PAUL HASTINGS

STAY CURRENT

August 2015

Follow @Paul_Hastings

Elder Financial Abuse on the Rise: What Financial Institutions Can Do to Address Increasing Regulatory Scrutiny Designed to Protect At-Risk Customers

By Gerard Comizio, Amanda Kowalski & Laura Bain

With the number of U.S. residents 65 and older projected to grow from 41 to 86 million by 2050,[1] elder financial exploitation[2] is emerging as a serious consumer threat, and an increasingly important risk management area for financial institutions. According to the American Association of Retired Persons ("AARP"), every year "abuse and exploitation rob older Americans of $3 billion."[3] In response to this rising problem, state legislatures and state and federal financial regulators are imposing heightened expectations on financial institutions to identify, report, and prevent elder financial abuse. The Consumer Financial Protection Bureau ("CFPB") in particular has indicated enhanced scrutiny of financial institutions' elder abuse prevention efforts; in an April 2015 speech at the White House Conference on Aging Regional Forum, CFPB Director Richard Cordray stated that the CFPB is "calling on financial institutions to do their part to help protect older Americans" as financial institutions are well positioned to recognize scams against older consumers as well as unusual financial behavior.[4] The ABA has also recently "called upon financial institutions to educate employees and consumers alike on identifying these crimes against the elderly and talked about the importance of banks' partnerships with law enforcement and social service organizations to help prevent fraud and financial abuse."[5]

Risk of elder financial abuse is not limited to certain kinds of financial products and services. It is a dangerous misconception to assume that only products marketed directly to older customers, such as reverse mortgages and retirement accounts, can create exposure to liability for elder financial exploitation. It is a similar misconception to conclude that elder financial abuse exposure is limited to a financial institution's own products, services, or customer interactions. **Any time a financial institution interacts with a customer over a certain age in person or online, it could be exposed to liability and regulatory actions if it has not implemented strong policies and procedures and trained employees to identify signs of elder financial abuse by third parties.** In fact, in many states, financial institutions bear a legally enforceable responsibility to report elder financial abuse.

Given the increased attention to elder financial abuse prevention, federal and state law enforcement and regulators are applying enhanced scrutiny in this area; laws and regulatory focus are evolving. There is a new regulatory focus on cyber crime, which poses a significant threat to older consumers.

This article provides an overview of the legal landscape applicable to identifying and reporting financial abuse, identifies some recent legal and regulatory changes in this area, and serves as a guide for financial institutions to review their existing compliance efforts.

Increasing Scrutiny from the CFPB

Elder financial exploitation has emerged as a hot topic in consumer protection, as evidenced by increased activity by and focus from the CFPB. The CFPB's Office for Older Americans has been actively studying elder financial abuse and has been issuing numerous reports to Congress. One such report explored the potential problem of "senior designation" credentials that many financial advisors use when they market their services to older Americans to indicate they have advanced expertise in older consumers' financial needs. According to the CFPB's report, these credentials indicated special training or expertise in older consumers' financial needs but generally were not supported by any specific training or increased knowledge. Based on its findings, the CFPB made recommendations to policymakers that they implement rigorous training standards for and increase supervision and enforcement with respect to the use of senior designation credentials.

Current State of State Law Reporting Requirements

Approximately half of states in the U.S. require financial institutions and/or their employees to report cases of elder financial abuse.[6] State laws vary with respect to their reporting requirements and the range of companies subject to such requirements. Some states mandate reporting, while others merely permit reporting of suspected elder financial abuse. The entities required to report also vary—in some states, the applicability of reporting requirements may be limited to banks, whereas in other states such requirements extend to a wide range of financial institutions and their employees.

