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Separating belief from suspicion in elder abuse investigations

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The bottom line

- Financial institutions have a responsibility to intervene when they suspect their services are being used to facilitate elder financial exploitation.
- Deciding whether to place transaction holds or file suspicious activity reports requires evaluating the facts and using subjective and objective standards.
- The best defense for an institution is to carefully document investigative steps they have taken in cases of suspected elder financial exploitation.

Elder financial exploitation, or EFE, is on the rise, with vulnerable adults losing more than US$28 billion annually, according to a recent AARP study. Whether these frauds are perpetrated by family members and acquaintances or professional criminals unknown to the victim, financial institutions may find themselves in trouble if they don't respond appropriately to being caught in the middle of a fraud scheme.

Financial institutions providing services to, or holding accounts for, a vulnerable adult have a series of steps to consider when suspicious underlying circumstances involving the individual are present: placing a transaction hold on transactions within the account and/or disbursements from their accounts, and/or filing a suspicious activity report with the Financial Crimes Enforcement Network or FinCEN.

The standard in many states for effecting a transaction hold is synonymous with whether the financial institution "reasonably believes," after initiating an internal review, that the transaction will result in financial exploitation. If so, the institution may (but isn't required to) place a hold on the transaction, pending further review and providing appropriate notification to specified state agencies.

A financial institution is required to file a SAR if it has a reasonable suspicion that a transaction (or attempted transaction) through the financial institution is an effort to facilitate criminal activity.

Placing a hold

A "reasonable belief" is a term that connotes both objective and subjective components. A belief is "a state or habit of mind in which trust or confidence is placed in some person or thing"—or what a person *subjectively* believes. Reasonable, as a legal requirement, has long been identified as an *objective* standard.

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The North American Securities Administrators Association Inc., created a "NASAA Model Act to Protect Vulnerable Adults From Financial Exploitation," which has been adopted in various forms in nearly 40 states. The commentary to the Model Act states reasonable belief is "intended to be both a subjective and objective standard – *i.e.*, a qualified individual must have a subjective belief in the existence of financial exploitation, and this belief must be objectively reasonable."

This blended standard is intended to be flexible and capture instances of actual knowledge of exploitation—as well as instances in which the reviewer has a belief of exploitation, and a reasonable person armed with the same information would reach the same conclusion.

Further adding flexibility to the Model Act standard (and permitting a transaction hold under appropriate circumstances) is the inclusion of the word "may"—that is, "the requested [transaction] may result in financial exploitation of the eligible adult." With this additional modifier, financial institutions only have to rationally believe that financial exploitation could take place.

A shorthand way to describe this standard is: "Do I believe, after a review has been commenced, that a transaction may be exploitive, and would a hypothetical co-worker agree with me?"

Although not necessarily explicitly embodied in cases or statutes, this operates similarly to a preponderance-of-the-evidence standard that exploitation could take place. Under those circumstances, a financial institution is permitted (but not required) to put a transaction hold in place.

This careful balancing makes sense when it's understood that a vulnerable adult's funds are at issue, and potentially being held for weeks. Many vulnerable adults rely on their retirement and investment accounts to meet periodic and other living expenses. However, there is a collective societal interest in putting measured, appropriate safeguards in place to protect the most vulnerable from theft, fraud or other illegal activity.

One other significant safeguard for financial institutions is the availability of immunity for reporting suspected exploitation to state officials and putting transaction holds in place, as long as the financial institution acted in "good faith."

In one of the few reported cases on the scope of statutes designed to protect vulnerable adults and financial institution responsibilities, a North Carolina federal district judge gave a broad interpretation to immunity provisions for financial institutions.

Given the overall purposes underlying these statutes and their paternalistic nature, financial institutions have broad space to make judgment calls and, at minimum, buy time to more fully and completely investigate the underlying facts.

In some circumstances, the investigation of the underlying facts and the consequent judgment call will result in no transaction hold (or anything else) taking place. Other instances may result in law enforcement and protective services' involvement, potentially leading to legal proceedings.

Filing a SAR

In stark contrast, if a financial institution has a reasonable suspicion a transaction (or attempted transaction) is being used to facilitate criminal activity, it is required by law to file a SAR. This includes instances of EFE. As FinCEN has explained in the context of EFE, financial institutions "are uniquely situated to detect possible financial exploitation through their relationships with older customers."

