NEW YORK STATE
DEPARTMENT of
FINANCIAL SERVICES

Andrew M. Cuomo
Governor

Benjamin M. Lawsky
Superintendent

TO: Financial Institutions Doing Business in the State of New York

FROM: Benjamin M. Lawsky, Superintendent

DATE: February 26, 2015

RE: Guidance for Financial Institutions on Preventing Elder Financial Exploitation

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The New York State Department of Financial Services (the "Department") is providing the following guidance to financial institutions[1] doing business in New York concerning the prevention of financial exploitation of elderly adults.[2] Financial institutions can play a key role in preventing elder financial exploitation, yet it appears that they are underreporting cases of abuse to the relevant authorities even though they are permitted to report under state and federal law. The Department recommends that financial institutions in New York make greater efforts to protect the elderly from financial exploitation by adopting red flag protocols, enhancing staff training, and reporting suspected financial abuse to Adult Protective Services ("APS") or other authorities. Administered under the authority of the New York State Office of Children and Family Services, APS units are in every county in New York and are authorized to investigate suspected financial exploitation of vulnerable adults and intervene as appropriate.[3]

The Problem of Elder Financial Exploitation in New York

Elder financial exploitation is the illegal or improper use of an elderly adult's funds, property, or resources by another individual.[4] Perpetrators are generally either those who have a relationship

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[1] The term "financial institutions" as used herein primarily refers to depository institutions, including New York community and regional banks and credit unions. While the definition of a "financial institution" under the Gramm-Leach-Bliley Act may have a wider applicability, the privacy exemptions of this Act, discussed further below, apply to the institutions for which the Department is issuing this guidance.

[2] Much of this guidance also applies to adults who may be vulnerable to financial exploitation but are not elderly, including those who are dependent on caregivers or those with certain impairments.

[3] *See* New York State Office of Children and Family Services, Protective Services for Adults Frequently Asked Questions, http://ocfs.ny.gov/main/psa/faq.asp. A listing of every APS unit in New York along with contact information is available at http://ocfs.ny.gov/main/localdss.asp.

[4] *See* N.Y. Social Services Law § 473(6)(g). Here, "elderly adult" refers to any adult who is 60 years of age and older because this is the age that New York State social services, including Adult Protective Services, uses. *See* Lifespan of Greater Rochester Inc., Weill Cornell Medical Center of Cornell University, and New York City Department for the Aging, Under the Radar: New York State Elder Abuse Prevalence Study: Self-Reported Prevalence and Documented Case Surveys 17 (May 2011), http://nyselderabuse.org/documents/ElderAbusePrevalenceStudy2011.pdf [*hereinafter* Under the Radar]. *See also* N.Y. Penal Law § 260.30(3); 42 U.S.C. 3002(40).

of trust with an elderly person (for example, family members, caretakers, or fiduciaries) or strangers who target the elderly. Common forms of elder financial exploitation include but are not limited to fraud, false pretenses, embezzlement, conspiracy, forgery, falsifying records, identity theft, and property transfers involving the misuse of powers of attorney. Victims of elder financial exploitation are commonly between the ages of 80 and 89, living alone, and often require assistance with their health care or home maintenance.[5]

Elder financial exploitation is a serious and growing problem as the number of elderly persons in the U.S. is increasing as a percentage of the population. In 2011, the MetLife Mature Market Institute reported that the annual financial losses from elder financial exploitation surpassed $2.9 billion nationwide, a 12% increase from 2008.[6] There are many reasons why the elderly are targeted, including the possession of assets built up over a lifetime of work and saving, isolation, cognitive or physical impairments, and dependency on caregivers.

New York has the third largest elderly population in the nation, and a major study in 2011 found that financial exploitation was the leading form of elder abuse in New York.[7] Nonetheless, the same study found that elder financial exploitation was severely underreported to state and local authorities: for every 44 cases of elder financial exploitation, only one case was reported.[8] Greater reporting from all parties with relevant information, including financial institutions, is necessary to prevent elder financial exploitation and provide greater assistance to those elderly adults who have been exploited.

<u>Federal and State Law Allows Financial Institutions to Report Elder Financial Exploitation</u>

Financial institutions in New York should report suspected financial exploitation to the relevant authorities, including APS units. Federal and state law allows such reporting. Eight federal agencies have issued guidance to financial institutions clarifying federal privacy law for purposes of reporting suspected elder financial exploitation by these institutions to relevant authorities.[9] The federal guidance noted that the privacy provisions of the Gramm-Leach-Bliley Act

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[5] *See* MetLife Mature Market Institute, <u>The MetLife Study of Elder Financial Abuse: Crimes of Occasion, Desperation, and Predation Against America's Elders</u> 3 (June 2011), https://www.metlife.com/assets/cao/mmi/publications/studies/2011/mmi-elder-financial-abuse.pdf.
[6] *Id*. at 2.
[7] Lifespan of Greater Rochester Inc., Weill Cornell Medical Center of Cornell University, and New York City Department for the Aging, <u>Under the Radar</u> 3, 13 (May 2011), http://nyselderabuse.org/documents/ElderAbusePrevalenceStudy2011.pdf.
[8] *Id*. at 50.
[9] Board of Governors of the Federal Reserve System, Commodity Futures Trading Commission, Consumer Financial Protection Bureau, Federal Deposit Insurance Corporation, Federal Trade Commission, National Credit Union Administration, Office of the Comptroller of the Currency, Securities and Exchange Commission, "Interagency Guidance on Privacy Laws and Reporting Financial Abuse of Older Adults" (Sept. 24, 2013), http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20130924a2.pdf.

