

PROPOSED AMENDMENT TO THE BANKING AND SOCIAL SERVICES LAW
For the Protection of Vulnerable Elderly Persons

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INTRODUCTION

New York is among the last state to pass legislation authorizing the banking industry to address the growing concern over financial elder abuse. With 10,000 baby boomers reaching retirement age daily, the need to address financial abuse of vulnerable elderly persons increases.¹

According to a report issued in 2016 by the AARP Public Policy Institute, one in five elderly persons are victims of financial exploitation annually at a cost of \$3 billion each year and each victim defrauded by approximately \$120,000.² On May 24, 2018, the Senior Safe Act was passed into law, granting immunity to financial service providers who are on the front lines and witness to financial abuse of the elderly. This federal law also encourages financial institutions to train their staff to promptly identify elder financial abuse. In July 2018, Governor Cuomo allocated \$8.4 billion to address the ever-growing problem of financial exploitation of the elderly population. The time is ripe to initiate legislation that permits the banking industry to take action when confronted with financial exploitation.

The purpose of this bill is to amend the social services and banking laws in their protection of vulnerable elderly persons from financial exploitation. Penal Law Section 260.31 defines “vulnerable elderly person” as a person sixty years of age or older who is suffering from a disease or infirmity associated with advanced age and manifested by demonstrable physical, mental or emotional dysfunction to the extent that the person is incapable of adequately providing for his or her own health or personal care.

In order to effectively address these concerns, protocols for the banking industry need to be established defining the methodology to be employed when authorizing a bank employee to freeze an account; the process for notification; reporting to law enforcement authorities; and guidance of bank personnel as to the identification of financial abuse. Within these parameters, banking institutions will be afforded immunity from prosecution. The proposed legislation strikes a

¹ Can Medicare and Social Security Handle It?, Eric Pianin, The Fiscal Times, May 9, 2017

² New Law Targets Elder Financial Abuse, Victoria Sackett, AARP, May 24, 2018

balance between establishing policies for intervention in the event of suspected financial exploitation and the banking industry's concern to protect the privacy of its clients.

OVERVIEW OF THE PROBLEM

The 1990's saw a proliferation of Adult Protective Services across the country in an effort to address financial elder abuse. States initiated training programs in an effort to identify elder abuse across many disciplines. In some states, mandatory reporting of suspected elder abuse by certain classes of persons was required while in others reporting is discretionary. No uniformity exists among the states. While a positive step in the process of identification, the mere presence of Adult Protective Services across the country does not resolve the problem. Moreover, incidents of elder abuse, particularly of the financial nature remains under-reported and not often prosecuted. In order to confront the financial exploitation of elderly persons in New York, the banking industry requires empowerment through a methodology with which to act in conjunction with law enforcement agencies.

Social Services Law §473 provides for the implementation of protective services to or for the benefit of individuals "who, because of mental or physical impairments, are unable to manage their own resources, carry out the activities of daily living, or protect themselves from physical abuse, sexual abuse, emotional abuse, active passive or self neglect, financial exploitation or other hazardous situations without assistance from others and have no one available who is willing and able to assist them responsibly." While the statute details the circumstances which warrant investigation and describes the procedures for developing and implementing protective services for adults, a more defined law is required to address financial exploitation of vulnerable elderly persons. Moreover, banking institutions must share the responsibility in ensuring that such persons are protected.

Without regulations regarding the protection of vulnerable elderly persons, the banking industry has no guidance as to what procedures should be undertaken to protect individuals who may be victims of financial exploitation. Absent regulations, banks have no industry-wide system to determine when and how long to freeze bank accounts, authorize payment of certain expenditures during an investigation, how to train their employees and what type of notification must be given the vulnerable elderly person and other interested parties, as well as reporting obligations to law enforcement and other authorities. The affirmative legislation seeks to amend Section 4 of the Banking Law in order to enact uniform standards of policies and procedures to be incorporated by banking institutions. Additionally, banks will be afforded protection for their actions provided that any determinations to delay or refuse the disbursement of funds belonging to a vulnerable elderly adult were done so in good faith and based upon articulable facts.

