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Retirees Are Vulnerable to 401k and IRA Fraud Involving Precious Metals

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Elderly and Retirees Are Vulnerable to 401k and IRA Fraud Involving Precious Metals

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OVERVIEW

Elderly are especially vulnerable to financial fraud, including fraud involving precious metals. Their cognitive abilities are generally in decline, they generally have more savings, and precious metals are perceived as a safe alternative investment in times of financial turmoil, particularly of the type we have seen recently.

In the program, presenters Aaron Cohn, Esq. and Scott Silver, Esq. will discuss some of the scams employed against the elderly involving precious metals, why they are vulnerable under the current laws governing self-directed IRA accounts and precious metals regulations, and what changes should be considered to implement better safeguards in connection with precious metals investments using retirement accounts.

Elderly tend to be more vulnerable to financial exploitation and fraud

Why are elderly targets of financial fraud?

- Among older adults without mild cognitive impairment or dementia, age-related changes in cognition are associated with poor decision-making and greater susceptibility to scams. [*Boyle PA, Yu L, Wilson RS, Gamble K, Buchman AS, Bennett DA. Poor decision making is a consequence of cognitive decline among older persons without Alzheimer's disease or mild cognitive impairment. PLoS One. 2012;7(8):e43647.*]
- Older adults are more likely to have financial resources than are their younger counterparts, and this, in combination with the higher prevalence of cognitive, functional, and health impairments, renders them uniquely susceptible to fraud and scams.

Elderly tend to be more vulnerable to financial exploitation and fraud, (continued)

- Older adults are disproportionately targeted by fraud–scam attempts and encounter fraud–scam schemes that are specifically designed to exploit age-associated vulnerabilities.
- People age 60 and older make up 15 percent of the U.S. population, but they also account for about 30 percent of fraud victims according to Consumer Action, a consumer-advocacy group.
- In 2020, financial institutions filed over 62,000 elder financial exploitation SARs involving over \$3.4 billion.

Elderly tend to be more vulnerable to financial exploitation and fraud, (continued)

- In 2022, FINCEN (the Financial Crimes Enforcement Network), issued an advisory to alert financial institutions to the rising trend of EFE targeting older adults. *[FIN-2022-A002]*
- No one knows exactly how many older Americans are victims of investment fraud. Often, older victims don't report crimes because they don't want people to know they have lost money or made an unsound investment. Also, they don't know how or where to complain.
- Precious metals scammers expressly target elderly for their assets and lack of clear judgment.

Elderly tend to be more vulnerable to financial exploitation and fraud, (continued)

Why are some elderly attracted to precious metals as an investment?

- Precious metals are relentlessly sold as a “safe” investment and hedge against inflation on advertisements to common news channels, including Fox News
- Most of the victims we talk to are already primed to believe that precious metals are a safe alternative to investing in the stock market
- Brokers piggy-back on the media story, often forwarding news articles that appear to be legitimate sources of info on investing

Retirement accounts are prime targets for scammers

Why are retirement accounts targeted for elder precious metals scams?

- Legally, a retirement account may be moved to a different custodian at the request of the customer. This is referred to as a trustee to trustee transfer and is a tax-free movement of retirement funds. The trustee has to follow the direction of the client.
- Fraudsters use this “right” to convince clients to transfer their retirement account custodian to a self-directed custodian that allows for the purchase of silver and gold coins from the current custodian directly to a self-directed IRA (“SDIRA”) custodian.
- Once a fraudster has convinced a victim to roll over a retirement account to an SDIRA to make an investment, the procedure is relatively easy. Fraudsters usually facilitate the transfer by assisting with opening a self-directed IRA with a custodian, and then calling the current custodian with the victim to facilitate the transfer.

Retirement accounts are prime targets for scammers

Self-directed IRA accounts are often used to scam the elderly.

What is an SDIRA and SDIRA custodian?