("GLBA") contain specific exemptions which allow financial institutions to report nonpublic personal information to third parties, such as APS or law enforcement in order to:

- "protect against or prevent actual or potential fraud, unauthorized transactions, claims or other liability"[10];
- "comply with Federal, State, or local laws, rules, and other applicable legal requirements" [11]; or
- "comply with a properly authorized civil, criminal, or regulatory investigation, or subpoena or summons by federal, state, or local authorities".[12]

The guidance clarified that these exemptions generally allow financial institutions to report nonpublic personal information about elderly adults to federal, state or local authorities when elder financial exploitation is suspected.

Similarly, New York State law allows financial institutions in New York to report suspected elder financial exploitation to APS 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 eighteen 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.[13] 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.[14]

<u>Best Practices: How New York Financial Institutions Can Prevent Elder Financial Exploitation</u>

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[10] 15 U.S.C. 6802(e)(3)(B).
[11] 15 U.S.C. 6802(e)(8).
[12] 15 U.S.C. 6802(e)(8).
[13] *See, e.g., Marilyn S. v. Independent Group Home Living Program, Inc.* 73 A.D.3d 895, 896-97 (2d Dep't 2010); *see also, Mantis v. United Cerebral Palsy Assoc. of Nassau County* 662 N.Y.S.2d 698, 700 (Nassau County Sup. Ct. 1997).
[14] New York Social Services Law Section 144-a contains very similar language. This provision states that if requested by an official authorized for administering a program under the Social Services Law, "the officials of any banking or financial organization or institution doing business in the state whether chartered under state law, federal law, or the laws of another jurisdiction, shall furnish to such government officials such information as such officials have as to whether any present applicant for or recipient of any assistance, car or services authorized by this chapter, has or had funds, securities or other property on deposit or in the custody of such banking or financial organization or institution, and the amount or probable value thereof." This provision is inclusive of and in addition to section 4 of the Banking Law.

The federal Government Accountability Office has concluded that financial institutions can play a key role in preventing elder financial exploitation by improving training of staff in detecting abuse.[15] Bank tellers and other staff, including those overseeing investment accounts or offering investment advice, are on the frontlines of combating elder financial exploitation. These individuals frequently work directly with elderly customers and are in a unique position to observe potential "red flags" of abuse. To prevent elder financial exploitation, the Department urges financial institutions to adopt the following best practices:

> (1) Develop a plan to detect and report suspected elder financial exploitation, including the use of "red flag" procedures;
>
> (2) Train employees regularly on the organization's policies and procedures to prevent elder financial exploitation;
>
> (3) Appoint staff within the organization to investigate suspected elder financial exploitation and to report this information to APS or other authorities.

In adopting red flag procedures, New York financial institutions should consult FinCEN's 2011 advisory that directs financial institutions to submit a Suspicious Activity Report filing with the code "elder financial exploitation" when they suspect that abuse is occurring.[16] In this advisory, FinCEN proposed red flags to guide financial institutions on how to identify and prevent elder financial exploitation. These red flags are only possible signs of elder financial exploitation, and it is important for financial institutions to conduct careful, but prompt, investigations when employees observe signs of uncharacteristic behavior involving an elderly customer. FinCEN's list of red flags includes the following:

- Erratic or unusual banking transactions, or changes in banking patterns, such as:
  - Frequent large withdrawals, including daily maximum currency withdrawals from an ATM;
  - Sudden non-sufficient fund activity;
  - Uncharacteristic nonpayment for services, which may indicate a loss of funds or access to funds;
  - Debit transactions that are unusual for the elder;
  - Uncharacteristic attempts to wire large sums of money;
  - Closing of certificate of deposits or accounts without regard to penalties.

- Interactions with customers or caregivers:

[15] Government Accountability Office, Elder Justice: National Strategy Needed to Effectively Combat Elder Financial Exploitation 31-35 (Nov., 2012), http://www.gao.gov/assets/660/650074.pdf.
[16] Financial Crimes Enforcement Network, Advisory to Financial Institutions on Filing Suspicious Activity Reports Regarding Elder Financial Exploitation (Feb. 22, 2011), http://www.fincen.gov/statutes_regs/guidance/html/fin-2011-a003.html.

- A caregiver or other individual shows excessive interest in the elder's finances or assets, does not allow the elder to speak for him or herself, or is reluctant to leave the elder's side during conversations;
- The elder shows an unusual degree of fear or submissiveness toward a caregiver, or expresses a fear of eviction or nursing home placement if money is not given to a caretaker;
- The financial institution is unable to speak directly with the elder, despite repeated attempts to contact him or her;
- A new caretaker, relative, or friend suddenly begins conducting financial transactions on behalf of the elder without proper documentation;
- The customer moves away from existing relationships and toward new associations with other “friends” or strangers;
- The elderly individual's financial management changes suddenly, such as through a change of power of attorney to a different family member or a new individual;
- The elderly customer lacks knowledge about his or her financial status, or shows a sudden reluctance to discuss financial matters.[17]

This list of red flags is not exhaustive, and it is provided here as a means of supplementing financial institutions’ existing fraud detection systems.[18]

Questions about this guidance may be directed to Jared Elosta, Assistant Counsel, at (212) 480-2289.

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[17] *See id.*

[18] For additional resources, see New York Bankers Association, Best Practices on Reporting of Possible Financial Exploitation of the Elderly, https://www.nyba.com/wp-content/uploads/2012/07/BestPracFERevisedSept2012.pdf; National Federation of Community Development Credit Unions and the Credit Union Association of New York, New York Credit Union Best Practices Guide on Detecting and Reporting Elder Financial Abuse, http://www.betterdirections.org/wp-content/uploads/2013/10/CU-best-practices-on-detecting-elder-abuse.pdf; New York State Office of Children and Family Services, Financial Exploitation of Elderly and Impaired Adults, Pub. 4664, http://www.ocfs.state.ny.us/main/publications/pub4664text.asp.