# AN ANALYSIS OF ELDER FINANCIAL EXPLOITATION: FINANCIAL INSTITUTIONS SHIRKING THEIR LEGAL OBLIGATIONS TO PREVENT, DETECT, AND REPORT THIS "HIDDEN" CRIME

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*As the United States' elder population continues to grow, the increasing prevalence of elder financial exploitation will have profound implications for financial institutions. Evidence suggests that as many as one in five elder Americans have been victims of financial exploitation. Elder individuals are "ideal victims" for financial exploitation as many of these elderly victims are unlikely to report these crimes due to mental incapacity, embarrassment, fear, and refusal to acknowledge victimization. Financial institutions fail to focus enough on the issue of elder financial exploitation. Elder financial exploitation has caused an estimated annual cost of $20 billion. This Article illustrates how financial institutions fail to uphold the legal*

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*obligations imposed on them by the Bank Secrecy Act and the USA Patriot Act to detect and report elder financial exploitation in the United States. Furthermore, this Article presents financial institutions, regulators, lawmakers, and others with various recommendations on how to better prevent, detect, and report elder financial exploitation.*

## I. Introduction

In November 2018, one of the key architects of Marvel Comics,[1] Stan Lee, passed away at the age of 95.[2] While most people in the comic book world revered him as a legend, the final year of Lee's life was marred by allegations of elder abuse at the hands of his sole child, including verbal and physical assaults, forged checks, unauthorized real estate purchases, and the manipulated signing of a Power of Attorney.[3] In 2018, reports were published concerning an unauthorized check for $300,000 referencing a loan, written from Lee's business account without his knowledge to Hands of Respect, a company formed by Lee and Jerry Olivarez, a former business associate of Lee's daughter.[4] Additionally, in the fall of 2017, Olivarez reportedly used Lee's money to purchase a condominium in West Hollywood for $850,000.[5] Stan Lee's story has put a face to a problem regularly affecting millions of elderly Americans, costing them several billions of dollars a year.[6]

Elder financial exploitation is a major, and growing, issue in the U.S.—to the tune of up to $36 billion per year[7]—with some estimating that as many as one in five Americans over the age of sixty-five has

1. Mark Ebner, *Stan Lee Breaks His Silence: Those I Trusted Betrayed Me*, DAILY BEAST (Oct. 8, 2018, 5:10 AM), https://www.thedailybeast.com/stan-lee-would-like-to-set-the-record-straight-will-anyone-let-him?ref=scroll [hereinafter Ebner].

2. Jeremy Engle, *Learning With: 'Stan Lee Is Dead at 95; Superhero of Marvel Comics'*, N.Y. TIMES (Nov. 14, 2018), https://www.nytimes.com/2018/11/14/learning/learning-with-stan-lee-is-dead-at-95-superhero-of-marvel-comics.html.

3. Ebner, *supra* note 1, at 3.

4. Mark Ebner, *'Picked Apart by Vultures': The Last Days of Stan Lee*, DAILY BEAST (Mar. 10, 2018, 10:40 PM), https://www.thedailybeast.com/picked-apart-by-vultures-the-last-days-of-stan-lee.

5. Gary Baum, *Stan Lee Needs a Hero: Elder Abuse Claims and a Battle Over the Aging Marvel Creator*, HOLLYWOOD REPORTER (Apr. 10, 2018, 6:30 AM), https://www.hollywoodreporter.com/features/stan-lee-needs-a-hero-elder-abuse-claims-a-battle-aging-marvel-creator-1101229.

6. Nick Leiber, *How Criminals Steal $37 Billion a Year from America's Elderly*, BLOOMBERG (May 3, 2018, 3:00 AM), https://www.bloomberg.com/news/features/2018-05-03/america-s-elderly-are-losing-37-billion-a-year-to-fraud.

7. Tobie Stanger, *Financial Elder Abuse Costs $3 Billion a Year. Or Is It $36 Billion?*, CONSUMER REPORTS (Sept. 29, 2015), https://www.consumerreports.org/cro/consumer-protection/financial-elder-abuse-costs--3-billion-----or-is-it--30-billion-.

been victimized by financial exploitation.[8] The number of elders in the United States is exploding as the baby boomer generation ages and advances in medical technologies continue to extend the median lifespan.[9] Subsequently, elder financial exploitation will likely continue to grow, both in terms of the number of victims and the overall dollar impact.

One of the primary reasons why elder financial exploitation is such a big problem is that fraudsters see older individuals as attractive targets because they often have sizeable assets and regular income.[10] Elders can be more vulnerable to financial exploitation due to isolation, bereavement, health problems, physical disabilities, or declines in cognitive thinking.[11] Additionally, fraudsters who victimize elders know that elder abuse often goes unreported due to the victims' mental incapacity, embarrassment, fear, intimidation, or refusal to acknowledge victimization.[12] Indeed, it is for these reasons that the Consumer Financial Protection Bureau ("CFPB") has described elder financial exploitation as the "crime of the 21st century."[13]

To address and attempt to mitigate the growing issue of elder financial exploitation, the Financial Industry Regulatory Authority ("FINRA"), the Securities and Exchange Commission ("SEC"), and other agencies have recently enacted various guidance and rules specifically designed to better protect seniors and other at-risk adults, such

8. Press Release, Investor Protection Trust, Survey: 1 Out Of 5 Older Americans Are Financial Swindle Victims, Many Adult Children Worry About Parents' Ability To Handle Finances (June 15, 2010), available at http://www.investorprotection.org/downloads/EIFFE_Press_Release.pdf.

9. *The Growth of the U.S. Aging Population*, SENIORCARE, https://www.seniorcare.com/featured/aging-america/ (last visited Sept. 30, 2019) (According to SeniorCare.com, as of November 8, 2018, there are approximately 54,189,000 Americans age 65 or older, with that number growing to over 70 million by 2030 and 83 million by 2050.).

10. Jon Watson, *How to avoid and detect elder fraud: A guide for older people, carers, and relatives*, COMPARITECH, https://www.comparitech.com/blog/information-security/elder-fraud/ (last updated July 25, 2019).

11. *See, e.g.*, *Preventing Elder and Vulnerable Adult Financial Abuse*, WELLS FARGO, https://www.wellsfargoadvisors.com/planning/life-events/elder-protection.htm (last visited Sept. 30, 2019).

12. *Money Smart for Older Adults Resource Guide*, BUREAU OF CONSUMER FIN. PROT. & FED. DEPOSIT INS. CORP. (Sept. 2018), available at http://catalog.fdic.gov/system/files/MSOA_RG_180828.pdf [hereinafter *Money Smart*].

13. Stephen Deane, *Elder Financial Exploitation: Why it is a concern, what regulators are doing about it, and looking ahead*, U.S. SEC. & EXCH. COMM'N, (June 2018), https://www.sec.gov/files/elder-financial-exploitation.pdf [hereinafter Deane].

as those who are disabled.[14] While this new guidance and rulemaking is a much-needed step in the right direction to help raise awareness about elder financial exploitation, it is most important to first ensure that financial institutions adequately adhere to laws that have been in existence for decades.[15]

Because of the nature of elder financial exploitation, financial institutions are in a perfect position to prevent, detect, and report many of these fraudulent activities.[16] Yet, statistics plainly show that financial institutions are failing, in many instances, miserably, at upholding their legal obligations under the Bank Secrecy Act ("BSA") and the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act ("Patriot Act") to monitor for and report suspicious activity that may indicate elder financial exploitation.[17] Going forward, financial institutions must do a better job of carrying out their responsibilities to prevent and detect elder financial exploitation in order to mitigate the overall impact of this growing epidemic.

To bring more light to this critical issue, we explain herein how elder financial exploitation is defined and describe what types of activities are and are not included. The purpose of this Article is to illustrate how financial institutions fail to prevent, detect, and report the vast majority of elder financial exploitation. It also provides specific information related to casinos, which appear to have the most egregious failures in terms of their legal obligation to detect and report elder financial exploitation by far.

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14. *See, e.g.*, *4512. Customer Account Information*, FIN. INDUS. REGULATORY AUTH., https://www.finra.org/rules-guidance/rulebooks/finra-rules/4512 (last visited Sept. 30, 2019).

15. *See, e.g.*, Juan M. Arcinegas et al., *Recent Developments: Bank Responsibility for Elder Financial Exploitation*, NAT'L L. REV. (Apr. 30, 2016), https://www.natlawreview.com/article/recent-developments-bank-responsibility-elder-financial-exploitation.

16. *See, e.g.*, *Reporting of Suspected Elder Financial Exploitation by Financial Institutions*, CONSUMER FIN. PROT. BUREAU (July 2019), available at https://files.consumerfinance.gov/f/documents/cfpb_suspected-elder-financial-exploitation-financial-institutions_report.pdf.

17. *See, e.g.*, *Financial Privacy, Reporting Requirements Under the Bank Secrecy Act*, ACLU, https://www.aclu.org/report/financial-privacy-reporting-requirements-under-bank-secrecy-act (last visited Sept. 30, 2019); *see also Advisory for financial institutions on preventing and responding to elder financial exploitation*, CONSUMER FIN. PROT. BUREAU, at 1 (Mar. 2016), https://files.consumerfinance.gov/f/201603_cfpb_advisory-for-financial-institutions-on-preventing-and-responding-to-elder-financial-exploitation.pdf.

This Article provides a brief overview of the BSA, the Patriot Act, and the obligations of financial institutions as they relate to preventing, detecting, and reporting elder financial exploitation. It then analyzes the number of Suspicious Activity Reports ("SARs") that have been categorized as elder financial exploitation in relation to statistics reported from other sources. Next, it offers several explanations as to why financial institutions may not be meeting their regulatory obligations around elder financial exploitation. Finally, this Article provides several recommendations designed to help financial institutions, regulators, lawmakers, and others with better preventing, detecting, and reporting elder financial exploitation.