- In 1974, Congress passed ERISA allowing for IRA accounts
- An Individual Retirement Account (IRA) provides investors with certain tax benefits for retirement savings. Some common examples of IRAs include the traditional IRA, Roth IRA, Simplified Employee Pension (SEP) IRA, and Savings Incentive Match Plan for Employees (SIMPLE) IRA.
- All IRA accounts are held for investors by custodians. Custodians may include banks, trust companies, or any other entity approved by the Internal Revenue Service (IRS) to act as an IRA custodian. Most IRA custodians limit the holdings in IRA accounts to firm-approved stocks, bonds, mutual funds, and CDs.

Retirement accounts are prime targets for scammers

- A self-directed IRA is an IRA held by a custodian that allows investment in a broader set of assets than is permitted by most IRA custodians. Custodians for self-directed IRAs disclaim most duties to investors and may allow investors to invest retirement funds in “alternative assets” such as real estate, promissory notes, tax lien certificates, and private placement securities.
- SDIRA accounts began to be used in the early 1980s.
- The custodian satisfies the IRS reporting and custody requirements.

Retirement accounts are prime targets for scammers

Types of investments available in an SDIRA account.

- A self-directed IRA can invest in real estate, private companies, precious metals, and numerous other non-traditional investments. The law only restricts a few specific types of investment assets.

Retirement accounts are prime targets for scammers

An SDIRA cannot hold:

- Collectibles such as art, stamps, certain coins, alcoholic beverages, or antiques, IRC § 408(m);
 - *An exception allows your IRA to invest in one, one-half, one-quarter, or one-tenth ounce U.S. gold coins, and one-ounce silver coins minted by the Treasury Department. It can also invest in certain platinum coins and certain gold, silver, palladium, and platinum bullion (94% in purity).*
- Life insurance, IRC § 408(a)(3);
- S-corporation stock, IRS Letter Ruling 199929029, April 27, 1999, IRC § 1361 (b)(1)(B); and
- Any investment that constitutes a prohibited transaction pursuant to IRC § 4975 (e.g., purchase of any investment from a disqualified person such as the spouse of the retirement account owner).

[IRS Publication 590 (1994)]

Self-Directed IRA Accounts are used to scam the elderly (continued)

Investments through an SDIRA tend to have unique risks, including a lack of disclosure and liquidity, and the risk of fraud.

- SDIRA custodians generally do not evaluate the quality or legitimacy of any investment in the SDIRA or its promoters and most custodial agreements between an SDIRA custodian and an investor explicitly state that the custodian has no responsibility for investment performance.
- Fraudsters are more likely to exploit self-directed IRAs because custodians or trustees of these accounts may offer only limited protections.

Self-Directed IRA Accounts are used to scam the elderly (continued)

- The use of an SDIRA custodian lends an air of legitimacy to the investment because many retail investors assume that an IRA custodian has a fiduciary duty or at least a basic duty to perform due diligence on the investments offered through its platform.
- Given the risks, government agencies, including the SEC and CFTC, have warned investors of the potential risks associated with SDIRAs.
- *[SEC Investor Alert: Self-Directed IRAs and the Risk of Fraud, available here: <https://www.sec.gov/investor/alerts/sdira.html> (August 8, 2018)]*
- *[CFTC Customer Advisory: Beware “IRS Approved” Virtual Currency IRAs, available here: https://www.cftc.gov/LearnAndProtect/AdvisoriesAndArticles/beware_irs_approved_virtual_currency.html]*

Self-Directed IRA Accounts are used to scam the elderly (continued)

Who are the largest SDIRA custodians?

- Equity Trust (\$13 billion)
- IRA Financial
- uDirect IRA
- PENSCO
- The Entrust Group
- Alto IRA
- Rocket Dollar
- *Others with more limited investment options: Charles Schwab, TD Ameritrade and Merrill Edge*

Self-Directed IRA Accounts are used to scam the elderly (continued)

Investment promoters can partner with SDIRA custodians to transfer investor assets and, in connection with that partnership, can misrepresent the relationship between the promoter and the SDIRA custodian.

- Fraudsters may misrepresent the duties of self-directed IRA custodians to deceive investors into believing that their investments are legitimate or protected against losses.
 - ❑ For example, fraudsters often claim or suggest that self-directed IRA custodians investigate and validate any investment in a self-directed IRA. However, unlike custodians for other types of IRAs, self-directed IRA custodians are responsible only for holding and administering the assets in a self-directed IRA.