HISTORY

The need to address financial exploitation of the elderly gained momentum when verbiage pertaining to the financial exploitation of the elderly appeared in Governor Cuomo's 2017 Budget Bill. Specifically, the language was found in the Article VII Bill for "Transportation Economic

Development and Environmental Conservation.” Several concerns were raised with respect to the language, including a proposal to freeze guardianship and trust accounts. Missing from that bill was a definition of “vulnerable elderly adult.” In 2017, The Elder Abuse Committee was asked to review S.6736 (Valesky) and A.6099A (Lupardo), which were bills that dealt with banks and financial exploitation of elders. By way of legislative history, the Senate bill passed the Senate on June 15, 2017. The Assembly bill was amended on June 16, 2017, to conform to the Senate bill and recommitted to the Aging Committee that same day. The Assembly bill, unlike the Senate bill, is accompanied by a Memorandum in Support of Legislation (“Memo”) which was reviewed by the Elder Abuse Committee. The Elder Abuse Committee presented its analysis of the Valesky bill to the Elder Law and Special Needs Section (“Section”). The Section, while recognizing the need for legislation to protect vulnerable elderly persons from financial exploitation, deliberated its concerns; particularly with respect to enforceability and the possible negative consequences the freezing of transactions might have on elderly individuals. The Section voted to oppose the legislation as it was written.

Without a bill pending before the Senate, the Elder Abuse and Legislation Committees reviewed the issues and prepared a memorandum recommending changes to the prior bills which would afford meaningful protection to vulnerable elderly persons, while providing immunity to the banking institutions so long as they acted in good faith. Since the Section previously opposed the bill, the next step was to present affirmative legislation, which is submitted along with this memorandum.

At The Elder Law and Special Needs Section Fall 2018 Meeting, the Section voted to approve the proposed affirmative legislation.

DISCUSSION

The primary goal of this legislation is to protect vulnerable elderly persons from financial exploitation. Guidelines are needed so that banking institutions will be able to take the necessary steps in recognizing financial abuse, resulting in prompt reporting and expeditious investigation by the proper authorities, while ensuring that certain financial obligations continue to be paid from an individual’s bank accounts.

If a banking institution, in good faith, believes that an elderly person has been the victim of financial exploitation, the institution will be authorized to freeze single financial transactions on the bank account of said person. By enacting legislation that allows for the denial or delay of such a transaction and establishes the requirements for a timely and thorough investigation, vulnerable elderly persons will be afforded greater protection from financial exploitation by means that do not presently exist. This bill provides banking institutions with protocols for making decisions to delay or deny a disbursement. The bill places time-sensitive notification requirements and allows for expediting an investigation by the proper authorities.

The bill specifies that if a banking institution refuses to disburse moneys or delays the disbursement of funds from the account of a vulnerable elderly person, certain actions on the part of the banking institutions would be required. The bank will have to provide notice, no later than

one day following the refusal or delay to honor the transaction to the vulnerable elderly person and all parties authorized to transact business on the account. Additionally, the banking institution would be required to report the incident to the appropriate social services agency. In order to ensure that an investigation into the possible financial exploitation of a vulnerable elderly person is acted upon in a timely manner, the banking institution would be required to furnish any investigation agency copies of all information and records relating to the denied or delayed transaction. This is especially significant as it eliminates the requirement of the investigating agencies to obtain a subpoena or court order.

In order to protect the well-being and personal safety of a vulnerable elderly person, banking institutions would not be permitted to delay or deny payments of funds that are necessary to pay for expenditures such as medical care, rent, mortgage payments, utilities and medical expenses.

This bill provides immunity from criminal, civil or administrative liability to a banking institution or its employees, provided that certain actions have been taken in making a decision to refuse or delay payment of a single transaction. The determination to deny or delay a single transaction must be made in good faith, based upon articulable facts and be in accordance with the provisions set forth in article nine of section four hundred seventy-three of the Social Services Law. Banking institutions will be required to make a report or provide copies of records to social services officials or law enforcement agencies.

The proposed legislation requires that banking institutions establish training and education to its employees in order to enable them to identify, help prevent and report the financial exploitation of a vulnerable elderly person. Banks will adopt their own internal policies and programs that employees will be required to follow when considering a delay or denial of a financial transaction from the account of a vulnerable elderly person.

As a matter of public policy, it is necessary to enact legislation to protect vulnerable elderly persons. While financial exploitation of this fragile population will not be completely eradicated by the passage of this bill, the codification of specific guidelines to identify abuse, delay or deny payment of questionable expenditures and to refer such matters to the proper authorities within a set time-period will, no doubt, lead to greater protection of these individuals.