## II. What Is Elder Financial Exploitation?

There are many types of elder abuse, including physical, emotional, sexual, and financial.[18] Studies indicate that an estimated five million elders are abused in some way every year.[19] This abuse is committed by family members, caregivers, and strangers, both male and female.[20] Unfortunately, the most common abuser is someone who is entrusted to care for the elder, and of those abusers, 60% of abusers are family members.[21] Elder abuse has real, tangible, and measurable impacts on the elderly.[22] For example, elders who are abused are three times more likely to die prematurely, and the financial toll could mean the loss of a lifetime of savings.[23]

Elder financial exploitation is broadly defined as the "illegal or improper use of the funds, property, or assets of an elder."[24] The exact age at which an individual is considered an elder and receives statutory protection varies from state to state and typically ranges from sixty to

18. *Elder Abuse Facts*, NAT'L COUNCIL ON AGING, https://www.ncoa.org/public-policy-action/elder-justice/elder-abuse-facts/ (last visited Sept. 30, 2019) [hereinafter *Elder Abuse Facts*].

19. *Id.*

20. *Statistics and Data*, NAT'L CTR. ON ELDER ABUSE, https://ncea.acl.gov/What-We-Do/Research/Statistics-and-Data.aspx (last visited Sept. 30, 2019).

21. *Elder Abuse Facts, supra* note 18.

22. *Id.*

23. *Id.*

24. *Types of Abuse*, NAT'L CTR. ON ELDER ABUSE, https://ncea.acl.gov/Suspect-Abuse/Abuse-Types.aspx (last visited Sept. 30, 2019).

sixty-five.[25] At the federal level, an elder individual is defined as an individual who is sixty years of age or older.[26]

Elder financial exploitation is typically categorized as one of two different types.[27] The first type of financial abuse involves a perpetrator with a trusted relationship with the victim.[28] The perpetrator is often a family member, friend, caregiver, or trusted professional such as an attorney, accountant, or wealth manager.[29] The saga of Stan Lee's last year of life is a perfect example of this type of elder financial exploitation because he was victimized by his own child and business associates.[30]

The second type of elder financial exploitation is fraud perpetrated by strangers. This type of financial abuse involves a perpetrator without a relationship with the victim and often involves lottery, sweepstakes, and charity scams, predatory lending and Medicare scams, and investment and securities scams.[31] For instance, earlier this year, the Justice Department announced charges filed against more than 250 individuals involved in a $500 million elder fraud scheme.[32] The scam used mass mailings and telemarketing to victimize more than one million people.[33] An additional example involves a common scam currently being perpetrated against individuals: fraudsters pose as the Internal Revenue Service ("IRS"), in some cases by spoofing IRS phone numbers, and threaten the victims with arrest by claiming that they owe the IRS money.[34] Victims are told that they must make immediate

25. *See Senior and Vulnerable Investor Laws*, BRESSLER, AMERY & ROSS, P.C., https://www.bressler.com/senior-map (last visited Sept. 30, 2019).
26. 42 U.S.C. § 3002(40) (2018).
27. *Elder Financial Exploitation*, NAT'L ADULT PROTECTIVE SERVS. ASS'N, http://www.napsa-now.org/policy-advocacy/exploitation/ (last visited Sept. 30, 2019) [hereinafter *Elder Financial Exploitation*].
28. *Id.*
29. *Id.*
30. *See* Chloe Melas, *Stan Lee's former manager is charged with elder abuse*, CNN (May 14, 2019, 5:53 PM), https://www.cnn.com/2019/05/14/entertainment/stan-lee-manager-elder-abuse-keya-morgan/index.html; *see also* Brian Cronin, *Stan Lee's Daughter Accused of Physical, Psychological Elder Abuse*, CBR.COM (Apr. 10, 2018), https://www.cbr.com/stan-lee-daughter-elder-abuse/.
31. *Elder Financial Exploitation*, *supra* note 27.
32. *Id.*
33. Darla Mercado, *Justice Department announces charges in $500 million senior fraud schemes*, CNBC (Feb. 22, 2018, 12:47 PM), https://www.cnbc.com/2018/02/22/justice-department-files-charges-against-250-defendants-in-senior-fraud-schemes.html.
34. *Id.*

payment either with a specific prepaid debit card or by wire transfer.[35] Although many of these schemes do not necessarily target elders specifically,[36] elders are frequent victims of these types of scams for many of the reasons previously discussed.

## III. The BSA and Patriot Act: What Are They, and What Do They Require from Financial Institutions?

The BSA, enacted in 1970, requires financial institutions to assist government agencies with preventing and detecting money laundering by monitoring for and reporting certain types of customer financial activities and transactions.[37] Then, in response to the terrorist attacks of September 11, 2001, Congress passed the Patriot Act, which, among other things, amended the BSA to require financial institutions to implement additional anti-money laundering ("AML") prevention, detection, and response controls as part of their AML program.[38]

According to the BSA, financial institutions are broadly defined and include the following:

> **Depository institutions:** Commercial banks, insured banks, private banks and bankers, and U.S. branches of foreign banks.
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> **Casinos and card clubs**: Licensed casinos or gaming establishments under the laws of any state or any political subdivision of any state; or an Indian gaming operation conducted under or pursuant to the Indian Gaming Regulatory Act.
>
> **Insurance companies**: Companies that provide products including a permanent life insurance policy other than a group life insurance policy; any annuity contract other than a group annuity contract; or any other insurance product with features of cash value or investment.
>
> **Loan or finance companies**: Business entities that make loans to or finance purchases on behalf of consumers and

35. *IRS Cautions Taxpayers to Watch for Summertime Scams*, INTERNAL REVENUE SERV. (June 26, 2017), https://www.irs.gov/newsroom/irs-cautions-taxpayers-to-watch-for-summertime-scams.
36. *Id.*
37. *Id.*
38. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. 107–56, 115 Stat. 274 (2001) [hereinafter USA Patriot Act].

> businesses, including nonbank residential mortgage lenders and originators, generally known as "mortgage companies" and "mortgage brokers" in the residential mortgage business sector.
>
> **Money service businesses ("MSBs"):** Businesses engaged in the issuing or selling of money orders or traveler's checks, money transmission, check cashing, or foreign currency exchange.
>
> **Securities broker-dealers**: Businesses engaged in the trading of securities for its own account or on behalf of its customers.[39]

The BSA and Patriot Act (collectively, "AML regulations") require financial institutions to establish an AML program that consists of four main requirements known as the Four Pillars:[40]

- Develop internal policies, procedures, and controls;
- Designate an individual as a BSA compliance officer;
- Independently test the BSA/AML program; and
- Conduct periodic training for appropriate personnel.[41]

In 2016, a fifth pillar, customer due diligence, was added and, more recently, understanding beneficial ownership was mandated as part of the customer due diligence requirement.[42] The Financial Crimes Enforcement Network's ("FinCEN") final rule on customer due diligence became effective on July 11, 2016, and requires financial institutions to obtain and analyze sufficient customer information to understand the nature and purpose of customer relationships for the purpose of developing a customer risk profile.[43] Moreover, financial institutions are required on a risk basis to maintain and update customer information, including information regarding the beneficial owner(s) of legal entity customers.[44]

39. Bank Secrecy Act, 31 U.S.C § 5312(a)(2) (2018).
40. USA Patriot Act, *supra* note 38.
41. *Id.*
42. Customer Due Diligence Requirements for Financial Institutions, 81 Fed. Reg. 29,398 (May 11, 2016) (to be codified 31 C.F.R. Part 2010).
43. *Id.*
44. *Id.*

These five pillars are designed to work cohesively and comprehensively to help ensure that financial institutions are, among other things:[45]

- Obtaining and verifying customer information and documentation at the time of an account opening;
- Monitoring transactions and customer account activity to determine whether the activity in a customer account is consistent with the customer profile;
- Reporting certain types of activity, such as large cash transactions, through the filing of a currency transaction report ("CTR");
- Reporting potentially illegal activity to law enforcement through the filing of a SAR;
- Sharing information with other financial institutions and law enforcement; and,
- Closing accounts where patterns of potentially suspicious and/or illegal activity exist.[46]

Perhaps not surprisingly, the focus of law enforcement following the terrorist attacks on September 11, 2001, and the pretext for strengthening AML regulations through the passage of the Patriot Act, was to have banks aid law enforcement with identifying activity that may be indicative of terrorist financing.[47]

SARs have been a regulatory requirement since the passage of the Annunzio-Wylie Anti-Money Laundering Act of 1992.[48] They are required for activity that is identified as potentially suspicious and in aggregate over $5,000,[49] or $2,000 for money services businesses.[50] Suspicious activity is defined as a transaction analyzed by a financial

45. USA Patriot Act, *supra* note 38.
46. *Id.*
47. *Id.*
48. *See History of Anti-Money Laundering Laws*, U.S. DEP'T OF THE TREASURY FIN. CRIMES ENF'T NETWORK, https://www.fincen.gov/history-anti-money-laundering-laws (last visited Sept. 30, 2019).
49. *Bank Secrecy Act/ Anti-Money Laundering Examination Manual*, FED. FIN. INST. EXAMINATION COUNCIL, (Feb. 27, 2015) available at https://bsaaml.ffiec.gov/docs/manual/01_Introduction/01.pdf [hereinafter *Bank Secrecy Act/ Anti-Money Laundering Examination Manual*].
50. *Money Services Business (MSB) Suspicious Activity Reporting*, U.S. DEP'T OF THE TREASURY FIN. CRIMES ENF'T NETWORK, http://www.fincen.gov/money-services-business-msb-suspicious-activity-reporting (last visited Sept. 30, 2019). [hereinafter U. S. DEP'T OF THE TREASURY FIN. CRIMES ENF'T NETWORK].

institution that is deemed to be unusual or inconsistent for that particular client, and may be indicative of criminal activity.[51]

Financial institutions file SARs with FinCEN, an agency within the Department of the Treasury.[52] According to their website, FinCEN's mission is to "safeguard the financial system from illicit use, combat money laundering, and promote national security through the strategic use of financial authorities and the collection, analysis, and dissemination of financial intelligence."[53] One of the most important tasks of FinCEN is to maintain a repository of CTRs and SARs e-filed by financial institutions.[54] The e-filing of CTRs and SARs allows FinCEN, law enforcement, and regulators to access information in a timely and expeditious manner and either aid in an ongoing investigation or provide a tip about potential criminal activity that should be investigated.[55]

Under the AML regulations, financial institutions are required to file SARs on a litany of crimes—not just those related to terrorism.[56] In fact, financial institutions are obligated to tailor their AML programs to prevent, detect, and report on more than 200 predicate crimes.[57] When financial institutions file SARs with FinCEN, they are required to include information on the SAR such as the type of financial institution where the suspicious activity occurred, the amount and date range of the suspicious activity, the product type, the type and characterization of suspicious activity, and a narrative describing the nature and circumstances of the suspicious activity in more detail.[58] Some examples of the type and characterization of suspicious activity include terrorist financing, money laundering, mortgage fraud, bribery, embezzlement, human trafficking, identity theft, securities fraud, structuring, and, of

51. *Bank Secrecy Act/ Anti-Money Laundering Examination Manual*, *supra* note 49 ("One purpose of filing SARs is to identify violations or potential violations of law to the appropriate law enforcement authorities for criminal investigation.").

