Cullen | Dykman

CFPB Updates Guidance on Elder Financial Exploitation

August 8, 2019

Joseph D. Simon

Garden City

The Consumer Financial Protection Bureau ("CFPB") has issued further guidance to financial institutions on how to prevent and respond to elder financial exploitation, focusing on the prompt reporting of suspected exploitation to appropriate federal, state and local authorities. This new guidance (the "2019 Guidance") also recommends that financial institutions file Suspicious Activity Reports ("SARs") when suspecting elder financial exploitation.

I. Background

The CFPB issued an advisory in 2016 setting forth recommendations for financial institutions to help prevent and respond to elder financial exploitation (the "2016 Guidance"). Our advisory on the 2016 Guidance is available here
.

The 2016 Guidance provides six categories of voluntary best practices for financial institutions: (1) developing and implementing internal procedures for protecting account holders from elder financial exploitation, (2) training management and staff to prevent, detect, and respond to suspicious events, (3) detecting elder financial exploitation by harnessing technology, (4) reporting all cases of suspected exploitation to relevant federal, state and local authorities, (5) protecting older account holders by complying with the Electronic Funds Transfer Act and Regulation E and by offering age-friendly services that can enhance protections against financial exploitation, and (6) collaborating with other stakeholders, such as law enforcement, adult protective services ("APS"), and service organizations. In the 2019 Guidance, the CFPB specifically focuses on item (4) — the recommendation to report suspected elder financial exploitation to appropriate authorities.

II. Reporting Requirements under Federal and State laws

A. Senior Safe Act

The 2019 Guidance discusses the federal Senior Safe Act (part of the regulatory relief bill signed into law in May, 2018) which grants a safe harbor to a financial institution that discloses suspected elder financial exploitation to covered governmental agencies if the financial institution provided training to their employees on how to identify and report elder exploitation. Additionally, the individual immunity is available for employees who served as a supervisor or in a compliance or legal function (including as Bank Secrecy Act officer) at the time of the disclosure. Our prior advisory on the Senior Safe Act can be found here.

B. State Provisions

The 2019 Guidance also discusses various state laws that allow or mandate financial institutions to report suspected elder financial exploitation to appropriate authorities.

Currently, New York law allows (but does not mandate) that financial institutions report suspected elder financial exploitation. New York Social Services Law Section 473-b grants immunity from civil liability to anyone who reports suspected elder abuse in good faith. Specifically, It provides that any person who in good faith believes that a person 18 or older may be an endangered adult or in need of protective or other services, and who, based on such belief reports or refers such person to the New York State Department of Social Services, office for the aging, or any local social services district office or designated area agency on aging, law enforcement agency, or any other person, agency or organization that such person, in good faith, believes will take appropriate action, will have immunity from any civil liability that might otherwise result by reason of the act of making such report or referral. Please note that, unlike the federal Safe Senior Act, the New York law does not specifically provide protection to the employer of the person who reports the abuse (such as a financial institution). However, case law in New York suggests that the provision may be read to cover the employer, and the New York State Department of Financial Services ("DFS") in 2015 guidance takes the view that a financial institution would be covered by the state law. Please see our prior advisory on the DFS guidance here.

A related issue addressed in the CFPB's 2019 Guidance is state laws that allow financial institutions to delay the disbursement of funds from an account of a person that the institution believes may be subject to financial exploitation. This is a concern for financial institutions because if financial exploitation is suspected and the institution wants to delay or refuse to allow a transaction from an account, the institution could face potential liability from the account holder for such refusal or delay if the transaction is ultimately determined not to be the result of exploitation. The 2019 Guidance notes that six states currently allow financial institutions to hold transactions while the transactions are being investigated. New York is not one of those states, so financial institutions in New York must be careful when deciding whether to allow a questionable transaction to be completed.

III. Reporting Suspicious Activity Reports

The 2019 Guidance recommends that financial institutions file SARs when they suspect elder financial exploitation. Since robust reporting to APS can increase the chances that victims will receive appropriate services, the CFPB also emphasizes the importance of reporting directly to APS. Additionally, the CFPB urges financial institutions to work with their legal counsel to expedite their responses to requests for SAR supporting documentation by law enforcement and other agencies.

IV. More Information

The 2019 Guidance is available here. If you have any questions regarding the 2019 Guidance or reporting elder financial exploitation in general, please feel free to contact Joseph D. Simon at (516) 357-3710 or via email at jsimon@cullenanddykman.com, Elizabeth A. Murphy at (516) 296-9154 or via email at emurphy@cullenanddykman.com, or Mandy Xu at (516) 357-3850 or via email at mxu@cullenanddykman.com.

Practices

- Banking and Financial Services

Industries

- Financial Institutions

Attorneys

- Elizabeth A. Murphy
- Joseph D. Simon