CURRENT STATUS OF PROPOSED BILL

On January 17, 2019, the Elder Law and Special Needs Section (“Section”), presented our Section’s position regarding the need for legislation to protect vulnerable elderly individuals where financial exploitation was suspected.

Prior to the meeting, concerns regarding certain provisions were raised in a letter by a member of the Banking Committee of the Business Law Section. Following our presentation, the Executive Committee deferred any action with respect to the proposal and requested that our committee review the concerns raised and to communicate with other Sections with particular interest in the proposal. At the April 12 meeting of the Executive Committee, the Section presented revised legislation which was result of our collaboration with the other Sections; however, some drafting issues still remained. The Committee granted the Section three weeks to finalize our proposal.

Ultimately, the Business Law Section offered its support of the proposed legislation. The Trust & Estates Law Section supports the proposed legislation, as well. Our proposal was also shared with Criminal Justice Section, since law enforcement would be notified of potential abusive transactions under the legislation and to our knowledge, there were no objections. It is our understanding that the NYSBA Executive Committee will be voting on this issue at their next upcoming meeting.

The efforts made to present the Executive Committee with this legislation clearly demonstrate a universal concern across the various disciplines of legal practice in support of codifying procedures to protect vulnerable elderly persons.

This bill is intended to give clarity and direction to banks who are already facing issues of addressing financial exploitation:

- Banks have already voluntarily taken precautionary measures to initiate practices and procedures in addressing suspected financial exploitation.
- Most if not all banks hold training sessions for their employees with respect to financial exploitation.
- Members of the Elder Law and Special Needs Section regularly hear of instances of banks unilaterally freezing accounts where they believe financial exploitation is occurring.
- Legislation which affords protection to vulnerable elderly persons is consistent with other states, as well as the financial services sector governed by FINRA.

PROPOSED AMENDMENT – HIGHLIGHTS

The Elder Law Section proposes the following amendments to Section 473 of the social services law and Section 4 of the banking law; and adding new Sections 4-d and 4-e to the banking law.

We are proposing changes to Section 1. Section 473 of the social services law by adding a new subdivision 9, which provides definitions as applied to the law.

- Definition of “Banking institution” will include those institutions with deposit-taking offices in New York and/or doing business in the state as provided under state and federal laws.

Depository Institutions - Section 461(b) of Title 12 of the United States Code, as amended;

Federal Credit Unions - Section 1752 of Title 12 of the United States Code

Credit unions chartered under the laws of New York or any other state, and as subsequently amended.

- Definition of “vulnerable elderly person” shall have the same meaning as in section 260.31 of the penal law, and as subsequently amended.
- Definition of “financial exploitation” means
 - improper use of a vulnerable elderly person's funds, property or resources by another individual, including, but not limited to, fraud, false pretenses, embezzlement, conspiracy, forgery, falsifying records, coerced property transfers or denial of access to assets, or
 - one or more acts or omissions to: (1) obtain control, through deception, intimidation, or malicious influence, a vulnerable elderly person’s money, assets, or property, or (2) convert the vulnerable person’s money, assets, or property.
- Definition of “Temporary account hold” shall mean a restriction on the ability of the owner or any other person to withdraw some or all of the funds from a deposit account at a banking institution.
- “to withdraw” shall mean to obtain funds from a deposit account of a vulnerable elderly person at a banking institution by any means through the use of a check drawn on the account, an automated teller machine, a point of sale terminal, a withdrawal slip presented at a deposit taking office of a banking institution, or any other means by which a person can obtain any funds representing all or any part of such deposit account.

Additional proposed changes include:

What circumstances shall give rise to voluntary reporting and temporary account holds?

If a banking institution, social services official or law enforcement agency reasonably believes that financial exploitation of a vulnerable elderly person is occurring or may occur, the banking institution may, but shall not be required to, place a temporary account hold on the account.

What circumstances may give rise to a temporary account hold?

- A banking institution may also place a temporary account hold if a social services official, district attorney’s office or law enforcement agency provides information to such institution demonstrating that it is reasonable to believe that financial exploitation of a vulnerable elderly person is occurring or may occur.
- A banking institution shall not be required to place a temporary account hold on any deposit account unless it receives a court order or administrative order enforceable in

New York requiring it to do so. Absent such an order, placing a temporary account hold shall be in the banking institution's sole discretion.

What are the guidelines proposed for placing a temporary account hold?

NOTICE REQUIREMENT:

Who receives Notice?