52. *Id.*; *BSA Filing System*, U. S. DEP'T OF THE TREASURY FIN. CRIMES ENF'T NETWORK, https://bsaefiling.fincen.treas.gov/main.html (last visited Sept. 30, 2019).

53. *Mission*, U.S. DEP'T OF THE TREASURY FIN. CRIMES ENF'T NETWORK, https://www.fincen.gov/about/mission (last visited Sept. 30, 2019).

54. *See What We Do*, U.S. DEP'T OF THE TREASURY FIN. CRIMES ENF'T NETWORK, https://www.fincen.gov/what-we-do (last visited Sept. 30, 2019).

55. *Id.*

56. *Bank Secrecy Act/Anti-Money Laundering Examination Manual*, *supra* note 49.

57. *Id.*

58. *Id.* at 71; *see also* United States Sec. & Exch. Comm'n v. Alpine Sec. Corp., 308 F. Supp. 3d 775 (S.D.N.Y. 2018); *Frequently Asked Questions Regarding the FinCEN Suspicious Activity Report (SAR)*, FIN. CRIMES ENF'T NETWORK, https://www.fincen.gov/frequently-asked-questions-regarding-fincen-suspicious-activity-report-sar (last visited Sept. 30, 2019).

course, elder financial exploitation, which was added as a SAR form category in 2013 when SAR filings were changed from paper filings to an e-filing system.[59]

In light of these developments, it may come as no surprise that SARs are considered to be the key bulwark of the AML regulations.[60] Indeed, they are one of the primary tools used by law enforcement to become informed about potentially criminal conduct and to aid in their investigations.[61] It is also the primary reason why financial institutions monitor for suspicious activity—i.e., to identify activity that should be reported to law enforcement through the filling of a SAR.[62] Financial institutions are required to monitor for potentially suspicious activity where a customer is a victim of a potential fraud, and where a customer, or other individual or entity, may be committing fraud.[63] Financial institutions are required to file SARs both for victims of fraud and for perpetrators of fraud, such as money mules, people who serve as intermediaries between victims, and criminal organizations.[64]

In 2017 alone, financial institutions filed SARs on nearly five million instances of suspicious activity in eighty different categories.[65] Comparatively, in 2015 and 2013, approximately 4.3 million and 2.7 million SARs were filed, respectively.[66] One reason for the rise in reporting is the increased regulatory scrutiny and growth in enforcement actions over the last several years.[67] Because SARs serve such a critical function in, and are an integral part of, many enforcement investigations, failing to file SARs and other systemic failures in an AML program can lead to fines in the hundreds of millions, and even billions, of dollars.[68] There are several recent notable cases, including:

59. *See Suspicious Activity Report (FinCEN SAR) Electronic Filing Requirements*, FIN. CRIMES ENF'T NETWORK (2018) https://bsaefiling.fincen.treas.gov/docs/XMLUserGuide_FinCENSAR.pdf [hereinafter FINCEN Suspicious Activity Report].

60. *Suspicious Activity Report Statistics (SAR Stats)*, FIN. CRIMES ENF'T NETWORK, https://www.fincen.gov/reports/sar-stats (last visited Sept. 30, 2019) [hereinafter FIN. CRIMES ENF'T NETWORK].

61. *See What We Do*, DEP'T OF THE TREASURY FIN. CRIMES ENF'T NETWORK, https://www.fincen.gov/what-we-do (last visited Sept. 30, 2019).

62. *See id.*

63. *Bank Secrecy Act/ Anti-Money Laundering Examination Manual*, *supra* note 49.

64. *See* FINCEN Suspicious Activity Report, *supra* note 59.

65. FIN. CRIMES ENF'T NETWORK, *supra* note 60.

66. *Id.*

67. *See, e.g.*, Rashida Kamal, *Trend Watching Across FinCEN's Suspicious Activity Data*, ENIGMA (Nov. 17, 2017), https://www.enigma.com/blog/trend-watching-across-fincens-suspicious-activity-data.

68. U.S. DEP'T OF THE TREASURY FIN. CRIMES ENF'T NETWORK, *supra* note 50.

**Société General:** $1.4 billion total fine for violating U.S. sanctions against Cuba and other countries, in addition to other AML program failures;[69]

**Western Union:** $586 million total fine for failing to maintain adequate policies, procedures, and internal controls;[70]

**Rabobank:** $368 million total fine for impairing, impeding, and obstructing the Office of the Comptroller of Currency ("OCC") by concealing deficiencies in its AML program, including failures to adequately investigate transactions by "high-risk" customers and obstructing the OCC's examination of the bank;[71] and

**U.S. Bank:** $613 million total fine for violating the requirement to develop and implement an effective AML program, as well as violating CTR and SAR filing requirements.[72]

As a result of increased regulatory scrutiny, enforcement actions, and resulting fines, financial institutions have increasingly made AML compliance and the filing of SARs a priority.[73] The problem, however, is that even though these staggering AML-related fines have generally resulted in financial institutions being more proactive about preventing, detecting, and reporting potentially suspicious activity, the statistics clearly show that financial institutions are focusing their attention on drug trafficking, terrorist financing, and other types of fraud—not on elder financial exploitation.[74]

69. *See Societe Generale to pay $1.4 billion to settle cases in the U.S.*, CNBC (Nov. 19, 2018, 1:07 PM), https://www.cnbc.com/2018/11/19/societe-generale-to-pay-1point34-billion-fine-for-sanctions-violations-federal-reserve-says.html.

70. *See* Lauren Debter, *Western Union Slammed for Aiding Crooks, Agrees to Pay $586 Million*, FORBES (Jan. 19, 2017, 2:33 PM), https://www.forbes.com/sites/laurengensler/2017/01/19/western-union-anti-money-laundering-consumer-fraud-violations/#252ad0b27238.

71. Karen Freifield, *Rabobank agrees to pay $368 million over processing illicit funds*, REUTERS (Feb. 7, 2018, 12:55 PM), https://www.reuters.com/article/us-rabobank-fraud-usa/rabobank-agrees-to-pay-368-million-over-processing-illicit-funds-idUSKBN1FR2U4.

72. Kate Berry, *Regulators fine U.S. Bank for more than $600M for AML errors*, AMERICAN BANKER (Feb. 15, 2018, 10:44 AM), https://www.americanbanker.com/news/regulators-fine-us-bank-more-than-600m-for-aml-errors.

73. *See, e.g.*, Rashida Kamal, *Trend Watching Across FinCEN's Suspicious Activity Data*, ENIGMA (Nov. 17, 2017), https://www.enigma.com/blog/trend-watching-across-fincens-suspicious-activity-data.

74. FIN. CRIMES ENF'T NETWORK, *supra* note 60.

## IV. Elder Financial Exploitation and SAR Filing Statistics

The statistics related to elder financial exploitation are simply staggering and, unfortunately, vary widely.[75] For example, a study by the Investor Protection Trust, a nonprofit organization devoted to investor education, estimated that one in five Americans over the age of sixty-five has been victimized by financial exploitation,[76] whereas researchers in the Journal of General Internal Medicine concluded that the number is approximately one in twenty.[77] In a recent report on elder financial exploitation, the SEC cited research from five different studies that indicated between 2.7% and 6.6% of elders are exploited financially on an annual basis, with many cases going unreported.[78]

The U.S. Census Bureau estimated that there were approximately 49.2 million individuals age sixty-five or older in early 2016,[79] with that population crossing the 50 million threshold in November 2016.[80] In November 2018, the population of individuals age sixty-five and older was approximately 54 million.[81] Therefore, anywhere from about 1.3 million to 3.5 million elders are exploited financially every year, and that number continues to grow.[82]

Elder financial exploitation is often referred to as a "hidden crime"[83] because so much elder abuse goes unreported due to the elderly victim's mental incapacity, embarrassment, fear, intimidation, refusal to acknowledge victimization, and many other valid reasons.[84] Indeed, the Federal Trade Commission has estimated that only one in

75. *See generally* Press Release, Inv'r Prot. Tr., Survey: 1 Out Of 5 Older Americans Are Financial Swindle Victims, Many Adult Children Worry About Parents' Ability To Handle Finances (June 15, 2010) (on file with author), http://www.investorprotection.org/downloads/EIFFE_Press_Release.pdf.

76. *Id.*

77. Janey C. Peterson et al., *Financial Exploitation of Older Adults: A Population-Based Prevalence Study*, 29 J. GEN. INTERNAL MED. 1615, 1621 (2014).

78. *See* Deane, *supra* note 13.

79. Press Release, The Nation's Older Population Is Still Growing, Census Bureau Reports, U.S. CENSUS BUREAU, (June 22, 2017) (on file with author), https://www.census.gov/newsroom/press-releases/2017/cb17-100.html.

