JACKO LAW GROUP, PC

Legal Risk Management Tip
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REGULATORY CONSIDERATIONS FOR SERVICING AGING CLIENTS

As our older population in the United States (*i.e.*, persons 65 years of age of older) continues to increase, so do the servicing opportunities of the financial industry. According to the U.S. Department of Health and Human Services, in 2013 one in seven Americans (or 14.1% of the U.S. Population) was over age 65.[1] By 2040, that number is forecasted to grow to 21.7%.[2]

Servicing aging clients poses certain challenges. The aging process naturally brings with it increased health issues, including the potential for the onslaught of diminished capacity, and even dementia.

The regulators recognize that from a servicing perspective, financial advisors must be cognizant of the unique client support needs of elderly clients. This article will focus on and discuss various considerations for dealing with aging clients from a compliance, operational and practical perspective, including steps that should be taken for protecting aging investors and your firm.

What is Diminished Capacity?

Diminished capacity is a mental or cognitive condition that affects a person's ability to understand their own acts or decisions.[3] While it is normal that through the aging process it will take perhaps longer for a person to store or retrieve information mentally, it does not necessarily impair intellectual functioning.

One of the most common forms of diminished capacity in aging adults is dementia (now commonly referred to as a major neurocognitive disorder). Dementia describes a set of symptoms that may include memory loss and difficulties with thinking, problem-solving or language.[4] Unlike a minor neurocognitive disorder, dementia affect's a person's daily life and behaviors. A person afflicted with dementia often experiences memory loss, confusion, emotional disturbances (such as depression, anxiety and paranoia), changes in personality and loss of visual-spatial and language skills. Often, brain damage caused by strokes or illnesses such as Alzheimer's disease cause dementia.

Common Signs of Cognitive Decline

Every person is unique and can experience cognitive decline differently. A person suffering from early stages of Alzheimer's disease, for example, typically exhibits cognitive difficulties with thinking and memory which includes problems with:

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[1] *See* http://www.aoa.acl.gov/aging_statistics/index.aspx.
[2] Id.
[3] *See* https://olderadults.wordpress.com/2013/03/28/capacity_assessment/.
[4] For more information, please refer to the following as published by the Alzheimer's Society at https://www.alzheimers.org.uk/site/scripts/documents_info.php?documentID=106.

- Mild disorientation (such as not knowing the date);
- Judging distances;
- Following a conversation;
- Making decisions or performing tasks (such as paying bills); and
- Recalling events.

Other noticeable changes include mood changes, suspiciousness, denial, poor judgment and loss of initiative.[5]

Regulatory Expectations for Dealing with Aging Clients

In recent years, there have been numerous regulatory releases, as well as proposed rules, which provide valuable insight into the regulatory expectations for dealing with aging clients. This includes, among other things, the following:

1. National Senior Investor Initiative (Apr. 15, 2015)[6]

As part of a collaborative effort, the Securities and Exchange Commission's ("SEC") Office of Compliance Inspections and Examinations ("OCIE") and the Financial Industry Regulatory Authority ("FINRA") performed examinations on forty-four (44) broker-dealer firms focusing on, among other things, the types of securities purchased by senior investors, suitability of recommended investments and training of brokerage firm representatives. The goal of this initiative was to bring awareness to financial institutions of the importance to ensure aging clients are receiving suitable recommendations and meaningful disclosures about costs and associated risks of their investment opportunities.

2. FINRA Regulatory Notice 07-43[7]

This Regulatory Notice addresses firm obligations relating to senior investors and highlights industry best practices, suitability concerns, communications with the public (including use of designations and seminars), and dealing with investors with diminished capacity and occurrences of suspected financial abuse. The Notice also contains practical tips for firms to follow when drafting firm policies and procedures related to senior investors.

3. SEC Investor Bulletin: Planning for Diminished Capacity and Illness[8]

The SEC's Office of Investor Education and Advocacy partnered with the Consumer Financial Protection Bureau's Office for Older Americans to generate this bulletin not for financial professionals, but rather for the investors themselves. The Bulletin encourages investors to plan

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[5] Id.
[6] *See* https://www.finra.org/newsroom/2015/sec-staff-and-finra-issue-report-national-senior-investor-initiative.
[7] *See* http://www.finra.org/sites/default/files/NoticeDocument/p036816.pdf.
[8] *See* https://www.sec.gov/oiea/investor-alerts-bulletins/ib_illness.html.

for possible "diminished financial capacity;"[9] and stresses the importance of such planning tools as: (i) organizing important documents, (ii) providing financial professionals with trusted emergency contacts, and (iii) creating a durable financial power of attorney. The Bulletin goes on to provide guidance for those who may not be suffering diminished financial capacity themselves, but know someone who is, and how they may be able to help those persons.

Compliance Program Development for Servicing Aging Clients

Dealing with aging clients goes beyond the scope of financial industry knowledge and into the realm of medical and social work considerations. Because this is such a complex area, training of both compliance officers and financial advisors is paramount.

To help fulfil that obligation, the firm is tasked with developing written policies and procedures applicable to its business model.[10] To the extent that the firm services aging clients, consider implementing the following:

- Train financial advisors on the stages of aging, focusing on situational examples involving early, middle and late stages of dementia, elder abuse scenarios and other aging considerations. As necessary, bring in social workers to assist.
- Document a "response plan" on what actions will be taken by the firm for aging client concerns. This may include sending account statements to both the account holder and someone with power of attorney, contacting emergency contacts for medical concerns and reaching out to law and regulatory authorities for instances of elder abuse and exploitation.
- Enhance internal control policies and procedures to help protect aging client issues. This includes gathering emergency contact information account inception and capturing who, under what circumstances, has power of attorney for the client accounts.
- Summarize regulatory guidance so that advisors can understand why aging client compliance and operational protocols are important.
- Develop suitability considerations for aging client products and services. Be sure to communicate investment guidelines for dealing with elderly clients.
- Implement escalation process for what to do if you suspect a client has dementia or is a victim of elder abuse.
- Intervene, if necessary, to help the client. This may include having a trusted person obtain a healthcare proxy, engaging an attorney for a health care directive or care manager team for quality of life issues and/or obtaining the individual's consent for a competency evaluation.

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[9] The Bulletin defines "diminished financial capacity" as a decline in a person's ability to manage money and financial assets to serve his or her best interest, including the inability to understand the consequences of investment decisions.

[10] See Final Rule: Compliance Programs of Investment Companies and Investment Advisers at https://www.sec.gov/rules/final/ia-2204.htm.

Final Thoughts

As clients continue to live longer, and as the baby boomers enter into retirement, it is essential for firms to be proactive in implementing a thoughtful, dynamic process for dealing with aging clients. Regulatory agencies, as well as state and federal lawmakers, view older investors as particularly vulnerable and in need of protection. In many instances, financial firms are the first line of defense in seeing an aging client issue. By implementing sound practices and through consistent training, the firm will be in a good position to meet those regulatory requirements and assist their clients through the aging investor process.

JLG assists financial firms with the regulatory compliance considerations for dealing with aging clients. . For more information on this topic, please contact us at (619) 298-2880 or at info@jackolg.com.

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