skurnik et al., *How Warnings About False Claims Become Recommendations*, 31 J. CONSUMER RES. 713, 713 (2005).

was false, the more likely they were to misremember the claim as true. In the second study, trying to discredit claims after making them familiar to older adults backfired and increased their tendency to call those claims true.<sup>160</sup>

In other words, repetition may compound the problem. Repeated characterization of a claim as false may only result in an older adult responding positively to the claim.<sup>161</sup> Thus, rather than scaring him away from an implausible investment opportunity, fraud prevention education may catapult an older person right into the arms of his defrauder.

Critics of fraud prevention education also might point to the failures of other forms of “scare” advertising; marketers have learned that repetition of such messages “may lead to habituation, annoyance, and an increased tendency for individuals to tune out the message.”<sup>162</sup> The people at whom this type of marketing is aimed may come to equate it with a “hectoring parent [lecturing] an errant child” and reject the message even though they know it offers good advice.<sup>163</sup>

One also might argue that the powerful role of emotion and desire in making investment decisions “offers little hope for those who would attack swindling through education about swindling practices.”<sup>164</sup> As a practical matter, information about con artists’ tactics and admonitions to hang up on telemarketers may have little effect on those older adults whose deliberative powers are overcome by appeals to their fears, their sense of self, or various visceral needs.<sup>165</sup> The same may be true of less complex cognitive biases such as over-optimism or overconfidence.<sup>166</sup> As Stephen Choi has pointed out,

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160. *Id.* (emphasis added).

161. A similar phenomenon may be found in the use of legal disclaimers. Experience has shown that a written disclaimer that Product A is not associated with Product B merely serves to reinforce the notion that the two products are related. Mitchell E. Radin, *Disclaimers as a Remedy for Trademark Infringement: Inadequacies and Alternatives*, 76 TRADEMARK REP. 59, 65 (1986) (“[T]he use of disclaimers of association may actually increase consumer confusion in a trademark usage context.”). Thanks to Laura Heymann for pointing this out.

162. Gerard Hastings et al., *Fear Appeals in Social Marketing: Strategic and Ethical Reasons for Concern*, 21 PSYCHOL. & MARKETING 961, 966 (2004).

163. Gerard Hastings & Lynn MacFadyen, *The Limitations of Fear Messages*, 11 TOBACCO CONTROL 73, 74 (2002).

164. Langenderfer & Shimp, *supra* note 123, at 781.

165. *See id.* at 769–70.

166. *See id.* at 781.

“[d]eeply-rooted behavioral biases may be resistant to education efforts.”<sup>167</sup>

Finally, critics might argue that the most likely audience for fraud prevention education are those older adults who are already cautious, risk-averse investors who seek reinforcement of their fears and concerns.<sup>168</sup> On the other hand, the type of person who is most likely to make an irrational investment decision—a stubborn, self-reliant, risk-seeking seventy-five-year-old man—is precisely the type of person least likely to seek out or internalize cautionary educational messages.<sup>169</sup> Those messages must surely often miss their intended targets.

Do these criticisms mean that we should abandon fraud prevention education aimed at older adults? I am not quite prepared to make that claim. I can say that we have little-to-no evidence that fraud prevention education as it is currently practiced has been successful with this population and very little reason to think it is likely to succeed.

But, what if I am wrong? Is it possible that some types of fraud prevention education might actually assist older adults in avoiding investment fraud schemes?<sup>170</sup>

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167. Stephen J. Choi, *A Framework for the Regulation of Securities Market Intermediaries*, 1 BERKELEY BUS. L.J. 45, 68 (2004).

168. See Kent Daniel et al., *Investor Psychology in Capital Markets: Evidence and Policy Implications*, 49 J. MONETARY ECON. 139, 183 (2002).

169. *Id.* (“A big obstacle in overcoming bias is that someone who is irrational in his direct investment decisions is also likely to be irrational in his decision to seek out investment advice, and in his choice of intermediaries.”).

170. We do know that one-on-one peer counseling can, in the short run, reduce revictimization rates of older adults who have been victimized in the past. *Old Scams-New Victims*, *supra* note 23, at 42 (statement of Anthony R. Pratkanis, Ph. D., Professor of Psychology, University of California at Santa Cruz) (explaining how in a “reverse boiler room” program in which volunteers called and counseled people whose names had been found on “mooch lists,” then a few days later professional telemarketers tried to persuade the victims to participate in a new (simulated) scam, researchers found that their interventions were effective in reducing victimization rates by about 50%). We also know that well-designed public health programs can change unhealthy behavior in older adults. See, e.g., Lindy Clemson et al., *The Effectiveness of a Community-Based Program for Reducing the Incidence of Falls in the Elderly: A Randomized Trial*, 52 J. AM. GERIATRICS SOC. 1487 (2004); C.K. Miller et al., *Nutrition Education Improves Metabolic Outcomes Among Older Adults with Diabetes Mellitus: Results from a Randomized Controlled Trial*, 34 PREVENTIVE MED. 252 (2002); Medical News Today, *Pharmacy Care Program Can Increase Medication Adherence in Elderly*, <http://www.medicalnewstoday.com/articles/56977.php> (last visited Nov. 12, 2009).