The reasonable suspicion prong for SAR-filing appears, on its face, to be an objective standard. Analogizing to the well-developed body of criminal law under *Terry v. Ohio*—which applies a similar standard in the context of brief law enforcement interaction with a suspect—such a legal threshold is lower than probable cause.

Along the same lines, reasonable suspicion requires something more than a mere hunch, but a showing of a reasonable belief isn't required. Applying a rough percentage range for the reasonable suspicion standard, something like a 33 percent to 40 percent likelihood (and certainly well short of 51 percent) that criminal activity may be occurring seems generally reasonable.

In determining whether a reasonable suspicion is present, all surrounding facts and circumstances must be considered. This will consist of, among other things: the unique characteristics of the customer, the historical and known transaction history in

the relevant accounts, other assets and income that the customer may have and the customer's risk tolerance and investment objectives.

While there can't be a precise formula for finding reasonable suspicion because it is inherently fact-based, regulators have identified the following examples of red flags supporting a reasonable suspicion:

- Unusual types of account activity (for the customer, the type of account, or similarly situated customers)
- Customer appears distressed or fearful
- Caregiver shows unusual or excessive interest in the customer's business or accounts

Enforcement cases against financial institutions for failing to file SARs have been prevalent in recent years. However, because there are a wide range of judgment calls in this space, enforcement cases typically involve instances in which financial institutions have done little in terms of either SAR filings or documenting the underlying investigative steps and reciting why a filing a SAR wasn't appropriate.

At bottom, a SAR filing is mandatory in instances when the financial institution evaluates a set of facts and merely has a reasonable suspicion it is being used to facilitate criminal activity through the financial institution.

Suggested steps

As noted above, the same set of facts of suspected EFE will, in many instances, necessitate both a transaction hold and a SAR filing. However, other instances may require one step or the other—or maybe neither step. A non-exhaustive list of suggested practices to consider in these circumstances include:

Immediately contacting the financial professional responsible for the accounts or investments. This should be among the first steps considered, unless the professional is suspected of being involved in the EFE. The financial professional likely will know the vulnerable adult well and be able to shed light on financial, personal and physical situations.

Attempt to contact the customer. What the customer says (or doesn't say), and how the customer reacts, may provide clues as to what is occurring in their personal and financial life.

Attempt to contact a trusted contact person or third party reasonably associated with the vulnerable adult. Many financial institutions have been encouraging customers to identify a trusted contact person, or TCP, for the account. Several states also permit contacting a third party reasonably associated with the vulnerable adult (in addition to or instead of the TCP) if there is a reasonable belief exploitation may be occurring. However, neither the TCP nor any other third party associated with the vulnerable adult should be contacted if they are suspected of being involved in the EFE.

Conduct a comprehensive review of the account activity and documents. Review the recent transactions giving rise to the concern against historical transaction data and the account's investment objectives. An email review using the customer's known email address may provide additional clues, such as other people who are suddenly being copied on the vulnerable adult's communications.

Document investigative and evaluative steps considered and taken. A well-documented file will be the best shield against any potential regulatory or civil liability. A broad continuum of gray area exists for transaction holds and SAR filings. Documenting findings, as well as investigative steps taken and steps considered, will be the best support for whichever "reasonable" standard is at issue.

After these steps have been taken, stress-test the facts. The findings and steps should be discussed with at least one other person to assess whether the findings and conclusions are objectively supportable. If the conclusion is debatable, additional investigation may be necessary.

In the case of a transaction hold, once a hold is put in place, continued communication will remain key. Communication with the customer about the status of their funds and any communications with law enforcement or regulators should be frequent and well documented.

Outlook

EFE will keep rising given the continued aging of the US population, coupled with overall investment returns since 2010. The nature and types of EFE also will be dynamic as technology rapidly advances.

Financial institutions will continue to face facts in which EFE may be occurring. Investigation of the underlying facts will often result in concluding that both the "reasonable belief" and "reasonable suspicion" standards were or weren't met, though in limited instances, one or the other actions may be appropriate. Above all, financial institutions should document their investigative steps and conclusions to make the decisions defensible down the road.

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