- Notice must be provided to the vulnerable elderly person immediately, but no later than the next business day
- Notice must be provided to all parties authorized to transact business on the account within five business days after a temporary account hold is placed

Procedure for Notice:

- Personal delivery or overnight delivery service to all parties authorized to transact business on the account for which the temporary account hold was placed
- Telephone, text, email message or other electronic communication medium to all parties named on the account for which the temporary account hold was placed for which the party has provided contact information, and multiple notice attempts if the bank does not receive confirmation that the foregoing notice has been received
- Immediately, but no later than the next business day, after a temporary account hold was placed the banking institution shall:

report the temporary account hold to the government official responsible for administering adult protective services, or a similar agency, in the county in which the banking institution's records show the residence of the affected vulnerable elderly person is located or, if no such residence in the state of New York is shown, then to the government official administering adult protective services, or a similar agency, in the county in which the banking institution's office where the applicable account is domiciled. Such report shall include the reason for placing the temporary account hold or the banking institution's basis for the temporary account hold; and

promptly provide the government official responsible for administering adult protective services or a similar agency with such information and documents as are reasonably requested by such official regarding the reasons for the temporary account hold.

When does the temporary account hold terminate?

The earlier of:

- the banking institution determining, in its discretion, to reverse its decision to impose the temporary account hold and giving notice of same;
- the issuance of an order by a court of competent jurisdiction directing the banking institution to take any action with respect to the subject accounts; or
- ten business days after the banking institution imposes the temporary account hold.

Extension of termination:

- A court order is required if the government official responsible for administering adult protective services, or a similar agency, or any law enforcement official believes that the temporary account hold should remain in effect for longer than ten business days

Payments to Meet Ongoing and Necessary Expenses:

- The banking institution shall terminate the temporary account hold to the extent of any funds:
 - upon receipt of written notice from the government official administering adult protective services, or similar agency, law enforcement official; or
 - by court order
- Either such notice or court order must state that the specified funds are believed to be necessary to meet ongoing obligations of the vulnerable elderly person

Examples include, but are not limited to:

mortgage payments

utilities

automatic clearing house debit (ACH) withdrawals which represent pre-arranged payments

an amount of five hundred dollars available for cash withdrawals for the purchase of food and incidental medical expenses, such as prescriptions or insurance co-payments, as adjusted for inflation.

Immunity Protection:

- A banking institution or an employee of such an institution shall be immune from criminal, civil or administrative liability

for placing a temporary account hold

for actions taken in furtherance of a determination made pursuant to such subdivision, including making a report or providing access to or copies of relevant records or disclosing information to a government official, law enforcement agent, or court of competent jurisdiction, or for any resultant delay in the use of funds following the temporary account hold permitted by this subdivision
- No immunity protection if it is established by clear and convincing evidence that the banking institution acted in bad faith or with willful disregard.

We are proposing changes to Section 4 of the banking law is amended by adding a new subdivision 4. This subdivision will provide immunity language consistent with the language of the proposed amendment to the social services law.

We are proposing the addition of new sections

Training and education.

- Financial exploitation training shall be developed by the superintendent, in consultation with

the director of the office for the aging

the director of the bureau of adult protective services within the office of children and family services

the commissioner of the office of people with developmental disabilities and the director of the office of victim services
- Banking institutions shall also consult with elder law and advocacy groups that possess specialized knowledge in the prevention and/or identification of financial exploitation, advocacy groups that possess specialized knowledge in developmental disabilities, diseases and other conditions that may impair mental and cognitive function, instructors from organizations that provide services to vulnerable elderly persons that may have experience in identifying financial exploitation, and organizations that provide services to individuals with developmental disabilities.

- Training and education program shall be voluntary
- Training and education program shall be designed to provide information, training and education on how to identify, help prevent and report the financial exploitation of a vulnerable elderly person.
- Materials and instruction of the financial exploitation training and education program shall be made available to all banking institutions across the state at no cost
- Training and education shall be available via both live instruction platforms as well as through online instructional presentations
- Accessibility of training and education shall be provided through the websites of the department, the office for the aging, the office of children and family services, the office of people with developmental disabilities and the office of victim services.
- Policies and procedures shall be established for ensuring proper notification for the placing of a temporary hold on an account and for reporting suspected financial exploitation to other appropriate agencies and entities, including the attorney general, the Federal Trade Commission, and the appropriate law enforcement agency, as consistent with the social services law.

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