80. *The Growth of the U.S. Aging Population*, SENIORCARE.COM, https://www.seniorcare.com/featured/aging-america/ (last visited Sept. 30, 2019).

81. *Id.*

82. Based on the following calculation: 2.7 percent of 49.2 million = 1,328,400; 6.6 percent of 54 million = 3,564,000.

83. Brenda K. Uekert & Richard Van Duizend, *Resources for Fighting Elder Abuse—The Hidden Crime*, 24 EXPERIENCE 26, 26 (2014).

84. *Money Smart*, *supra* note 12.

twenty-four cases of elder financial exploitation is reported.[85] A study from New York in 2011 concluded that only one in forty-four cases of elder financial exploitation is reported.[86]

Additionally, even though the overall financial impact of elder financial exploitation is ultimately unknown, estimates range from approximately $3 billion per year to over $36 billion per year.[87] The reason for such a broad range is due to the low rate of reporting, and it is almost impossible to accurately measure because of the many types of exploitation and schemes.[88]

Nevertheless, for the purpose of this Article and analysis going forward, we will use the following estimates and assumptions which take into consideration the reported statistics from various studies:

- Estimated annual cost of elder financial exploitation: $20 billion;[89]
- Individuals age sixty-five or older in the U.S. in 2017: 50 million;[90]
- Number of elders financially exploited in 2017: 2.2 million;[91]

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85. Tobie Stanger, *Financial Elder Abuse Costs $3 Billion a Year. Or Is It $36 Billion?*, CONSUMER REP (Sept. 29, 2015), https://www.consumerreports.org/cro/consumer-protection/financial-elder-abuse-costs—3-billion——-or-is-it—30-billion-.

86. *Id.*

87. *Id.*; *Recommendations and report for financial institutions on preventing and responding to elder financial exploitation*, CONSUMER FIN. PROT. BUREAU (Mar. 2016), https://files.consumerfinance.gov/f/201603_cfpb_recommendations-and-report-for-financial-institutions-on-preventing-and-responding-to-elder-financial-exploitation.pdf (Claiming that the estimate of approximately $3 billion, considered very conservative, is based on a MetLife study in 2011 using reported cases and amounts of financial exploitation, while the $36 billion estimate was extrapolated and generalized across the population based on caregiver surveys).

88. *Money Smart*, *supra* note 12.

89. Based on the following calculation: ($2.9 billion + $36.5 billion)/2 = $19.7 billion, rounding up to $20 billion.

90. *The Growth of the U.S. Aging Population*, SENIORCARE.COM, https://www.seniorcare.com/featured/aging-america/ (last visited Sept. 30, 2019) (stating the population of individuals aged sixty-five or older was approximately 52 million at the end of 2017); *But see* Press Release, Facts for Features: Older Americans Month: May 2017, U.S. CENSUS BUREAU (Apr. 10, 2017) (on file with author), http://www.census.gov/newsroom/facts-for-features/2017/cb17-ff08.html (stating that as of May 2017 the population of Americans aged sixty-five or older was 47.8 million. Accordingly, we averaged the two figures and rounded to 50 million (47.8 million + 52 million)/2 = 50 million).

91. *See* Deane, *supra* note 13.

- Total number of SARs filed for 2017: 5 million;[92] and
- Total SARs filed by all financial institutions categorized as elder financial exploitation for 2017: 63,000.[93]

## V. Slicing and Dicing the Statistics: Financial Institutions Are Failing Our Elders

Financial institutions have been steadily increasing the number of SARs that they file, and SARs related to elder financial exploitation are no exception.[94] Since 2014, the number of SARs concerning elder financial exploitation increased from approximately 25,000 in 2015 to 63,000 in 2017.[95] In other words, in 2015, approximately 0.6% of all SARs filed related to elder financial exploitation[96] compared with 2017, when 1.3% of all SARs filed related to elder financial exploitation.[97] Assuming, as indicated in the various studies, that elder financial exploitation has remained relatively constant from 2015 to 2017, this increase tends to indicate that financial institutions are doing better at detecting and reporting elder financial exploitation.[98] Compared to the enormity of the elder financial exploitation problem, however, the statistics plainly show that financial institutions, as a whole, are still failing miserably at preventing, detecting, and reporting elder financial exploitation.[99]

More specifically, given that approximately 2.2 million elders were exploited financially in 2017 and 63,000 SARs related to elder financial exploitation were filed, that means that financial institutions detected and reported only 2.8% of the instances of elder financial exploitation in 2017.[100] Furthermore, that percentage is even more abys-

92. *FINCEN Suspicious Activity Report Statistics*, FIN. CRIMES ENF'T NETWORK, https://www.fincen.gov/reports/sar-stats (last visited Sept. 30, 2019).

93. *Id.*

94. *Suspicious Activity Reports on Elder Financial Exploitation: Issues and Trends*, CONSUMER FIN. PROT. BUREAU, at 29 (2019), https://files.consumerfinance.gov/f/documents/cfpb_suspicious-activity-reports-elder-financial-exploitation_report.pdf [hereinafter CONSUMER FIN. PROT. BUREAU].

95. FIN. CRIMES ENF'T NETWORK, *supra* note 60.

96. *Id.*

97. *Id.*

98. *See* CONSUMER FIN. PROT. BUREAU, *supra* note 94.

99. *See id.*

100. FIN. CRIMES ENF'T NETWORK, *supra* note 60 (63,000 / 2,200,000 = .028 = 2.8%).

mal when considering that many of those victims were exploited multiple times.[101] Additionally, some of the 63,000 SARs filed by financial institutions were likely "continuing SARs"—SARs indicating that activity identified as suspicious is recurring, follows a consistent pattern or typology, and continues over a longer period of time.[102] Granted, on one hand, not all elder financial exploitation occurs through a financial institution and, therefore, cannot be prevented, detected, or reported by a financial institution through a SAR filing.[103] On the other hand, the vast majority of elder financial exploitation schemes do involve, in one way or another, a financial institution.[104] Therefore, the best-case scenario is that financial institutions identified and reported only about 2.8% of those victimized by elder financial exploitation in 2017, but because of continuing SARs and victims who are exploited more than once, that percentage is likely even lower—perhaps significantly lower.[105]

While financial institutions are generally failing in their legal obligation to prevent, detect, and report elder financial exploitation, casinos are the worst offenders in terms of failing to report potentially suspicious activity that may be indicative of elder financial exploitation.

Very few SARs reported by casinos relate to elder financial exploitation. The American Gaming Association's 2013 edition of *State of the States* was the last edition to have data relating to the number of visitors over the age of sixty-five.[106] The report stated that 76.1 million people visited casinos in 2012, and 28% (21.3 million) were over the age of

101. *See, e.g.*, *Incidence of Financial Exploitation*, NAT'L INST. OF JUST., (June 7, 2013), https://www.nij.gov/topics/crime/elder-abuse/pages/financial-exploitation.aspx.

102. *See FinCEN Suspicious Activity Report (FinCEN SAR) Electronic Filing Instructions*, FIN. CRIMES ENF'T NETWORK, at 84 (Oct. 2012), available at https://www.fincen.gov/sites/default/files/shared/FinCEN%20SAR%20ElectronicFiling Instructions-%20Stand%20Alone%20doc.pdf.

103. *Elder Financial Exploitation*, NAT'L ADULT PROTECTIVE SERVS. ASS'N, https://www.napsa-now.org/policy-advocacy/exploitation/ (last visited Sept. 30, 2019).

104. *Identification and Detection of Elder Financial Exploitation*, NICE ACTIMIZE 4 (2018), https://www.niceactimize.com/Documents/Fraud_Elder_Exploitation_white_paper.pdf.

105. FIN. CRIMES ENF'T NETWORK, *supra* note 60.

106. *State of the States: The AGA Survey of Casino Entertainment*, AM. GAMING ASS'N, at 23 (2013), http://www.theinnovationgroup.com/maint/docs/aga_sos 2013_fnl.pdf.

sixty-five.[107] Assuming that the number of casino visitors and the proportion of visitors over the age of sixty-five has remained relatively constant from 2012 through 2017, approximately 128 million people over the age of sixty-five visited casinos during that time period.[108] Furthermore, reporting indicates that as of December 31, 2017, there were 1268 commercial and tribal casinos and card rooms (all of which are required to file SARs) in the U.S.[109] Yet, astonishingly, casinos filed only sixty SARs related to elder financial exploitation between 2012 and 2017,[110] compared to 378,050 SARs filed by casinos for all types of suspicious activity during that same time period.[111] Thus, between 2012 and 2017, less than 0.02% of SARs filed by casinos related to elder financial exploitation.[112]

By comparison, during that same period, depository institutions, such as banks, filed 88,505 out of a total of approximately 11.5 million SARs, or 0.8%, related to elder financial exploitation.[113] Additionally, all financial institutions filed about 182,000 out of a total of approximately 21 million SARs, or 0.9%, related to elder financial exploitation during that same period.[114]

Disturbingly, the trend of casinos failing to prevent, detect, and report elder financial exploitation appears to be continuing. In 2018, casinos filed only twenty-four SARs through October 2018 related to elder financial exploitation, whereas all financial institutions filed nearly 46,000 SARs for elder financial exploitation for the same period.[115]

These statistics no doubt paint a bleak picture of financial institutions, especially casinos, in terms of meeting their legal obligation to prevent, detect, and report elder financial exploitation.[116] There are seemingly a number of reasons why this appears to be the case. Nevertheless, financial institutions are failing our aging population, and changes need to be made.

107. *Id.*
108. *See id.*
109. *Id.* at 14.
110. FIN. CRIMES ENF'T NETWORK, *supra* note 60.
111. *Id.*
112. *Id.* (60 / 378,050 = .000158 = .02%).
113. *Id*. (88,505 / 11.5 million = .0077 = .8%).
114. *Id.* (182,000 / 21 million = .0087 = .9%).
115. *Id.*
116. *Suspicious Activity Reports and Their Role in Investigations of Elder Financial Exploitation*, DEP'T OF JUST. ELDER JUST. INITIATIVE (Nov. 2, 2017), https://www.justice.gov/file/1064536/download [hereinafter ELDER JUST. INITIATIVE].