For example, California mandates that all officers and employees of financial institutions report financial abuse. Under California law, "financial institution" includes any federally- or state-chartered bank, savings association, or credit union as well as any institution-affiliated party, such as a director, officer or employee of the institution.[7] In particular, California's law provides:

> Any mandated reporter[8] of suspected financial abuse[9] of an elder or dependent adult who has direct contact with the elder or dependent adult[10] or who reviews or approves the elder or dependent adult's financial documents, records, or transactions, in connection with providing financial services with respect to an elder or dependent adult, and who, within the scope of his or her employment or professional practice, has observed or has knowledge of an incident, that is directly related to the transaction or matter that is within that scope of employment or professional practice, that reasonably appears to be financial abuse, or who reasonably suspects that abuse, based solely on the information before him or her at the time of reviewing or approving the document, record, or transaction in the case of mandated reporters who do not have direct contact with the elder or dependent adult, shall report the known or suspected instance of financial abuse….[11]

Thus, California's legally mandated reporting requirement applies not only to a bank teller who directly interacts with an older consumer, but also to any bank officer who approves the transaction, and potentially even to other employees that review a pattern of transactions that would reasonably indicate financial exploitation of the consumer.

In contrast, the state of Washington does not mandate reporting, but permits financial institutions and their employees to report suspected elder financial exploitation to the proper authorities.[12] Importantly, although Washington does not mandate reporting, Washington defines the term "financial

institution" much more broadly—financial institutions include banks, trust companies, mutual savings banks, savings and loan associations, credit unions, broker-dealers, and investment advisers.[13]

Growing Expectations from States

In recent months state legislatures have begun to proactively consider measures to further enhance elder financial protection requirements in their states.

- In May, Georgia amended its elder abuse law, which requires financial institutions, investment companies, and their employees to report elder financial exploitation, to clarify the actions that government agencies are required to take upon receiving reports of elder abuse.[14]

- In June, Missouri enacted a law that authorizes broker-dealers to refuse a disbursement request from the account of an adult who is 60 years of age or older (or, alternatively, disabled) when the broker-dealer reasonably suspects such disbursement may result in financial exploitation.[15] If the broker-dealer refuses to make the disbursement, he must make reasonable effort to notify parties authorized to transact business on the account within two days and to notify the Department of Health and Senior Services and Commissioner of Securities within three days.

- In July, Maine enacted An Act to Strengthen the Protections for Senior Citizens in the State, which, among other things, revises Maine's elder abuse law to redefine "abuse" to include financial exploitation.[16]

- New York's senate recently passed Bill S. 639, which if adopted would grant banks discretion to refuse any transaction requiring the disbursement of money from a vulnerable adult's account when a bank, social services official, or law enforcement agency reasonably suspects that the vulnerable adult is being financially exploited.[17]

- Ohio is currently considering the Ohio Elder Justice Act, a bill that would among other things mandate that financial institutions report suspected elder abuse.[18] The bill has passed the Ohio House of Representatives and is currently pending in the Senate.[19]

This recent uptick in state legislative action reflects a trend toward enhanced awareness of the growing social problem of financial exploitation of elderly citizens. Moreover, state governments appear to have recognized financial institutions and their employees as best positioned to combat elder abuse and are increasingly designating financial institutions as the protectors of older consumers.

As concern for and awareness of elder financial exploitation deepens, a financial institution's failure to adequately address the risk of abuse in its compliance programs and employee training could expose it to significant consumer litigation liability as well as enforcement actions by state, and federal, regulators in the future.

Emerging Cybersecurity Concerns

Although not often discussed, older consumers may be particularly at risk of identity theft and other forms of cyber fraud. Often, older consumers have high credit scores and established savings which can make them attractive targets for identity thieves and hackers; moreover, older consumers may lack the technology skills and techniques to identify scams or protect themselves from such cyber

criminals. For example, less technologically sophisticated consumers are more vulnerable to phishing attacks (mass emails sent by cyber criminals requesting sensitive information or directing users to visit fake websites). Financial institutions should be particularly aware of the impact data breaches or cyber hacks may have on their elderly consumers and may deem it prudent to take additional disclosure efforts for their older consumers.

However, the greatest risk to elder consumers online may be the people they trust most. According to a 2009 study, family members and caregivers are the culprits in 55 percent of elder financial exploitation cases.[20] Elder consumers may share their online banking account information and passwords with family members or caregivers. Armed with this information, family members and caregivers can easily access an elder consumer's online banking account and take unauthorized actions, for example transferring money to their own accounts. The risk of online account exploitation by family members poses a significant challenge for financial institutions—both to identify and prevent. This risk is further exacerbated by the unwillingness consumers often have to report exploitation by a person they depend upon.