We assume that alerting people to their cognitive biases should help them take those biases into account when processing information and making decisions.<sup>171</sup> Some recent fraud prevention materials have adopted this approach.<sup>172</sup> We also assume that educating consumers about producers' marketing strategies can help equip them to make more informed consumer choices.<sup>173</sup> Perhaps we could use these kinds of programs as a template for fraud prevention education.

At our current state of knowledge, however, we have no theory about how to educate against investment fraud and no metrics to determine whether educational programs are effective. We do not know whether alerting people to the possibility (or even the known existence) of a risk assessment deficit in the brain can help them in thinking in a new way about risky investment options. We do not know whether fraud prevention education can suppress a lifelong attraction to risk. In short, we do not know if or how education can disrupt the powerful influences reflected in the deception/decision cycle.

So, there is much to be learned through well-designed research on the impact of education (and different *types* of education) on investment decision making and susceptibility to fraud.<sup>174</sup> This is true for every age cohort and especially true for older adults.

The FINRA Investor Education Foundation is an obvious funding source for such research. The Foundation and its predecessor, the NASD Foundation, have already sponsored important research on investment fraud practices and the characteristics of investment fraud

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171. See Katherine Hall, *Looking Beneath the Surface: The Impact of Psychology on Corporate Decision Making* 49 *MANAGERIAL L.* 93, 94 (2007) (advocating training on cognitive biases for corporate directors); Gregory Mitchell, *Why Law and Economics' Perfect Rationality Should Not Be Traded for Behavioral Law & Economics' Equal Incompetence*, 91 *GEO. L.J.* 67, 87-94 (2002) (noting the impact of corrective education on common cognitive biases).

172. FINRA INVESTOR EDUC. FOUND., *OVERCOMING BIASES TO PROMOTE WISE INVESTING* 2 (2000), <http://www.finrafoundation.org/web/groups/foundation/@foundation/documents/foundation/p118416.pdf>.

173. See Willis, *supra* note 141, at 201.

174. A telling colloquy at the 2005 Senate Hearings on victimization of older investors suggests there has been little assessment of educational programs to date. See *Old Scams-New Victims*, *supra* note 23, at 33 (questions of Sen. Gordon Smith: "Do you do any research testing [these programs'] effectiveness? Do you have a sense you are reaching consumers? Is it getting through how they can protect themselves?" The answer stressed pretesting of materials, but not follow-up assessment. No one, apparently, has attempted to measure the success of these programs.).



victims;<sup>175</sup> attitudes of older investors (fifty-five and older) about their own financial literacy and overall market competence;<sup>176</sup> and the behavioral norms of this population with respect to brokers, investment advisers, and recommendations from friends.<sup>177</sup> It also has underwritten early research into the types of interventions that might actually help older adults make wiser investment choices.<sup>178</sup> Other possible funders include the AARP Foundation,<sup>179</sup> the charitable giving units of brokerage firms,<sup>180</sup> and foundations that fund programs in financial literacy.<sup>181</sup>

Whoever provides the funding, here are some of the questions that future researchers ought to seek to answer:

- Are cautionary messages high in “sensation value” more effective for an older audience than informational messages?<sup>182</sup> If so, what might these messages look like?
- What media are most effective in educating older adults?
- What kind of reinforcement is necessary to ensure that the cautionary message has been internalized and retained? How often, and through what media, should reinforcing messages be provided?

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175. INVESTOR FRAUD STUDY, *supra* note 19, at 5.

176. NASD INVESTOR EDUC. FOUND., SENIOR INVESTOR LITERACY AND FRAUD SUSCEPTIBILITY SURVEY, [http://www.saveandinvest.org/web/groups/sai/documents/sai\\_original\\_content/p036699.pdf](http://www.saveandinvest.org/web/groups/sai/documents/sai_original_content/p036699.pdf) (last visited Nov. 12, 2009).

177. See SaveAndInvest.org, Key Findings of Older Investor Risk Survey, <http://www.saveandinvest.org/55Plus/Resources> (last visited Nov. 12, 2009).