Self-Directed IRA Accounts are used to scam the elderly (continued)

- Fraudsters sometimes claim that they are representatives of the SDIRA custodian or blur the distinction between the custodian and the promoter.
 - ❑ *Example:* Safeguard representatives told investors they work for Equity Trust and sent investors to look at Equity Trust's website and reviews to verify the legitimacy of the scheme.
- Most custodial agreements between a self-directed IRA custodian and an investor explicitly state that the self-directed IRA custodian has no responsibility for investment performance. Retail investors tend not to be aware of this fact or the meaning.

Self-Directed IRA Accounts are used to scam the elderly (continued)

The Securities and Exchange Commission attempted to hold an SDIRA custodian, Equity Trust, liable for fraud committed by promoters using Equity Trust's services.

- Promoters created a real estate ponzi scheme and used Equity Trust's SDIRA services to establish and process IRA conversions to facilitate investments.
- The promoters were convicted of criminal fraud.
- The SEC sued Equity Trust in an administrative proceeding for aiding securities fraud under the Securities Act of 1933 (similar to 10b5 of the Exchange Act).

Self-Directed IRA Accounts are used to scam the elderly (continued)

- The Administrative Law Judge found Equity Trust not liable because Equity Trust had no duty to the retail investor and had a lack of knowledge of the scheme despite red flags, including missing loan information found in the client accounts that Equity Trust had flagged.
- The administrative decision affirmed on appeal even though Equity Trust had implemented its own auditing procedures that caught certain red flags, which formed a basis to impute knowledge of the problems with the investment to Equity Trust.

Self-Directed IRA Accounts are used to scam the elderly (continued)

[*In the Matter of Equity Trust Company*, ADMINISTRATIVE PROCEEDING FILE NO. 3-16594, before the Securities and Exchange Commission (instituted June 16, 2015)]

- Despite the fact that Equity Trust implements its own investment auditing procedures, Equity Trust maintains very strong defenses from liability for fraud by a promoter as shown in the SEC administrative action. Additional examples of that immunity include:
 - ❑ *Paterson v. Equity Tr. Co.*, 2012-Ohio-860, ¶ 24 (affirming summary judgment on fiduciary duty claim brought against Equity Trust)
 - ❑ *Tarquinio v. Equity Tr. Co.*, 2007-Ohio-3305, ¶ 29 (same)
- Indeed, we could not locate a case where Equity Trust was held liable for fraud in connection with the underlying investment in a self-directed IRA account.

Precious Metals Scams against the Elderly

Precious metals scams against the elderly are common because precious metals are deemed safe by many older individuals, who are looking for security, and because precious metals sales are unregulated to a certain extent:

- Precious metals are a commodity.
- Generally, they are not considered a security, futures contract, or options contract.
- The SEC lacks jurisdiction over the sale of commodities except if an advisor qualifies as an investment advisor under the 1940 Act.

Precious Metals Scams against the Elderly

- The Commodity Futures Trading Commission maintains jurisdiction over the sale of commodities in a limited capacity. Its mandate is, generally, to regulate the futures and options markets. *See 7 U.S.C. § 1 et seq.*
 - ❑ It maintains jurisdiction over the fraudulent sale of precious metals if there is fraud in interstate commerce or the metals are not delivered to the retail customer within 28 days.
 - ❑ Fraudsters have carefully crafted programs to avoid regulation.
 - Goldline.
 - Monex.

Precious Metals Scams against the Elderly

- State investment advisor laws may apply to prohibit false or bad investment, but those laws are often difficult to invoke and often are outweighed by their complexity.
- As discussed earlier, precious metals are promoted as a safe investment to preserve wealth in times of economic and political turmoil.

Precious Metals Scams against the Elderly, continued

Precious metals brokers can operate as (purportedly) unregulated dealers.

- The industry attracts those brokers that were sanctioned, fined, or disbarred from the National Futures Association and the National Association of Securities Dealers.
- Telemarketing licenses.
- No licenses.
- No current registrations.

Precious Metals Scams against the Elderly, continued

What are the warning signs of a precious metals fraud?