## VI. Elder Financial Exploitation Prevention, Detection, and Reporting: Current Challenges and Recommendations for How Financial Institutions Can Improve

There are a number of reasons why financial institutions are likely failing at their obligation to prevent, detect, and report elder financial exploitation, but there are relatively simple actions that can mitigate or prevent elder financial exploitation.

First, varying definitions, standards, and inconsistencies related to defining elder abuse exist. There should be a uniform and standard definition of who is considered an elder.

Second, current AML programs, including transaction monitoring systems, are not tailored for detecting and reporting elder financial exploitation, and they are often focused on detecting and reporting suspicious activities such as terrorist financing, drug smuggling/dealing, and other types of fraud.[117] Accordingly, transaction monitoring systems should be more tailored for elder financial exploitation.

Third, a general lack of training and education exists, especially with front-line staff (i.e., staff that interact directly with customers), on indicia that elder financial exploitation may be occurring.[118] Additionally, there is a lack of education on when the "Elder Financial Exploitation" suspicious activity type should be indicated on the SAR.[119] Financial institutions should increase both the quantity and quality of staff training as it relates to elder financial exploitation, including when it should be indicated on a SAR. In many elder abuse schemes, perpetrators request cash and gift cards rather than direct payments (i.e., checks, money orders, wires, etc.) which are harder to trace and often sold by stores with few to no anti-fraud and AML controls.[120] All entities that deal with these types of financial instruments should be subject to the AML regulations and further scrutinized by regulators.

117. *See Anti-Money Laundering (AML)*, FINRA, https://www.finra.org/rules-guidance/key-topics/aml (last visited Sept. 30, 2019); Will Kenton, *Anti-Money Laundering (AML)*, INVESTOPEDIA (Sept. 10, 2019), https://www.investopedia.com/terms/a/aml.asp.

118. Deane, *supra* note 13, at 13.

119. *See id.*

120. *Merchant-Based Money Laundering Part 2: Prepaid Gift Card Smurfing*, ASS'N OF CERTIFIED FIN. CRIME SPECIALISTS (Jan. 26, 2017), https://www.acfcs.org/merchant-based-money-laundering-part-2-prepaid-gift-card-smurfing/.

Fourth, due to the lack of bank examiner and regulator focus and attention given to elder financial exploitation, regulators should focus on elder financial exploitation.[121] Regulators, when conducting routine examinations of financial institutions, should specifically focus on determining whether the program is adequate to prevent, detect, and report elder financial exploitation.

Finally, states can help prevent elder financial exploitation. Some states, such as Georgia, have laws that make all employees at financial institutions mandated reporters[122]—requiring them, by law, to report all types of suspected elder abuse.[123] Accordingly, all states should enact laws that require financial institution employees to be mandated reporters.

### A. The Definition of "Elderly" Is Inconsistent.

One issue potentially facing financial institutions when appropriately investigating and reporting potential elder financial exploitation relates to the age at which a person qualifies as an elder. For example, the American Association of Retired Persons ("AARP"), which has a membership of 38 million, allows members to join upon reaching fifty years of age.[124] In terms of Social Security, an individual can start receiving benefits as early as age sixty-two,[125] and the Census Bureau classifies any individual over the age of sixty-five as a senior.[126] Meanwhile, the IRS Tax Counseling Center for the Elderly and other federal laws define an elder as an individual age sixty or older.[127] Accordingly, little consistency exists at the federal level when defining the "elderly," let

121. Deane, *supra* note 13, at ii.

122. *See, e.g.*, *Mandatory Reporting Requirements: The Elderly Georgia* (Dec. 2017), https://apps.rainn.org/policy/policy-state-laws-export.cfm?state=Georgia&group=5.

123. *Id.*

124. *See, e.g.*, Angela Colley, *Is AARP Worth the Cost?*, YAHOO FIN. (Sept. 3, 2015), https://finance.yahoo.com/news/aarp-worth-cost-104016985.html.

125. *Can You Take Your Benefits Before Full Retirement Age?*, SOC. SEC. ADMIN., https://www.ssa.gov/planners/retire/applying2.html (last visited Sept. 30, 2019).

126. *See Older People Projected to Outnumber Children for First Time in U.S. History*, U.S. CENSUS BUREAU (Mar. 13, 2018), https://www.census.gov/newsroom/press-releases/2018/cb18-41-population-projections.html.

127. 41 U.S.C. § 3002(40) (2018); *Tax Counseling for the Elderly*, INTERNAL REVENUE SERV., https://www.irs.gov/individuals/tax-counseling-for-the-elderly (last visited Sept. 30, 2019).

alone differences between states.[128] In fact, some states define an elder as someone who is fifty-five years or older, yet other states define an elder as someone who is sixty-five years or older, and others still that are in between.[129]

This distinction matters for purposes of financial institutions reporting elder financial exploitation because the inconsistencies in terms of who is and is not considered an elder likely impact the way a SAR is classified. In other words, if an individual lives in a state where the legal definition of an elder is someone who is age sixty-five or older, and a financial institution employee believes there is suspicious activity related to a customer who is, for example, sixty-two years old, the SAR may not be classified as elder financial exploitation even though it arguably should be classified as such, because the federal age is sixty.

Furthermore, from a practical perspective, it is often difficult to determine whether an individual is an elder. Indeed, an NPR article quoted a seventy-year-old who said that "I certainly do not feel elderly . . . Elderly is at least over eighty and as someone else suggested maybe ninety-five"; the article further stated that "researchers tell us that ninety is the new fifty."[130] Accordingly, it is likely that financial institutions are, in some instances, appropriately filing SARs for potentially suspicious activity, yet not classifying the activity as elder financial exploitation because the victims are not being identified as elderly. Stated differently, financial institutions may be regularly detecting and reporting elder financial exploitation but not identifying and/or classifying the victim as elderly and, therefore, not filing the SAR for elder financial exploitation. The possibility also exists that suspicious activity is being reported through SAR filings, but is being classified as a different scheme that the individual filing the report believes is more accurate and/or specific, even though the SAR form allows for selecting more than one classification for the suspicious activity type.

While these are plausible explanations of the discrepancy between actual instances of elder financial exploitation and those reported by financial institutions through SARs in some instances, it is

128. *Compare* COLO. REV. STAT. § 11-51-1002(2) ("eligible adult"—person at risk for financial exploitation—defined as seventy years or older) *with* 720 ILL. COMP. STAT. 5/17-56 (2011) ("elder"—person over sixty).

129. *See Senior and Vulnerable Investor Laws*, BRESSLER, AMERY & ROSS, P.C., https://www.bressler.com/senior-map (last visited Sept. 30, 2019).

130. Linton Weeks, *An Age-Old Problem: Who is 'Elderly'?*, NPR (Mar. 14, 2013), https://www.npr.org/2013/03/12/174124992/an-age-old-problem-who-is-elderly.

highly unlikely that these issues account for more than a small amount of the discrepancy.

### B. AML Programs, Including Transaction Monitoring Systems, Are Typically Tailored to Focus on Detecting and Reporting Other Types of Suspicious Activities.

Banks and other financial institutions are failing to report elder financial exploitation because they are primarily focused on preventing, detecting, and reporting terrorist financing, traditional fraud, and drug-related money laundering. Following 9/11, the government focused on identifying, preventing, and reporting individuals, transactions, and organizations that may be indicative of terrorist activity.[131] Accordingly, shortly after 9/11, the Patriot Act was enacted, which significantly strengthened AML regulations and required financial institutions to markedly enhance their AML programs.[132]

One example that illustrates how financial institutions are focused on suspicious activity other than elder financial exploitation comes from *The SAR Activity Review–Trends, Tips & Issues*.[133] FinCEN publishes *The SAR Activity Review* to provide helpful information to financial institutions about the preparation, use, and value of SARs so that financial institutions can continue to improve their AML programs.[134] An analysis of topics detailed in Volumes 1–23 (October 2000–May 2013), however, identifies twenty-seven listings for terrorist-related financing, twenty-three listings for drug-related financing, but only three listings related to elder financial exploitation.[135]

Another example of how AML programs are focused on potentially suspicious activity other than elder financial exploitation is in Appendix F of the Federal Financial Institutions Examination Council's *Bank Secrecy Act/Anti-Money Laundering Examination Manual* ("FFIEC

131. *Anti-Money Laundering (AML)*, FIN. INDUS. REGULATORY AUTH., https://www.finra.org/rules-guidance/key-topics/aml (last visited Sept. 30, 2019).
132. USA Patriot Act, *supra* note 38.
133. *The SAR Activity Review–Trends, Tips & Issues*, FIN. CRIMES ENF'T. NETWORK, https://www.fincen.gov/sar-activity-review-trends-tips-issues (last visited Sept. 30, 2019).
134. *Id.*
135. *Index to Topics for The SAR Activity Review Volumes 1-23*, FIN. CRIMES ENF'T. NETWORK, https://www.fincen.gov/index-topics-sar-activity-review-volumes-1-23 (last visited Sept. 30, 2019) (displaying only twenty-three volumes are available online).

Manual"), which contains eight pages of examples of potentially suspicious transactions that may be red flags for money laundering.[136] The categories vary from the use of insufficient or suspicious information to cross-border financial institution transactions.[137] Indeed, the FFIEC Manual highlights particular characteristics, trends, patterns, and typologies identified by transaction monitory systems that are associated with and typical of what are considered traditional types of suspicious activity like terrorist financing and drug trafficking, among others that are not only very distinct, but are also quite dissimilar from common examples of elder financial exploitation.[138] None of the examples listed on those eight pages, however, are activities typically seen in a case of elder financial exploitation.