To date, the Federal Banking Agencies (the "FBAs") have provided scant guidance regarding mitigating this type of risk. Financial institutions may decide to deem all online banking accounts held by older consumers as high risk and impose a heightened level of monitoring on these accounts for red flag transactions, such as sudden substantial increases in mobile account payments to the accounts of relatives. By monitoring elder consumers' accounts for sudden shifts in online activity, financial institutions can identify and report possible exploitation. Although this level of risk management does not appear to be required by current FBA regulation or guidance, as discussed above, financial institutions may have a duty under state law to investigate and report this form of abuse.

Action Items for Financial Institutions

- In light of the changing state laws in this area, make sure to maintain an updated state survey of elder financial abuse laws and reporting requirements (which we previously discussed here) that apply to your financial institution and employees in the states in which your institution operates, and in states where these laws may otherwise potentially apply when you have contact with current or potential customers in that state;

- Establish and implement policies and procedures that train employees to recognize and report signs of elder financial exploitation, including:

  - Sudden reluctance to engage with financial institution employees to discuss financial matters;

  - Sudden, atypical, or unexplained withdrawals, wire transfers, or other changes in their financial situations;

  - Checks not clearing or bills not being paid;

  - Sudden increase in spending by family or friends with access to the elder's account;

  - Transfer of title of home or other assets to another person for no apparent reason;

  - Large, frequent "gifts" given to a caregiver;

  - Large, unexplained loans.

- Open a dialogue with local law enforcement, including Adult Protective Services agencies, and know how to file a report;[21]
- Periodically review policies and procedures regarding elder financial exploitation prevention; consider providing additional training to customer-facing employees on identifying and preventing elder financial abuse;
- Coordinate with affiliates to consider implementing similar measures for preventing potential elder financial abuse; and
- Consider enhancing consumer fraud education programs and information.

✧ ✧ ✧

If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

Atlanta

Todd W. Beauchamp
1.404.815.2154
toddbeauchamp@paulhastings.com

Chris Daniel
1.404.815.2217
chrisdaniel@paulhastings.com

Michael Haun
1.404.815.2279
michaelhaun@paulhastings.com

Erica Berg Brennan
1.404.815.2294
ericaberg@paulhastings.com

Heena A. Ali
1.404.815.2393
heenaali@paulhastings.com

Kevin P. Erwin
1.404.815.2312
kevinerwin@paulhastings.com

Meagan E. Griffin
1.404.815.2240
meagangriffin@paulhastings.com

Diane Holden
1.404.815.2326
dianeholden@paulhastings.com

Palo Alto

Rob R. Carlson
1.650.320.1830
robcarlson@paulhastings.com

Cathy S. Beyda
1.650.320.1824
cathybeyda@paulhastings.com

San Diego

Jane Song
1.858.458.3043
janesong@paulhastings.com

San Francisco

Thomas P. Brown
1.415.856.7248
tombrown@paulhastings.com

Stan Koppel
1.415.856.7284
stankoppel@paulhastings.com

Molly E. Swartz
1.415.856.7238
mollyswartz@paulhastings.com

Paul M. Schwartz
1.415.856.7090
paulschwartz@paulhastings.com

Washington, D.C.

V. Gerard Comizio
1.202.551.1272
vgerardcomizio@paulhastings.com

Behnam Dayanim
1.202.551.1737
bdayanim@paulhastings.com

Lawrence D. Kaplan
1.202.551.1829
lawrencekaplan@paulhastings.com

Gerald Sachs
1.202.551.1975
geraldsachs@paulhastings.com

Alexandra L. Anderson
1.202.551.1969
alexandraanderson@paulhastings.com

Laura E. Bain
1.202.551.1828
laurabain@paulhastings.com

Ryan A. Chiachiere
1.202.551.1767
ryanchiachiere@paulhastings.com

Lauren Kelly D. Greenbacker
1.202.551.1985
laurenkellygreenbacker@paulhastings.com

Amanda Kowalski
1.202.551.1976
amandakowalski@paulhastings.com

---

[1] Pew Research Center, *Chapter 4. Population Change in the U.S. and the World from 1950 to 2050* (Jan. 30, 2014), *available at* http://www.pewglobal.org/2014/01/30/chapter-4-population-change-in-the-u-s-and-the-world-from-1950-to-2050/.