- Website offers investment advice.
- Website offers “assistance” with retirement accounts.
- The agreement or other documentation states that precious metals transactions are not regulated by the CFTC or the National Futures Association.
- The agreement claims to effect delivery within 28-days but does not give the customer possession or control over the metals sold.
- The agreement does not identify the financial institution or bank that will be loaning the money.

Precious Metals Scams against the Elderly, continued

- Agreement that does not identify where the physical metal is located if they are going to be stored.
- Claims to deliver the physical metal to a bank under the control of the broker.
- Difficulty in verifying the company's license.
- No licensure from a government agency or simply a telemarketing license.
- Offering highly complex purchasing techniques for unusual success.

Precious Metals Scams against the Elderly, continued

One common scam against the elderly involves offering investment advice, selling overpriced precious metals into SDIRA accounts, and concealing fees and costs to the investor. This is effectively a **telemarketing scam**:

- Physical metals fall into two categories:
 - 1) bullion, which are coins or bars of a specific weight and purity; and
 - 2) “numismatic” or collectible coins, which can be rare or old coins, or special proofs that are newly minted as collectibles.
- Bullion prices are based on the spot market price plus a markup or “premium” of between 5 percent and 10 percent.

Precious Metals Scams against the Elderly, continued

- Customers that become victims of these scams are often encouraged to purchase numismatic coins with premiums that can range from 40 percent to 200 percent above the spot price without their knowledge.
- Buyers are told the coins will only go up in value because of their rare or collectible nature.
- Numismatic or semi-numismatic coins are difficult to value and the market for proofs or rare coins is illiquid.
- Customers who need to sell their collectible coins are often forced to return to the dealers, who buy the coins back at a fraction of the original sales price.

Precious Metals Scams against the Elderly, continued

Examples of the telemarketing scam:

❑ Metals.com, Chase Metals, and Barrick Capital

- *U.S. Commodity Futures Trading Comm'n v. Tmte, Inc.*, No. 3:20-CV-2910-L, 2022 WL 1321572, at *1 (N.D. Tex. May 3, 2022) (discussing factual basis for preliminary injunction, including that the scheme preyed on persons between 60 and 90 years of age and swindled them out of their retirement funds by charging them fraudulent prices to purchase Precious Metals Bullion)

❑ Safeguard Metals (semi-numismatic coin scheme)

- *Comm. Futures Trading Comm'n v. Safeguard Metals, LLC*, No. 22-CV-00691-JFW-SK (C.D. Cal.)
- *Sec. & Exch. Comm'n v. Safeguard Metals LLC*, No. CV 22-693-JFW(SKX), 2022 WL 3575297 (C.D. Cal. July 18, 2022)

Precious Metals Scams against the Elderly, continued

Examples of the telemarketing scam, continued:

❑ Lear Capital (semi-numismatic coin scheme)

- *People of the State of New York et al. v. Lear Capital Inc. et al.*, Case No. 807870/2021, in the Supreme Court of the State of New York, Erie County
- Status: Agreed to pay \$6 million to settle claims at the beginning of 2022.

Note: Churning is common once an SDIRA account is set up with a precious metals broker that is acting only in its own best interest but has designated its broker as the agent on the retirement account.

Precious Metals Scams against the Elderly, continued

Example of the telemarketing scam:

❑ Safeguard Metals (semi-numismatic coin scheme)

- *Safeguard allegedly advised retirees to invest in semi-numismatic precious metals coins as a safe investment, but did not disclose the 50%+ markups charged over wholesale prices. Safeguard also allegedly churned accounts.*
- *Comm. Futures Trading Comm'n v. Safeguard Metals, LLC*, No. 22-CV-00691-JFW-SK (C.D. Cal.)
- *Sec. & Exch. Comm'n v. Safeguard Metals LLC*, No. CV 22-693-JFW(SKX), 2022 WL 3575297 (C.D. Cal. July 18, 2022)
- Status: government cases are pending.