178. See SaveAndInvest.org, FINRA Investor Education Foundation, Investor Protection Campaign for Older Investors, <http://saveandinvest.org/55Plus/About/Index.htm> (last visited Nov. 12, 2009).

179. See AARP.org, AARP Foundation, [http://www.aarp.org/about\\_aarp/aarp\\_foundation](http://www.aarp.org/about_aarp/aarp_foundation) (last visited Nov. 12, 2009).

180. See Merrill Lynch Global Philanthropy, <http://philanthropy.ml.com> (last visited Nov. 12, 2009).

181. See Foundation for Financial Literacy, <http://www.ffliteracy.org> (last visited Nov. 12, 2009).

182. “Research in health communications . . . suggests that advertisements high in ‘sensation value’ (reflecting content that is novel, stimulating, graphic or explicit, among others) are more likely to increase viewers’ attention, motivation to call a hotline, ad recall, and intentions to perform the target behavior, than those with lower sensation value.” Lois Biener & T. M. Taylor, *The Continuing Importance of Emotion in Tobacco Control Media Campaigns: A Response to Hastings and MacFadyen*, 11 TOBACCO CONTROL 75, 76 (2002).

- What role, if any, should banks play in the educational effort? Banks, after all, often provide the last clear chance for avoiding unwise withdrawals or expenditures. (The same might be said for brokerage firms or pension funds.) Is today's fraud prevention message coming from the wrong messenger?
- How can we measure the success of fraud prevention educational programs?

As we explore these questions, we must remember a central, recurring law enforcement question. When confronted by widespread crime and given limited resources, should the state hire more policemen, sanction offenders more harshly, or rely on preemptive victim education? In the next section of this Article, I cast my vote for more resources spent on policemen and harsher sanctions and less on crime prevention education.

## VII. Alternative Strategies

Let us assume that the SEC, NASAA, AARP, and the many other providers of fraud prevention education for older adults are able to learn from the research suggested in this Article. Let us further assume that they consolidate some of their efforts. How might some of the money now spent on fraud prevention education be reallocated? In this section, I will briefly examine five possibilities: increased criminal prosecution for the perpetrators of securities fraud schemes targeted at the elderly; increased sanctions for those who are found guilty; monitoring of securities fraud first offenders with a profile suggesting the likelihood of recidivism; development of noninvasive diagnostic tools to identify those older adults whose risk assessment capacity has been compromised; and more fraud prevention education aimed at families.

First, it is essential that the predators who engage in securities fraud schemes against older adults be caught and sanctioned appropriately. Putting aside the many perpetrators who are outside the United States and not easily apprehended, most securities fraud perpetrators located in the United States are dealt with solely through the imposition of civil penalties, occupational bars, penny stock bars, and

“obey-the-law” injunctions.<sup>183</sup> Because of priority attention now given to terrorism issues, the FBI and U.S. Attorneys’ offices give little attention to the criminal prosecution of financial fraud, even big-dollar financial fraud.<sup>184</sup> This is a mistake. Somehow, more resources must be allocated to the prosecution of financial frauds at the retail level. High-profile frauds like Enron and WorldCom or Bernie Madoff’s Ponzi scheme unquestionably merit criminal prosecution, but so do the \$50,000 or \$100,000 securities frauds that deplete victims’ retirement accounts and also break their hearts.<sup>185</sup>

Second, when defendants are convicted of securities fraud schemes, they should be sanctioned harshly. Currently, the primary factor in determining sentence length is the amount of the victim’s financial loss.<sup>186</sup> While upward adjustment is allowed for the targeting of “vulnerable victims,” including targeting victims who are vulnerable because of their age,<sup>187</sup> the upward adjustments currently allowed for “use of a special skill” or use of “sophisticated means” in orchestrating one’s crime may be inadequate to take into account the types of persuasive techniques employed and perfected by the most predatory securities fraud defendants.<sup>188</sup>

I have suggested elsewhere some additional holes in the sentencing system for economic crimes. For example, upward departures are now available for telemarketing schemes aimed at older adults but not

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183. See Barnard, *supra* note 22, at 192–93 (pointing out the inadequacies of existing civil remedies to deter securities fraud perpetrators, especially recidivists).