Because many financial institutions are focused on preventing, detecting, and reporting other types of nefarious activity rather than elder financial exploitation, transaction monitoring systems are generally programmed to identify those characteristics, trends, patterns, and typologies such as the ones listed in the FFIEC Manual. Even so, for a variety of reasons, transaction monitoring systems are often unhelpful when it comes to detecting elder financial exploitation because, unlike terrorist financing and drug-related money laundering, many of the red flags that may indicate elder financial exploitation are behavioral and, therefore, not necessarily detectable by most transaction monitoring systems.[139] Many signs of elder financial exploitation require human interaction and intervention because they are behavioral.

For example, suspicions may be raised if a customer deposits cash just below $10,000, the amount at which a CTR is required to be filed with the government, or if a customer makes frequent or large transactions, but has no record of past or current employment. These types of transactions and patterns, which are frequently associated with more

136. FED. FIN. INSTS. EXAMINATION COUNCIL, BANK SECRECY ACT/ANTI-MONEY LAUNDERING EXAMINATION MANUAL F-1 (2014) [hereinafter FFIEC MANUAL].

137. *Id.* at F1–F2.

138. Joel Schectman et al., *Exclusive: Big U.S. banks to push for easing of money laundering rules*, REUTERS (Feb. 16, 2017, 5:54 AM), https://www.reuters.com/article/us-usa-banks-moneylaundering-exclusive/exclusive-big-u-s-banks-to-push-for-easing-of-money-laundering-rules-idUSKBN15V1E9.

139. *See, e.g.*, *Recommendations and report for financial institutions on preventing and responding to elder financial exploitation*, CONSUMER FIN. PROT. BUREAU, at 59–61 (Mar. 2016), https://files.consumerfinance.gov/f/201603_cfpb_recommendations-and-report-for-financial-institutions-on-preventing-and-responding-to-elder-financial-exploitation.pdf [hereinafter CFPB Recommendations].

traditional types of money laundering,[140] are easily detectable by transaction monitoring systems, but they are not typically evidence of potential elder financial exploitation.

By comparison, a common elder financial exploitation scenario involves an elderly individual who goes to a bank with an individual who is unknown to the teller, and potentially not related to the elderly customer, and cashes a check and/or makes a withdrawal, but is acting sheepish or nervous because it is being done against their will. Again, this type of red flag would not be identified through a transaction monitoring system. Instead, it requires a financial institution employee to observe the behavior and to identify and report it as potentially suspicious.[141]

Furthermore, even when elder financial exploitation is detectable by transaction monitoring systems, the amounts involved are, from a financial institution's perspective, frequently immaterial and/or below certain threshold amounts. The threshold for filing a SAR is when a transaction or series of transactions is greater than $5000.[142] Therefore, most transaction monitoring systems are designed to raise an alert for suspicious activity when the amount of the transaction(s) approach or exceed this amount.[143] With elder financial exploitation, as well as other types of criminal activity, the $5000 SAR threshold does not need to apply—i.e., while financial institutions are required to file SARs for suspected criminal activity greater than $5000, financial institutions may file a SAR for elder financial exploitation even if the $5000 threshold is not met.[144] Yet, because of the $5000 threshold for all other types of suspicious activity, most systems simply are not programmed and designed to detect potentially suspicious activity that is considered *de minimis* and/or otherwise would not require the filing of a SAR, even though, in the case of elder financial exploitation, the $5000 threshold for filing is not a legal requirement.

One example of a common elder financial exploitation scenario where this would be applicable is when an elderly individual begins

140. FFIEC MANUAL, *supra* note 136, at F-1–F-10.
141. CFPB Recommendations, *supra* note 139, at 13.
142. *FinCEN Suspicious Activity Report (FinCEN SAR) Electronic Filing Instructions*, FIN. CRIMES ENF'T NETWORK, at 84 (Oct. 2012), available at https://www.fincen.gov/sites/default/files/shared/FinCEN%20SAR%20ElectronicFiling Instructions-%20Stand%20Alone%20doc.pdf.
143. CFPB Recommendations, *supra* note 139, at 20–21.
144. *See* ELDER JUST. INITIATIVE, *supra* note 116.

withdrawing a sum that is materially above their usual amount, which could be an increase from $250 a week to $1000 a week. While the actual amount of the transaction could be immaterial from a SAR perspective since it is significantly below the $5000 threshold and, therefore, not identified as potentially suspicious, activity such as this may be out of pattern for an elderly customer. If the transaction monitoring system is programmed to detect potential elder financial exploitation, however, the customer profile would indicate an elderly customer and that the amount withdrawn being significantly more than what is "normal" for that customer.

Last, some instances of elder financial exploitation may seem legitimate to transaction monitoring systems and individuals if the transaction monitoring system is not designed to appropriately detect elder financial exploitation. One example is when a family member uses an elderly relative's savings or income for personal use instead of using those funds to pay for the elderly individual. Although financial institutions have increasingly adopted automated fraud detection systems using machine learning technology to analyze historical transaction activity in order to identify transactions which are anomalies or deviations from the pattern in real time,[145] financial institutions must start to recognize that unusual patterns in elderly customer activity do not necessarily match unusual activity patterns of terrorist financing or drug-related money laundering. It is for these reasons that while training is very important, financial institutions must invest time and resources into improving their technological capabilities, especially as they relate to transactional alert systems.

It is essential that financial institutions adopt automated fraud detection systems that use machine learning technology to analyze historical transaction activity in order to identify transactions which are anomalies or deviations from the customer's norm in real time. Predictive analytics must be a part of this technology to filter criteria against individual account holders' patterns and ensure a focus on additional risk factors that may be associated with elder financial exploitation.[146]

Even the CFPB is encouraging financial institutions to use predictive analytics to review their filtering criteria against individual account

145. CFPB Recommendations, *supra* note 139, at 20–21.
146. *Id*.

holders' patterns and explore additional risk factors that may be associated with elder financial exploitation.[147] Moreover, in December 2018, FinCEN and other federal banking regulators released a joint agency statement encouraging financial institutions to "implement innovative approaches" and "adopt new technologies" including artificial intelligence and predictive analytics to help identify potentially suspicious and/or fraudulent activity.[148] Although the joint statement does not mention elder financial exploitation,[149] financial institutions should certainly leverage this guidance as encouragement from their regulators to continue to innovate and identify new ways to prevent, detect, and report elder financial exploitation and other fraudulent activity.

### C. Deficiencies in Training and Education, Including When Suspicious Activity Should Be Classified as "Elder Financial Exploitation" on the SAR Form.

Transaction monitoring systems are frequently unhelpful for detecting most types of elder financial exploitation because many of the red flags are behavioral rather than transactional. For example, the CFPB indicates that red flags often include when an "older consumer appears newly distressed, unkempt, or unhygienic; older consumer mentions lottery or sweepstakes opportunities or winnings; older adult inquires about international wire transfers."[150] None of these red flags would be relevant with a transaction monitoring system, but instead would require bank employees to be knowledgeable of these red flags and raise concerns when they arise.

147. *Advisory for financial institutions on preventing and responding to elder financial exploitation*, CONSUMER FIN. PROT. BUREAU, at 2–3 (Mar. 2016), https://files.consumerfinance.gov/f/201603_cfpb_advisory-for-financial-institutions-on-preventing-and-responding-to-elder-financial-exploitation.pdf.

148. *Treasury's FinCEN and Federal Banking Agencies Issue Joint Statement Encouraging Innovative Industry Approaches to AML Compliance*, FIN. CRIMES ENF'T. NETWORK (Dec. 3, 2018), https://www.fincen.gov/news/news-releases/treasurys-fincen-and-federal-banking-agencies-issue-joint-statement-encouraging.

149. *Id*.

150. CFPB Recommendations, *supra* note 139, at 15.

There are two main methods of detecting potential elder financial exploitation: training and technology. While training appropriate personnel is one of the five pillars of an AML compliance program,[151] training to detect elder abuse requires that frontline branch staff and wealth management advisors, among others, receive appropriate instruction in identifying elder financial exploitation both by the behavior of elders or their caretakers, as well as the identification of unusual patterns in their transactions. Training programs should include, at a minimum:

- Comprehensive definitions of elder financial exploitation;
- Red flag indicators of potential elder financial exploitation, such as transaction patterns, behavioral changes, etc.;
- Clearly defined action steps for internal responses, law enforcement and state agency reporting, and the filing of detailed SARs;
- Examples of actual cases and case studies of elder financial exploitation so that financial institution employees know about actual scams that occurred, how they were identified, and what actions were taken; and,
- Regular updates and reminders on the importance of detecting and reporting potential elder financial exploitation, including articles on the financial institution's intranet, screensavers, and posters in frequently used employee areas, like break rooms.

Broadly speaking, elder financial exploitation is the illegal or improper use of the funds, property, or assets of people sixty and older. While not all states consider a person an elder until they reach sixty-five, many financial institutions prefer sixty as a more conservative approach to assessing whether their customers are victims of elder financial exploitation.[152]

Warning signs for elder abuse take many different forms and differ from typical suspicious money laundering activity.[153] Frontline staff,

151. *FinCEN Adds Fifth BSA Compliance "Pillar"*, NAT'L CREDIT UNION ADMIN.: NEWSROOM, https://www.ncua.gov/newsroom/ncua-report/2017/fincen-adds-fifth-bsa-compliance-pillar (last visited Sept. 30, 2019).

152. *See, e.g.*, *How to Spot and Stop Elder Financial Abuse*, NW. BANK (July 26, 2018), https://www.nwbonline.bank/about/blog/how-to-spot-and-stop-elder-financial-abuse.

153. Eileen Beal, *When Should You Act On Red Flags Of Elder Financial Abuse*, FORBES (June 12, 2015, 11:22 AM), https://www.forbes.com/sites/nextavenue/

specifically tellers, should be trained not only to recognize transactions that are out of pattern for their customers, but also to identify signs of diminished capacity in older customers. Frontline staff who interact with elders can help identify changes in their appearances, recent account changes such as requests that statements be sent to a third party, or common scams such as lottery or sweepstakes winnings. Bank personnel can also identify increased frequency of withdrawals, new spending patterns, or atypical ATM withdrawals. A robust training program should also include case studies to assist staff in understanding and identifying potential red flags.