Precious Metals Scams against the Elderly, continued

Example of the telemarketing scam: Metals.com/Barrick Capital/Chase Metals

- On September 22, 2020, the Plaintiffs Commodity Futures Trading Commission ("CFTC") and 30 States filed a Complaint against Metals.com, Chase Metals, Barrick Capital and affiliates. In the Complaint, the CFTC alleged that from September 2017 through September 22, 2020 the Defendants engaged in a scheme to defraud at least 1,600 persons throughout the United States into purchasing gold and silver bullion. The CFTC claimed that the Defendants preyed on persons between 60 and 90 years of age and swindled them out of their retirement funds by charging them fraudulent prices to purchase precious metals bullion. In particular, Plaintiffs contend the Defendants targeted politically conservative and Christian investors. The CFTC and States alleged violations of the Commodity Exchange Act and many State laws, including financial exploitation of the elderly.

Precious Metals Scams against the Elderly, continued

Example of the telemarketing scam: Metals.com/Barrick Capital/Chase Metals

- The CFTC also sought and obtained on an ex parte basis from the Court an order appointing a receiver that froze the assets of defendants (the “SRO”). More specifically, the SRO enjoined certain activities, placed the assets of the Defendants in receivership, appointed the Receiver to serve as an agent of the Court, and vested the Receiver with certain powers and responsibilities in carrying out the Court's mandate.
- That receivership is ongoing.
- Many individual brokers then started their own frauds based on the scheme perfected at Metals.com.

[*Commodity Futures Trading Commission et al. (including 30 States) v. TMTE, Inc. (aka Metals.com, Chase Metals, Inc., Chase Metals, LLC, Barrick Capital, Inc.) et al.*, Case No. 3:20-CV-2910-L, in the District Court for the Northern District of Texas.]

Precious Metals Scams against the Elderly, continued

Another precious metals scam: the leveraged precious metals account:

- A broker might call a customer and report that she ran into the company's lead trader who gave her a tip that the metal is about to take off in value. If the customer can put down 20 to 25 percent of the cost, the company will finance the rest of this "once in a lifetime opportunity."
- Scheme typically works when brokers:
 - ☐ Claim a client can make a lot of money with little risk by purchasing through a "financing agreement"
 - ☐ Claim that the client is buying physical metals so they cannot be taken or lost to the government or bad actors
 - ☐ The transactions are structured so the client only pays a small percentage (15-40%) of the total purchase price

Precious Metals Scams against the Elderly, continued

- ☐ The loan covers the difference between the equity and the full price of the metals
- ☐ The broker claims that it will store the precious metals in a storage facility or “bank”
- ☐ The broker claims that fees and costs will be easily covered by the expected rise in prices
- ☐ The broker claims that any downside is protected because the client can always sell the metals
- ☐ Some brokers successfully convince customers to liquidate their retirement accounts because the investment will be so lucrative, all costs and taxes will be covered

Precious Metals Scams against the Elderly, continued

- Commonly, these leveraged transactions include high interest charges and a form of speculation that could cause customers to lose everything. Metal prices can be volatile on a day-to-day basis and if the value of the purchased metal falls, the customers' equity falls with it. If the account falls below a certain level, the customers could be required to pay a margin call, or if the balance falls below a specific minimum, the account could be closed, and the customers would lose all of their funds.

Precious Metals Scams against the Elderly, continued

Leveraged precious metals account scam:

- Unless the company is registered as an exchange with the CFTC and conducts its trades on an exchange, or actually delivers the metal within 28 days, this sort of leveraged transaction is a violation of the Commodity Exchange Act, and may be a fraud.
- The Commodities Exchange Act (“CEA”) regulates the trading of commodity futures in the United States, and establishes the statutory framework under which the Commodity Future Trading Commission (“CFTC”) operates and oversees commodities futures transactions, among other things. *See 7 U.S.C. § 1 et seq.; 17 C.F.R. § 1 et seq.*