184. See Dan Eggen & John Solomon, *Justice Department’s Focus Has Shifted*, WASH. POST, Oct. 17, 2007, at A1 (noting that, during the Bush administration, the Justice Department had retreated from prosecution of white collar crimes in favor of prosecution of immigration and terrorism-related offenses, as well as sex-trafficking and obscenity prosecutions); Paul Shukovsky et al., *The FBI’s Terrorism Trade-off: Focus on National Security After 9/11 Means that the Agency Has Turned Its Back on Thousands of White Collar Crimes*, SEATTLE POST-INTELLIGENCER, Apr. 11, 2007, [http://seattlepi.nwsourc.com/national/311046\\_fbterror11.html](http://seattlepi.nwsourc.com/national/311046_fbterror11.html).

185. See Jayne W. Barnard, *Allocution for Victims of Economic Crimes*, 77 NOTRE DAME L. REV. 39, 52–56 (2001) (detailing the devastating impact experienced by victims of financial frauds).

186. Samuel W. Buell, *Reforming Punishment of Financial Reporting Fraud*, 28 CARDOZO L. REV. 1611, 1619 (2007) (noting that “dollar loss is the dominant [sentencing] factor”).

187. U.S. SENTENCING GUIDELINES MANUAL § 3A1.1 (2007).

188. § 3B1.3 cmt. n.4 (“Special skill” refers to a skill not possessed by members of the general public and usually requires substantial education, training, or licensing.); § 2B1.1(b)(8) cmt. n.7 (“Sophisticated means” requires especially complex or especially intricate offense conduct pertaining to the execution or concealment of the offense.).

for (increasingly common) Internet-based schemes.<sup>189</sup> Also, there is currently no provision for an upward departure when a scheme involves the depletion and reinvestment of a retirement account.<sup>190</sup> Congress and the Sentencing Commission, respectively, should enact these provisions.

Third, perpetrators of securities fraud schemes who exhibit a high likelihood of recidivism should be monitored after their first (or certainly their second) encounter with law enforcement, whether or not that encounter results in criminal prosecution. We do this already for sex offenders with a recidivism profile.<sup>191</sup> Con artists, or at least some con artists, deserve the same type of regulatory scrutiny.<sup>192</sup>

Fourth, the government should support current efforts to identify the source of the risk assessment deficit identified in the Iowa studies. We have much to learn about where this deficit is located, how it operates, what biological or social factors may affect a person's risk assessment capacity, and how the risk assessment deficit may be retarded or reversed. Perhaps most importantly, we need to identify some practical diagnostic tools that can help geriatricians identify which of their patients have, or are at risk for developing, a risk assessment deficit. Only when that work is done can we turn our attention to behavioral or pharmaceutical treatments.

Finally, we need to assist families in the care and oversight they provide for their elderly parents.<sup>193</sup> Families need to know more about the cognitive biases, marketing stimuli, psychological needs, and environmental circumstances that contribute to decisions to engage in unwise investing. They also must learn more about the deception/decision cycle described in this Article, and become better educated (as it becomes possible to do so) about interventions that may be effective in interdicting their parents' bad investment choices.

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189. See Jayne W. Barnard, *Creative Sanctions for Online Investment Fraud*, 76 *Miss. L.J.* 949, 970 (2007).

190. *Id.* at 970-71.

191. See Barnard, *supra* note 22, at 224-25.

192. See *id.* for further discussion of the monitoring proposal.

193. A modest beginning may be found in the NASAA podcast, "Talking to Your Parents About Senior Investment Fraud," [http://www.nasaa.org/nasaa\\_newsroom/6434.cfm](http://www.nasaa.org/nasaa_newsroom/6434.cfm) (last visited Nov. 12, 2009).

### VIII. Conclusion

Older adults today are disproportionately the victims of all sorts of frauds, not just securities frauds. The AARP warns that “people over age 60 make up only one-eighth of the U.S. population, yet they constitute one of every three scam victims.”<sup>194</sup>

The victimization of older adults is due, in part, to the fact that they control a lot of money.<sup>195</sup> It is also due to the neurobiological, psychosocial, and environmental factors identified and discussed in this Article.

Is fraud prevention education the answer to this problem? Or, is it really a project that feels good but offers little likelihood of altering older adults’ decision-making behavior? This Article offers no easy answer. It does, however, suggest a research agenda that would provide a sound basis for educational intervention. Alternatively, it suggests that some or all of the factors that play a role in fraud victimization may be impervious to educational intervention.

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194. Kirchheimer, *supra* note 12.

195. See *Protecting Senior Citizens*, *supra* note 3, at 2 (“Households led by people over 40 already own 91 percent of America’s net worth . . .”); PROTECTING SENIOR INVESTORS, *supra* note 14, at 2 (“75% of the nation’s consumer financial assets, valued at \$16 trillion, are held by households headed by someone who is 50 or older.”).