This is especially important in smaller community and regional banks that typically have more face-to-face interaction with customers on a regular basis. Properly trained personnel know what to look for and how to react when observing suspicious behavior or a suspicious transaction. Tellers can ask customers about particular transactions to ensure that the requests are legitimate, especially if they are out of pattern for the customer.

There is a (mis)perception by some financial institutions that asking questions of customers may be inappropriate and an invasion of privacy;[154] however, interagency guidance was issued to financial institutions to clarify the applicability of privacy provisions of the Graham-Leech-Bliley Act ("GLBA") concerning the reporting of suspected financial exploitation of older adults.[155] The guidance stated that reporting suspected elder financial abuse to appropriate local, state, or federal agencies does not, in general, violate the privacy provisions of the GLBA.[156]

To help some financial institutions with their concerns regarding the GLBA and reporting suspected elder financial exploitation, FINRA implemented Rule 4512, which requires some firms to make a "reasonable effort" to obtain information from elderly investors on a "trusted

2015/06/12/when-should-you-act-on-red-flags-of-elder-financial-abuse/#27dd8 76e736c.

154. *Cf.* Dan Hyde, *Savers must answer intrusive questions to get money*, THE TELEGRAPH (Apr. 27, 2014, 2:00 AM), https://www.telegraph.co.uk/finance/personalfinance/savings/10788369/Savers-must-answer-intrusive-questions-to-get-money.html (discussing British banks adjusting to new laundering laws and customers' offense to these questions).

155. SEC. & EXCH. COMM'N, *Interagency Guidance on Privacy laws and Reporting Financial Abuse of Older Adults* (2013) available at https://www.sec.gov/news/press/2013/elder-abuse-guidance.pdf.

156. *Id.*

contact" that the financial institution can reach in case of an emergency—including instances of suspected elder financial exploitation.[157] According to Law360, "The idea is to have someone unaffiliated with the account who can provide information about the investor's relationships, such as fake virtual lovers."[158] Anecdotal evidence from a few financial institutions suggests, however, that while the rule is a step in the right direction, especially for preventing future abuse, the most vulnerable elders are for the most part simply not completing the trusted contact forms.[159]

The results of effective training are undeniable.[160] The AARP has stated that reports of elder financial exploitation to appropriate state and local authorities rose 188% following training in banks where training was conducted with employees on how to specifically spot elder financial abuse.[161]

Additionally, financial institutions must focus on training that is effective and appropriate to identify elder financial abuse. The AARP's BankSafe program began offering free online training in May 2018 in twelve states as part of a pilot program.[162] The training is designed specifically for frontline staff, supervisors, and compliance officers and focuses on the many red flags that may be indicative of elder financial exploitation. The BankSafe training program is free for any financial institution and has many of the elements of an effective training program highlighted previously.

Financial institutions, however, need to enhance their training and education to specifically address the unique issues and red flags

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157. *Rule 4512. Customer Account Information*, FIN. INDUS. REGULATORY AUTH., https://www.finra.org/rules-guidance/rulebooks/finra-rules/4512 (last visited Sept. 30, 2019).

158. Alison Noon, *Wall Street Wants Backup To Fight Fraud Targeting Seniors*, LAW360 (Feb. 5, 2019, 9:15 PM), https://www.law360.com/articles/1126097/wall-street-wants-backup-to-fight-fraud-targeting-seniors.

159. Beth Pinsker, *Your Money: How to make seniors smarter about financial scams*, REUTERS (Sept. 25, 2019, 11:14 PM), https://www.reuters.com/article/us-money-retirement-elderabuse/your-money-how-to-make-seniors-smarter-about-financial-scams-idUSKBN1WB0BJ.

160. Jilenne Gunther, *Why Financial Institutions Should Fight Exploitation And Protect Savings*, AARP, https://www.aarp.org/content/dam/aarp/ppi/2016-11/Join-The-Fight-Financial-Institutions.pdf (last visited Sept. 30, 2019).

161. *Id.*

162. *AARP To Launch BankSafe Financial Exploitation Identification Training*, CAL. FIN. LITERACY PORTAL (Feb 2, 2018), http://www.calflp.org/2018/02/01/aarp-to-launch-banksafe-financial-exploitation-identification-training-california-one-of-twelve-states-selected-for-pilot-launch/.

that are associated with elder financial exploitation and conduct the training on a regular basis.

### D. Many Elder Abuse Schemes Involve the Perpetrators Requesting Cash and Gift Cards Rather than Direct Payments (i.e., Checks, Money Orders, Wires, etc.), Which Are Harder to Trace and Often Sold by Stores with Few to No Anti-Fraud and AML Controls.

The ability of law enforcement to trace the origin and destination of funds through the financial system has led fraudsters to attempt to obtain or elicit payment from their victims in the form of cash or gift cards because they are becoming easier and easier to purchase while simultaneously being much harder to trace.

Government scams, such as posing as an IRS agent, typically involve asking the victim to wire cash to an offshore bank account or use a prepaid debit or gift card to settle a fictitious tax bill.[163] Another common scheme called the "Granny Scam" involves fraudsters exploiting the compassion of grandparents by posing as grandchildren calling or emailing about an emergency situation that requires cash to be wired or prepaid cash cards to be sent quickly to help the grandchildren.[164] Unfortunately, there is typically no recourse once funds are transferred via wire or given via prepaid cash/gift cards, so the funds often cannot be recovered.[165]

The trend in many of these scams is the use of gift cards, prepaid debit cards, and cryptocurrency.[166] Regrettably, however, forms of payments such as these are becoming more widespread, commonplace, and easier to obtain.[167] For example, stories abound of fraudsters instructing their victims how to purchase and transfer cryptocurrencies

163. *Protecting those you love*, WELLS FARGO, https://www.wellsfargoadvisors.com/pdf/elder-protection/protection-guide.pdf (last visited Sept. 30, 2019).

164. *Id.*

165. "*Granny scam" tricking elderly out of billions*, CBS NEWS (Nov. 19, 2014, 6:57 AM), https://www.cbsnews.com/news/granny-scam-tricking-older-americans-out-of-billions-of-dollars/.

166. *Id.*

167. *Id.*; *see also* Victoria Song, *Bitcoin Scammers Try and Fail to Sextort 86-Year-Old Woman*, GIZMODO (July 26, 2019, 10:58 AM), https://gizmodo.com/bitcoin-scammers-try-and-fail-to-sextort-86-year-old-wo-1836726032.

or using popular video games to facilitate fraudulent payments.[168] Furthermore, nearly every restaurant and retail store has gift cards available for purchase, making transfers of several hundreds or thousands of dollars seamless. A recent article highlighted how fraudsters are accumulating these gift cards and selling them on the dark web at a discount, converting their illicit funds into legitimate and easily usable cash.[169] Accordingly, an individual could easily exploit elders through some of these scams and then launder the proceeds through the use of gift cards without raising suspicion.

While vendors that sell gift and prepaid debit cards need to have a heightened sense of awareness and be on the lookout for potentially fraudulent schemes, many more improvements in this area that need to be made. Specifically, stores that sell gift cards and prepaid debit cards should be required to train their staff on "red flags" that may indicate elder financial exploitation or other types of fraud.

More importantly, since gift cards and other forms of cards that can store money are becoming easier to purchase through non-financial institutions (e.g., convenience stores, retail stores, etc.) and more prevalent,[170] the definition of financial institutions should be broadened to include these types of entities. This would require these entities to implement at least a basic AML program that includes the five pillars, and most significantly, require them to file SARs. While entities such as retail stores certainly should not be required to have comprehensive AML programs like major banks, requiring them to incorporate at least <u>some</u> AML controls, will help prevent, detect, and deter fraudulent activity.

### E. Regulatory Focus on Elder Financial Exploitation Is Lacking.

State and federal regulators are, perhaps, in the best position to effectuate change in this area for a variety of reasons. First, state and federal banking regulators regularly conduct examinations of financial

168. *See, e.g.*, Brian Barrett, *Fortnite Scams Are Even Worse Than You Thought*, WIRED (Oct. 29, 2018, 6:00 AM), https://www.wired.com/story/fortnite-scams-even-worse-than-you-thought/.

169. John Burcham, *Three Gift Card Scams to Avoid*, FIGHTING IDENTITY CRIMES (Jan. 29, 2018), https://www.fightingidentitycrimes.com/gift-card-scams-to-avoid/.

170. *See* Jerry Cutler, *The Prepaid Trends Convenience Stores Need to Know*, CONVENIENCE STORE NEWS (Apr. 24, 2018), https://csnews.com/prepaid-trends-convenience-stores-need-know.

institutions. The examinations include an evaluation of a financial institution's BSA/AML program.[171] Consequently, regulators are able to examine exactly what financial institutions are doing, or not doing, with their efforts to prevent, detect, and report elder financial exploitation.

These routine examinations, though, typically do not include an examination of the program as it relates to whether the program is tailored and/or adequate to detect and report elder financial exploitation, specifically.[172] If regulators made elder financial exploitation a priority, examiners could easily include procedures specifically designed to address elder financial exploitation. Regulators, therefore, should start expressly testing financial institutions' controls around elder financial exploitation and identifying and penalizing institutions where deficiencies and failures are identified.

Second, state and federal banking regulators have the ability to initiate enforcement actions. Financial institutions are regularly fined by regulators including state banking agencies, the Federal Reserve, the OCC, and FinCEN.[173] As of the date of this article, however, there has never been an enforcement action issued by any federal regulator against any type of financial institution where the regulator cited elder financial exploitation as a cause—either directly or indirectly—of the action.[174] In other words, of all the enforcement actions that have been issued for failure to have an effective AML program to prevent, detect, and report activity as required under the BSA and Patriot Act, not one action mentions the word "elder" or "elder financial exploitation."[175]

171. *Bank Secrecy Act (BSA) & Related Regulations*, OFF. OF THE COMPTROLLER OF THE CURRENCY, https://www.occ.treas.gov/topics/supervision-and-examination/bsa/bsa-related-regulations/index-bsa-and-related-regulations.html (last visited Sept. 30, 2019).