Precious Metals Scams against the Elderly, continued

- In 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act (“the Dodd-Frank Act”), Pub. L. No. 111-203, 124 Stat. 1376 (2010). The law amended the CEA in several important respects. Among other things, it broadened the CFTC’s regulatory scope and imposed new regulations on commodities market participants. As part of the regulatory overhaul, off-exchange leveraged transactions with retail investors were made unlawful unless the commodity was delivered to the retail investor within 28-days of the transaction. 7 U.S.C. § 2(c)(2)(D)(ii)(III).
 - ❑ For leveraged retail transactions falling within this definition, where the commodity is not delivered within 28 days, Section 2(c)(2)(D)(iii) subjects those transactions to Sections 6(a), 6(b), and 6b of Title 7 of the United States Code. Id. (“(iii) Enforcement: Sections 6(a), 6(b), and 6b of this title apply to any agreement, contract, or transaction described in clause (i), as if the agreement, contract, or transaction was a contract of sale of a commodity for future delivery.”).
 - ❑ Section 6(a) of Title 7 makes it unlawful to conduct off-exchange transactions that are not conducted through an approved “contract market”. In other words, it is unlawful to enter into leveraged commodity transaction with a consumer that is executed outside of a national exchange unless the commodity is delivered to the consumer within 28-days of execution of the trade.

Precious Metals Scams against the Elderly, continued

Leveraged precious metals account scam:

The Commodity Futures Trading Commission sought to shut down dozens of illegal operators following adoption of the amendment to the Dodd-Frank Act:

- ❑ *U.S. Commodity Futures Trading Commission v. Hunter Wise Commodities, LLC*, 21 F. Supp. 3d 1317 (S.D. Fla. 2013);
- ❑ *U.S. Commodity Futures Trading Commission v. Global Precious Metals Trading Co., LLC*, Case No. 13-cv-21708, 2013 WL 5212237 (S.D. Fla. Sept. 12, 2013);
- ❑ *U.S. Commodity Futures Trading Commission v. Grossman*, Case No. 14-cv-62061, 2015 WL 11197766 (S.D. Fla. Feb. 26, 2015);
- ❑ *U.S. Commodity Futures Trading Commission v. Int'l Monetary Metals, Inc.*, Case No. 14-cv-62244, 2016 WL 8256852 (S.D. Fla. Aug. 01, 2016);
- ❑ *U.S. Commodity Futures Trading Commission v. Oakmont Financial, Inc.*, Case No. 16-cv-80055, 2017 WL 9963325 (S.D. Fla. Jan. 19, 2017);

Precious Metals Scams against the Elderly, continued

- ❑ *U.S. Commodity Futures Trading Commission v. North Amer. Management, LLC*, Case No. 16-cv-60093, 2017 WL 3635119 (S.D. Fla. June 2, 2017);
- ❑ *U.S. Commodity Futures Trading Commission v. Mintco, LLC*, Case No. 15-cv-61960, 2017 WL 7734061 (S.D. Fla. Dec. 19, 2017);
- ❑ *U.S. Commodity Futures Trading Commission v. Mark Olsen Mining Co.*, Case No. 18-cv-80759, 2019 WL 1996126 (S.D. Fla. Feb. 22, 2019);
- ❑ *U.S. Commodity Futures Trading Commission v. Omega Knight 2, LLC*, Case No. 18-cv-22377, 2019 WL 6796128 (S.D. Fla. Sept. 13, 2019).
- ❑ *U.S. Commodity Futures Trading Commission v. My Global Leverage, LLC*, Case No. 15-cv-00745, 2016 WL 8257337 (D. Nev. Aug. 26, 2016).

Precious Metals Scams against the Elderly, continued

Leveraged precious metals account scam:

Significant recent enforcement actions include:

- ❑ *Commodity Futures Trading Comm'n v. Monex Credit Co.*, No.817CV01868JVSDFMX, 2020 WL 7786540, at *1 (C.D. Cal. Dec. 28, 2020) (granting preliminary injunction), order clarified, No. SACV1701868JVSDFMX, 2021 WL 1537044 (C.D. Cal. Mar. 17, 2021), and aff'd sub nom. U.S. Commodity Futures Trading Comm'n v. Monex Credit Co., No. 21-55002, 2021 WL 3057072 (9th Cir. July 20, 2021)
- ❑ *Goldline, Inc. and A-Mark Precious Metals, Inc.* (CFTC Docket No. 22-30, Sept. 22, 2022)

Precious Metals Scams against the Elderly, continued

Leveraged precious metals account scam:

- ***Monex Credit Company***
- In 2017, the Commodity Futures Trading Commission initiated a lawsuit against Monex Credit Company, its affiliates, and its principals, for engaging in an unlawful leveraged precious metals scheme with retail customers.
- Monex offered leveraged retail precious metals accounts where the retail investor could purchase precious metals on margin (using borrowed funds) and store those metals in a facility controlled by Monex.
- The transactions were executed off-exchange, with Monex selling the metals to the retail customers.
- Monex entered into hundreds of millions in client transactions for more than 12,000 customers over nearly six years.

