Cullen | Dykman

CFPB Issues Guidance to Financial Institutions on Elder Financial Exploitation

March 30, 2016

The Consumer Financial Protection Bureau ("CFPB") has issued an advisory ("Advisory") and an accompanying report and recommendations ("Report and Recommendations") for financial institutions on preventing and responding to elder financial exploitation. The Advisory provides broad recommendations for banks and credit unions to help them prevent and respond quickly to elder financial exploitation and identifies benchmarks to help assess and strengthen institutions' current practices. The Report and Recommendations provide, among other things, additional background and greater detail on the recommendations contained in the Advisory.

The Advisory notes that financial exploitation—the illegal or improper use of an older person's funds, property or assets—is the most common form of elder abuse and yet only a small fraction of incidents are reported, and that older persons are attractive targets because they often have assets and a regular source of income, and may be especially vulnerable due to isolation, bereavement, and/or disability.

The Report and Recommendations emphasize that financial institutions play a vital role in preventing and responding to elder financial abuse because they (i) know their customers; (ii) often have the opportunity for face-to-face interaction with older consumers who make transactions; (iii) are uniquely positioned to detect that an elder account holder has been targeted or victimized; (iv) are mandated reporters of suspected elder financial exploitation under many states' laws; and (v) file Suspicious Activity Reports ("SARs"), which are useful for spotting elder financial exploitation when the dollar threshold and other Bank Secrecy Act requirements are met.

The CFPB recommends that financial institutions do the following to strengthen their current practices for preventing, detecting, and responding to the financial exploitation of older people:

1. Develop, implement and maintain internal protocols and procedures for protecting account holders from elder financial exploitation. The protocols should include key policies and procedures regarding (i) training requirements and resources; (ii) reporting to appropriate federal, state and local entities; (iii) Regulation E compliance (relating to electronic fund transfers); (iv) procedures for sharing account information with third parties; and (v) ongoing collaboration with stakeholders.

2. Train management and staff to prevent, detect, and respond to elder financial exploitation. Financial institutions should train employees regularly and frequently and should tailor training to specific staff roles. Key topics for training include providing: (i) a clear and nuanced definition of elder financial exploitation; (ii) warning signs that may indicate financial exploitation, including behavioral and transactional indicators of risk (red flag categories include, but are not limited to, transaction pattern changes, identity theft and coercion, and behavioral changes); and (iii) action steps to prevent exploitation and respond to suspicious events, including actionable tips for interacting with account holders, steps for reporting to authorities, and communication with trusted third parties.

3. Detect elder financial exploitation by harnessing technology. Fraud detection systems should include analyses of the types of products and account activity that may be associated with elder financial exploitation risk. Some indicators of elder fraud risk may not match conventionally accepted patterns of suspicious activity, but nevertheless may be unusual in light of a particular account holder's regular pattern of behavior. The CFPB encourages financial institutions using predictive analytics to review their filtering criteria against individual account holders' patterns and to explore additional risk factors that may be associated with elder financial exploitation.

4. Report suspicious activity. The CFPB recommends that financial institutions report suspected financial exploitation of older persons to all appropriate local, state or federal responders, regardless of whether reporting is mandatory or voluntary under state or federal law. New York State law allows financial institutions in New York to report suspected elder financial exploitation to Adult Protect Services ("APS") units or law enforcement. Section 473-b of the New York Social Services Law provides immunity from civil liability to any person who in good faith believes that a person 18 years of age or older may be an endangered adult or in need of protective services and who, based on this belief, reports that the adult needs protection to an APS unit or another authority who can take appropriate action. This provision provides civil immunity both to employees of financial institutions, as well as the financial institutions themselves. Furthermore, Section 4.1 of the New York Banking Law provides that, if requested by an official authorized to administer a program under the Social Services Law, financial institutions doing business in New York must, under certain circumstances, report whether a customer has funds or other property with the institution and the amount or probable value thereof.

In addition, the Advisory reminds financial institutions of 2011 guidance from the Financial Crimes Enforcement Network ("FinCEN") that SARs are a valuable reporting avenue for elder financial exploitation cases. FinCEN now provides a designated category of suspicious activity, "elder financial exploitation," on the electronic SAR form. The CFPB also emphasizes that the Gramm-Leach-Bliley Act is not a barrier to reporting suspected elder financial exploitation and that institutions should understand the roles of first responders, including core components in reports to state and local authorities, and expedite documentation requests.

5. Protect older account holders. Financial institutions should comply with the Electronic Fund Transfer Act ("EFTA") and Regulation E, which offer especially important protections to older consumers. Under EFTA and Regulation E, institutions must: (i) follow rules for extending time limits for consumers for extenuating circumstances such as extended travel or hospitalization; (ii) follow rules for accepting notices of unauthorized EFTs, which specify consumer rights regarding the method of providing notice, who provides notice, and the specificity of the notice; and (iii) confirm that all relevant conditions are met before imposing any liability on a consumer for an unauthorized EFT.

The CFPB also recommends offering account holders the opportunity to consent to the disclosure of account information to trusted third parties when financial exploitation is suspected. Further, institutions should offer age-friendly services that can enhance financial protections against financial exploitation. Specifically, the CFBP recommends that institutions: (i) provide information about planning for incapacity; (ii) honor valid powers of attorney; (iii) offer protective opt-in account features, such as cash withdrawal limits; and (iv) offer convenience accounts as an alternative to joint accounts.

6. Collaborate with other stakeholders. The CFPB recommends that financial institutions collaborate with local, regional and state organizations that play a critical role in preventing, detecting, and responding to elder financial exploitation. This may involve: (i) working with law enforcement and APS; (ii) participating in and supporting coordinated efforts to educate older account holders, caregivers and the public; and (iii) participating in and supporting local or regional multidisciplinary network initiatives, such as APS agencies, aging service agencies, law enforcement representatives, legal services organizations, non-profit senior service providers and financial services providers.

The CFPB's Advisory and Report and Recommendations provide helpful guidance for managing instances of suspected elder abuse. They supplement the guidance issued by the New York State Department of Financial Services ("NYSDFS") in 2015 that is discussed here: http://www.cullenanddykman.com/news-advisories-96.html.

Please note that at this time neither the federal nor New York State guidance provides a financial institution with any insulation from legal liability for taking action to prevent withdrawals, transactions, or other banking actions where elder financial abuse is suspected (however, please see the footnote below regarding the recently passed New York State Senate bill). Accordingly, financial institutions must manage these incidents very cautiously.

The Advisory is available at http://files.consumerfinance.gov/f/201603_cfpb_advisory-for-financial-institutions-on-preventing-and-responding-to-elder-financial-exploitation.pdf. The Report and Recommendations are available at http://files.consumerfinance.gov/f/201603_cfpb_recommendations-and-report-for-financial-institutions-on-preventing-and-responding-to-elder-financial-exploitation.pdf.

Please note that this advisory is a general overview of the CFPB's Advisory and Report and Recommendations and is not intended as formal legal advice. If you have any questions or issues pertaining to the Advisory, Report, and Recommendations, the NYSDFS guidance, or preventing and responding to elder financial exploitation, please feel free to contact Joseph D. Simon at 516-357-3710 or via email at jsimon@cullenanddykman.com.

Practices

- Banking and Financial Services
- Regulatory and Compliance

Industries

- Financial Institutions

Attorneys

- Joseph D. Simon