172. *Bank Secrecy Act (BSA) & Anti-Money Laundering (AML) Examinations*, OFF. OF THE COMPTROLLER OF THE CURRENCY, https://www.occ.treas.gov/topics/supervision-and-examination/bsa/bsa-aml-examinations/index-bsa-aml-examinations.html (last visited Sept. 30, 2019).

173. *See* Kate Berry, *Regulators fine U.S. Bank for more than $600M for AML errors*, AM. BANKER (Feb. 15, 2018, 10:44 AM), https://www.americanbanker.com/news/regulators-fine-us-bank-more-than-600m-for-aml-errors.

174. *See* Thomas Hafameister, *Elder Mistreatment: Abuse, Neglect, and Exploitation in an Aging America*, NAT'L ACADEMIES PRESS, https://www.ncbi.nlm.nih.gov/books/NBK98784/.

175. *Id.*

Furthermore, financial institutions typically monitor enforcement actions so if and when there is an enforcement action against one financial institution for a particular deficiency, it has the result of effectuating change in other financial institutions. If regulators begin to focus on and identify potential weaknesses in a financial institution's controls around elder financial exploitation and subsequently issue an enforcement action and/or fine and specifically cite elder financial exploitation, it should have the effect of triggering other financial institutions to strengthen their programs around detecting and reporting elder financial exploitation.

### F. Lawmakers Should Pass More Laws Specifically Designed to Mitigate Elder Financial Exploitation, Including Making All Financial Institution Employees Mandated Reporters.

Lawmakers at both the state and federal levels should both enhance existing laws and enact new laws that emphasize the importance and criticality of financial institutions preventing, detecting, and reporting elder financial exploitation. The Senior Safe Act ("Safe Act"), passed in May 2018, began to combat elder financial exploitation.[176] The goal of the Safe Act is to

> encourage a collaborative effort between regulators, financial firms, and legal organizations in order to prevent senior financial abuse by providing immunities for reporting under bank privacy laws . . . [and] encourage[] the development of education and training at financial institutions by conditioning these grants of immunity on the requirement that financial institutions provide training programs regarding recognizing and dealing with elder financial exploitation.[177]

While the passage of the Safe Act certainly is a good start, lawmakers from states that do not currently classify financial institution employees as mandated reporters should consider amending laws to include this category of reporters. This would mean that if <u>any</u> employee at a financial institution has "reasonable cause to believe that a disabled adult or elder person is in need of protective services or has been the victim of abuse . . . or has been neglected or exploited," they

176. 12 U.S.C. § 3423 (2018).

177. *The Senior Safe Act Becomes Law*, BRESSLER, AMERY & ROSS, P.C. (June 11, 2018), https://www.bressler.com/the-senior-safe-act-becomes-law.

are required by law to report that belief to the appropriate adult protection agency.[178] Further, if a mandated reporter fails to report, then that failure is punishable as a misdemeanor.[179]

States that have laws classifying employees at financial institutions as mandated reporters have several advantages. First, because the individuals are mandated reporters, they are required to receive training specifically designed to identify potential elder abuse.[180] Additionally, the individuals are trained on how to report that suspicion and what agencies should be contacted in those instances so that the potentially abused elder can be helped.[181]

Second, because it is a misdemeanor to fail to report suspected elder abuse, employees at financial institutions in states where they are considered mandated reporters are incentivized to be more alert when it comes to identifying potential elder abuse and reporting it. Third, states that have mandated reporter laws typically include immunity for reporters who in good faith report suspected abuse even where the belief is wrong.[182] Incorporating immunity helps alleviate concerns that financial institutions frequently have with reporting these types of activities because of a fear of violating other laws such as the GLBA or other privacy statutes. Accordingly, these laws help provide assurance to financial institution employees, and the financial institutions themselves, that they will not be penalized for otherwise disclosing potentially private information to law enforcement.

While amending some state laws to include financial institution employees as mandated reporters is probably the most immediate and critical step in making progress to prevent, detect, and report elder financial exploitation, below are a few other suggestions that lawmakers may want to consider:

1. Add or amend the BSA to specifically address elder financial exploitation. For example, require financial institutions to designate a specific individual as the "Elder

178. *See generally Reporting of Suspected Elder Financial Exploitation by Financial Institutions*, CONSUMER FIN. PROTECTION BUREAU (July 2019), https://files.consumerfinance.gov/f/documents/cfpb_suspected-elder-financial-exploitation-financial-institutions_report.pdf.

179. *Id.*

180. *See, e.g.*, *A Mandated Reporter's Guide to Elder & Dependent Adult Abuse Reporting*, CTY. OF RIVERSIDE DEP'T OF SOC. SERVS. ADULT SERVS. DIV., http://dpss.co.riverside.ca.us/files/pdf/asd/mandated-reporter-training-book.pdf.

181. *Id.*

182. *See, e.g.*, CAL. WELF. & INST. CODE § 15630.

Financial Exploitation Officer" and require that individual to implement an elder financial exploitation prevention and detection program. This individual would be responsible for incorporating specific information about elder financial exploitation into the policies, procedures, transaction monitoring system, and training program to help ensure that the financial institutions are adequately addressing the issue.

2. Require financial institutions to provide information and training on elder abuse to customers that are either elderly, or are approaching the elder age. While FINRA Rule 4512 was a step in the right direction, the problem is that anecdotal reports from financial institutions indicate that the targeted customers of that initiative—i.e., elderly customers—had the lowest successful response rate of all customers.[183] And, even so, elder financial exploitation is often committed by a relative or trusted individual of the elder's—i.e., an individual that may be listed as the elder's trusted contact.[184] Therefore, direct, face-to-face discussions between financial institution employees and elderly customers is needed on what constitutes elder financial exploitation, common schemes, signs that indicate they or someone they know may be a victim, and what to do if the individual is being abused or suspects someone they know is being abused. If there is a more direct approach through discussions, information, and training, it is likely elders will be more likely to provide alternate contact information, as required by FINRA Rule 4512 and/or report actual or suspected abuse if it occurs.
3. Increase the fines, penalties, and punishments for violations of law. Financial institutions are <u>already required</u> to report elder financial exploitation by filing a SAR

183. *See* Alan Wolper, *The Securities Regulators All Have Senior-itis. Maybe For Good Reason.*, JDSUPRA (Feb. 7, 2019), https://www.jdsupra.com/legalnews/the-securities-regulators-all-have-18743/ ("It was reported that Vanguard's chief compliance officer informed the attendees at the SIFMA conference that of the 300,000 trusted-contact forms Vanguard received in the last year, seventy-eight percent of them were for investors under age sixty-five.").

184. *Id.*

> and/or reporting the suspected abuse to law enforcement (depending on the state and whether they are considered mandated reporters). Yet, many financial institutions, and especially casinos, are blatantly violating the law—this must be stopped. Consequently, the penalties and punishments should be increased to further incentivize financial institutions to report suspected elder financial exploitation and dissuade them from continuing to put preventing, detecting, and reporting elder financial exploitation behind the identification of other crimes such as drug smuggling, terrorist financing, tax evasion, fraud, and others.

## VII. Conclusion

Elder financial exploitation is an issue that simply is not going away any time soon. Indeed, it is predicted that there will be nearly 100 million Americans aged sixty-five or older by 2060,[185] with the elder population making up one in four in the U.S.[186] Therefore, the problem is likely to only get worse, especially since banking is becoming less personal and more digital, the median net worth of elders continues to increase, and "other" crimes continue to be the priority for financial institutions and the people who regulate them.

While many reasons explain why financial institutions are likely failing at their obligation to prevent, detect, and report elder financial exploitation, the reasons and the proposed solutions should not be considered in isolation. Most, if not all, of these are inexorably linked and/or have a cause-and-effect relationship. For example, because there are varying definitions and standards for who qualifies as an elder, there needs to be more training for financial institution employees so they can better understand who might classify as elderly. Unfortunately, because there are competing priorities coupled with a lack of regulator focus on and attention to elder financial exploitation, financial institutions are not incentivized to increase the amount of training

185. Mark Mather et al., *Fact Sheet: Aging in the United States*, POPULATION REFERENCE BUREAU (July 15, 2019), https://www.prb.org/aging-unitedstates-fact-sheet/.

186. *Facts for Features: Older Americans Month: May 2017*, U.S. CENSUS BUREAU (last updated Aug. 3, 2019), https://www.census.gov/newsroom/facts-for-features/2017/cb17-ff08.html.

and education specifically tailored for preventing, detecting, and reporting elder financial exploitation, nor are they incentivized to tailor their programs to adequately address the issue.

Accordingly, to change the status quo, financial institutions have to enhance their internal policies, procedures, and controls that are designed to prevent, detect, and report elder financial exploitation, incorporate into their programs predictive analytics and transaction monitoring, as well as conduct ongoing training for frontline personnel, supervisors, and BSA compliance officers specifically designed for elder financial exploitation. Regulators and lawmakers should also make combatting elder financial exploitation a priority, penalizing financial institutions, especially casinos, that are brazenly in violation of the BSA, strengthening existing laws, and passing new laws that are aimed at tackling this massive, and growing, issue. While elder financial exploitation is currently considered to be the "crime of the 21st century,"[187] we need to collectively do what we can so that it is not also the "crime of the 22nd century."

187. Richard Eisenberg, *Why Elder Financial Abuse is Such a Slippery Crime*, FORBES (Feb. 13, 2015, 10:50 AM), http://www.forbes.com/sites/nextavenue/2015/02/13/why-elder-financial-abuse-is-such-a-slippery-crime/#2c267e036f90.