Precious Metals Scams against the Elderly, continued

- According to the CFTC's complaint, approximately 90% of customers lost money in that period of time.
- In the lawsuit, the District Court (Judge Selna) initially granted defendants' motion to dismiss, finding that the CFTC had failed to allege facts that would support lack of delivery to the clients because there was actual delivery to a secured storage facility.
- The Ninth Circuit Court of Appeal reversed, holding that the "actual delivery" requirement is not satisfied if delivery is to a custodial account where the account relationship is managed by the broker rather than the retail customer. See *U.S. Commodity Futures Trading Comms. v. Monex Credit Company et al.*, 931 F.3d 966, 972-75 (9th Cir. 2019).
- That opinion relied on an earlier opinion from the 11th Circuit Court of Appeals, *U.S. Commodity Futures Trading Comms. v. Hunter Wise*, 749 F.3d 967 (11th Cir. 2014), which held that there was no delivery to the retail customer unless the customer had some possessory interest in the metals.

Precious Metals Scams against the Elderly, continued

- The Ninth Circuit Court of Appeals' opinion was then applied on remand by the District Court to enjoin Monex from conducting further leveraged transactions with retail customers using its trading platform. See *Commodity Futures Trading Commission v. Monex Credit Company*, Case No. 17-cv-01868, 2020 WL 7786540 (C.D. Cal. Dec. 28, 2020) (slip opinion).
- The preliminary injunction is currently pending on appeal.

Precious Metals Scams against the Elderly, continued

Leveraged precious metals account scam:

- ***Goldline, Inc. and A-Mark Precious Metals, Inc.***
- On September 22, 2022, the CFTC entered an administrative order against one of the largest precious metals dealers in the Country, A-Mark Precious Metals, Inc. (“A-Mark”), and its subsidiary, Goldline Inc., as part of a settlement.
- The Order held A-Mark and its subsidiary liable for fraudulent conduct in connection with off-exchange precious metals transactions and for engaging in off-exchange, leveraged retail commodity transactions that violate the 28 -day delivery rule, among other things.
- A-Mark and its subsidiary were required to pay in excess of \$1 million in disgorgement and monetary penalties.

Precious Metals Scams against the Elderly, continued

- A-Mark is a publicly traded company and was held directly liable for the fraudulent conduct of its subsidiary because it controlled and directed management, which A-Mark replaced when it acquired the company in 2017.
- According to the CFTC's order, customers were defrauded from April 2018 through June 2021 by false breakeven disclosures and false buyback disclosures. Generally, a financial advisor fails to disclose breakeven rates to avoid disclosing that the profits being earned by the firm far exceed industry standards or will require a substantial gain in the precious metals market just for the investor to break even.

Precious Metals Scams against the Elderly, continued

- The order also found that A-Mark's subsidiary engaged in unlawful, off-exchange, leveraged retail transactions that violated the 28 -day delivery requirement from April 2018 through July 2019. Specifically, A-Mark's subsidiary offered a "Collateral Finance Program" under which customers could use their newly-purchased metals to secure loans of up to 75% of the asking price of those metals, which could then be used to purchase additional metals from Goldline. The metals were held in storage by an A-Mark subsidiary chosen by Goldline until the loans were satisfied. Customers paid additional fees for storage of their metals. Until the loans were satisfied, the metals could not be withdrawn. Thus, there was no delivery to the retail customer under this program because none of the customers could or did satisfy the loan and take possession of the metals within 28 days of their transactions. Accordingly, the off-exchange transactions violated the Commodity Exchange Act.
- Thus, the leveraged precious metals accounts operated in a manner similar to the Monex accounts. *Goldline, Inc. and A-Mark Precious Metals, Inc. (CFTC Docket No. 22-30, Sept. 22, 2022)*

Precious Metals Scams against the Elderly, continued

What can be done to protect elderly from precious metals scams?

