
New Federal Protection for Financial Institutions and their Employees who Report Suspected Elder Financial Exploitation

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While the main focus of the banking regulatory relief bill signed into law earlier this year was the easing of certain regulatory burdens on financial institutions, there is an important section of the law that provides financial institutions (and certain of their employees) with potential immunity for reporting suspected elder financial exploitation. This Advisory will discuss the new federal protection for reporting suspected elder financial exploitation, as well as the similar protection that exists under New York State law.

The Economic Growth, Regulatory Relief and Consumer Protection Act (the “Act”) was signed into law on May 24, 2018, and provides financial institutions with relief from various parts of the Dodd-Frank Act passed in 2010. In previous Advisories we have described the Act’s changes to the underwriting requirements on home mortgages under the Truth in Lending Act, the data collection and reporting requirements under the Home Mortgage Disclosure Act, and the easing of what kinds of deposits are deemed “brokered deposits.”

Another important section of the Act provides a financial institution and certain employees of an institution with immunity from civil and administrative liability for reporting suspected elder financial exploitation, provided certain employees are trained in identifying and reporting such exploitation. Financial institutions covered under this new law include banks, credit unions, investment advisors, broker-dealers, and insurance companies and agencies.

In order for a financial institution to be eligible for immunity, the financial institution (or a third party selected by the institution) must provide required training to those employees who (1) serve as a supervisor or in a compliance or legal function (including as Bank Secrecy Act officer), (2) may come into contact with a senior citizen as a regular part of the professional duties of such individual, and (3) may review or approve the financial documents, records, or transactions of a senior citizen in connection with providing financial services to a senior citizen. The training must instruct employees, as appropriate to a person’s job responsibilities, to identify and report the suspected exploitation of a senior citizen, including common signs that indicate the financial exploitation of a senior citizen. The training must also discuss the need to protect the privacy and respect the integrity of each individual customer of the institution. A senior citizen is defined as a person “who is not younger than 65 years of age.”

An individual who has received the required training is protected against liability, including in any civil or administrative proceeding, for disclosing the suspected exploitation of a senior citizen to a covered agency if the individual, at the time of the disclosure (1) served as a supervisor or in a compliance or legal function (including as Bank Secrecy Act officer) for a financial institution, and (2) made the disclosure in good faith and with reasonable care. "Exploitation" is defined as the fraudulent or otherwise illegal, unauthorized, or improper act or process of an individual, including a caregiver or a fiduciary, that (a) uses the resources of a senior citizen for monetary or personal benefit, profit, or gain, or (b) results in depriving a senior citizen of rightful access to or use of benefits, resources, belongings or assets. A "covered agency" includes a state financial regulator, certain federal financial regulators, a law enforcement agency, or a state adult protective services agency.

Please note that this potential immunity is only available to those 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, and not to lower level employees. Accordingly, any lower level employee suspecting elder financial exploitation should report the matter internally within the institution so that employee eligible for immunity reports the matter to a covered agency.

In addition to protecting financial institution employees with immunity, the Act also provides protection for the financial institution itself. The institution is protected against liability, including in any civil or administrative proceeding, for disclosure by an employee who meets the requirements for individual immunity if the individual was employed by the institution at the time of the disclosure, and before the time of disclosure, each of the types of individuals designated for training by the law (supervisors or persons in a compliance or legal function, persons who come into contact with a senior citizen as a regular part of the professional duties of such persons, and persons who review or approve the financial documents, records, or transactions of a senior citizen in connection with providing financial services to a senior citizen) received the required training.

While the Act provides an important new federal protection for financial institutions and their employees who report suspected elder financial exploitation, New York State has had a similar protection for over 30 years. New York Social Services Law Section 473-b states 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 department, 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 new federal law, 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 Department of Financial Services in 2015 guidance takes the view that a financial institution would be covered by the state law.

While this new federal law, in conjunction with the New York Social Services Law Section 473-b, provides financial institutions in New York with protections for reporting suspected elder financial exploitation, neither law addresses a common dilemma that financial institutions face when suspecting such exploitation. That dilemma is whether to allow a withdrawal or other transaction on the customer's account by a person who is suspected of

exploiting the customer or that the institution otherwise believes is being forced on the customer by such a person. The financial institution may believe that such withdrawal or transaction is not proper or in the best interests of the customer, but refusing the withdrawal or transaction could subject the institution to liability from the customer. Without proper protection for refusing such a transaction, financial institutions must act extremely cautiously when confronted with such a situation.

If you have any questions regarding the Act, New York Social Services Law Section 473-b, or reporting elder financial exploitation, please feel free to contact Joseph D. Simon at (516) 357-3710 or via email at jsimon@cullenanddykman.com, Kevin Patterson at (516) 296-9196 or via email at kpatterson@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.

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