[2] Except where otherwise specified, "elder financial exploitation," "elder abuse," and related terms are used interchangeably in this article. The definitions of such terms vary by state.

[3] AARP, *Fighting Against Elder Abuse and Exploitation* (Mar. 4, 2015), *available at* http://www.aarp.org/politics-society/advocacy/caregiving-advocacy/info-2015/fight-against-elder-abuse.html.

[4] Prepared Remarks of CFPB Director Richard Cordray at the White House Conference on Aging Regional Forum (Apr. 27, 2015), *available at* http://www.consumerfinance.gov/newsroom/prepared-remarks-of-cfpb-director-richard-cordray-at-the-white-house-conference-on-aging-regional-forum/.

[5] ABA, *ABA Addresses Elder Financial Abuse at White House Conference* (July 14, 2015), *available at* http://bankingjournal.aba.com/2015/07/aba-addresses-elder-financial-abuse-at-white-house-conference/.

[6] *Compliance Risk Management: What Financial Institutions Need to Know About Reporting Elder Financial Exploitation* (Mar. 2014), *available at* https://www.paulhastings.com/docs/default-source/PDFs/stay-current-compliance-risk-management-what-financial-institutions-need-to-know-about-reporting-elder-financial-exploitation.pdf.

[7] *See* Cal. Welf. & Inst. Code § 15630.1(a)&(b).

[8] *See id.*

[9] In California, "financial abuse" occurs when a person or entity does any of the following: (1) Takes, secretes, appropriates, obtains, or retains real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both. (2) Assists in taking, secreting, appropriating, obtaining, or retaining real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both. (3) Takes, secretes, appropriates, obtains, or retains, or assists in taking, secreting, appropriating, obtaining, or retaining, real or personal property of an elder or dependent adult by undue influence. Cal. Welf. & Inst. Code § 15610.30(a).

[10] "Elder" means any person residing in California who is 65 years or older. "Dependent adult" means any person between the ages of 18 and 64 years who resides in CA and who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities, or whose physical or mental abilities have diminished because of age. "Dependent adult" also includes any person between 18 and 64 years of age who is admitted as an inpatient to a 24-hour health facility. Cal. Welf. & Inst. Code § 15610.30(a).

[11] Cal. Welf. & Inst. Code § 15630.

[12] 2 Rev. Code Wash. § 74.34.020(13).

[13] 2 Rev. Code Wash. § 74.34.020(7); 2 Rev. Code Wash. § 30.22.040.

[14] Georgia House Bill 72, *enacted* May 5, 2015 and *effective* July 1, 2015, *available at* http://www.legis.ga.gov/Legislation/en-US/display/20152016/HB/72.

[15] Missouri Senate Bill 244, *enacted/effective* June 12, 2015, *available at* https://legiscan.com/MO/text/SB244/id/1075343.

[16] Maine Legislature, LD 1272 (July 6, 2015), *available at* http://legislature.maine.gov/LawMakerWeb/summary.asp?LD=1272&SessionID=11.

[17] New York Senate Bill S. 639, *passed Senate* June 15, 2015, *available at* http://assembly.state.ny.us/leg/?default_fld=&bn=S00639&term=2015&Summary=Y&Actions=Y&Text=Y.

[18] Ohio House Bill 24, http://www.ohioattorneygeneral.gov/Media/News-Releases/April-2015/Attorney-General-DeWine-Announces-Support-for-Ohio.

[19] https://legiscan.com/OH/bill/HB24/2015.

[20] MetLife, *Broken Trust: Elders, Family & Finance* (Mar. 2009), *available at* https://www.metlife.com/mmi/research/broken-trust-elder-abuse.html#findings.

[21] The National Center on Elder Abuse has an Eldercare Locator tool, *available at* http://eldercare.gov/Eldercare.NET/Public/Index.aspx.