- FINRA Rule 2165 provides a safe harbor that permits member firms to place temporary holds on disbursements of funds or securities from the accounts of specified customers where there is a reasonable belief of financial exploitation.
- Some states also provide a safe harbor and may allow for a delay in holding a securities transaction in addition to a disbursement, but currently there is no similar provision under federal law or under FINRA rules.
- Many states mandate reporting of potential financial exploitation.
- Some states mandate reporting to the state securities commissioner, Adult Protective Services, or law enforcement.

Precious Metals Scams against the Elderly, continued

What can be done to protect elderly from precious metals scams?

- Federal law may require a Suspicious Activity Report (“SAR”) to be filed. This federal requirement is entirely separate from the requirement to report senior or vulnerable adult financial exploitation to states.
- The NASAA Model Legislation to Protect Vulnerable Adults from Financial Exploitation (“NASAA Model Act”) was adopted on January 22, 2016. The majority of states have enacted or adopted a senior and/or vulnerable adult investor protection law similar to the NASAA Model Act.

Precious Metals Scams against the Elderly, continued

What can be done to protect elderly from precious metals scams?

- The NASAA Model Act has five core features that apply when there is a reasonable belief of financial exploitation of an eligible adult (a senior or vulnerable adult):
 - ☐ Mandatory reporting to the state securities commissioner and adult protective services;
 - ☐ Authority to notify certain identified third-parties;
 - ☐ Authority to temporarily delay disbursement of funds;
 - ☐ Immunity from civil and administrative liability for reporting, notifications, and delays; and
 - ☐ Mandatory record-sharing with law enforcement and state adult protective services agencies in cases of exploitation.

Precious Metals Scams against the Elderly, continued

What can be done to protect elderly from precious metals scams?

- Implement a mandatory hold on conversions to a self-directed IRA account
- Close the loophole on holding precious coins in SDIRA accounts
- Require SDIRA custodians to call customers and verify their information and signature before opening an account
- Prohibit SDIRA custodians from partnering with promoters in a manner that allows the promoter to become the “representative” on the account. The account owner or third party should be the only authorized agents on the account.

Precious Metals Scams against the Elderly, continued

What can be done to protect elderly from precious metals scams?

- Implement some means of holding SDIRA custodians accountable when basic audit standards are not met.
- Increase the funding and enforcement efforts of the Commodity Futures Trading Commission.
- Expand the jurisdiction of the CFTC and implement registration requirements and impose a fiduciary duty on any promoter that sells investments that use an SDIRA rollover to fund the investment.

CLOSING REMARKS / QUESTIONS & ANSWERS

The presenters, Aaron Cohn and Scott Silver,
thank you for your attendance and participation.



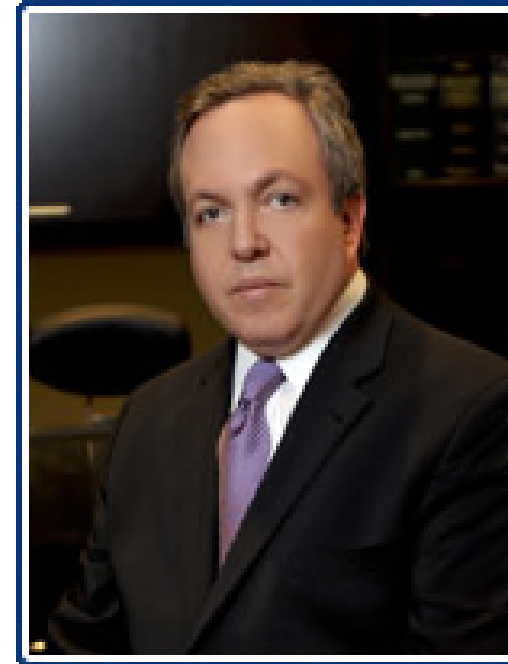
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