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Michigan Financial Exploitation Prevention Act

By David W. Barton

Background

Counsel to financial institutions frequently find themselves on the other end of the phone with a frustrated and concerned teller or branch manager, asking what they can or should do in cases where they suspect that an elderly or otherwise vulnerable customer is being victimized by a caregiver, family member, or other individual who is using the customer's funds for their own benefit. Over 70,000 Michiganders are estimated to be victims of elder abuse annually, nearly half of which involve financial exploitation.¹ Nationwide, up to five million seniors are abused every year and are estimated to lose as much as \$30 billion annually to financial exploitation.² The scope of the problem is accelerating as the aging population has record wealth, and electronic banking services become more predominant, increasing the motive and opportunity to financially exploit the elderly. From 2019 to 2020 alone, the estimated losses to elder financial exploitation increased by \$800 million.³

While Michigan has long had a law on the books criminalizing financial exploitation of vulnerable adults,⁴ acts of exploitation often go unreported by the victims due to diminished cognitive capacity, embarrassment, or because the perpetrator is a family member or caregiver in a position of influence over the victim. In addition, in some cases, financial institutions have been reluctant to report incidences of suspected exploitation due to concerns about financial privacy or liability, or the inability to definitively identify acts of exploitation. According to the National Council on Aging, only 1 in 24 cases of vulnerable adult financial exploitation is reported.⁵

In an effort to combat the increasing instances of vulnerable adult financial exploitation, the Michigan Attorney General formed the Elder Abuse Task Force in 2019 comprised of a variety of organizations in the public, private, and nonprofit sectors. One of the primary outputs of the task force was draft legislation imposing, among other things, obligations upon financial institutions to report

and prevent financial exploitation. Through a collaborative process involving the Michigan Attorney General, the Michigan Department of Insurance and Financial Services, the Michigan Department of Health and Human Services, the Michigan Bankers Association, the Michigan Credit Union League, state and local law enforcement agency associations, and others, the task force's draft legislation evolved into Senate Bill 464, the Financial Exploitation Prevention Act (the "Act"), which became effective September 26, 2021.⁶ As enacted, the Act imposes new requirements on financial institutions to require employee training and implement policies to identify and report suspected financial exploitation, and it indirectly encourages financial institutions to take certain actions to prevent suspected financial exploitation by providing limitations of liability for such actions. The Act also imposes express obligations upon law enforcement and adult protective services agencies to investigate reports of suspected financial exploitation made by financial institutions.

The Act

Definitions

The operative provisions of the Act incorporate various defined terms that instruct as to the coverage of the Act and scope of the obligations imposed by it. The Act applies to "covered financial exploitation," which is defined as financial exploitation of an individual through deception, manipulation, coercion, intimidation, or improper leveraging of a caregiver relationship.⁷ "Financial exploitation" is defined as either of the following: (i) a fraudulent or otherwise illegal, unauthorized, or improper act or process of an individual who uses or attempts to use the financial resources of another individual for monetary or personal benefit, profit or gain; or (ii) a fraudulent or otherwise illegal, unauthorized, or improper act or process of an individual that results or is intended to result in depriving another individual of rightful access to or use of benefits, resources, belongings, or assets.⁸ "Caregiver" is defined as a

Over 70,000 Michiganders are estimated to be victims of elder abuse annually, nearly half of which involve financial exploitation.

parent or other relative responsible for the health and safety of an individual, or a guardian, conservator, or any other person with legal or fiduciary obligations to an individual.⁹ “Unauthorized” is defined as without permission or utilizing permission obtained from a person through deception, manipulation, coercion, intimidation, or improper leveraging of a caregiver relationship.¹⁰ “Vulnerable adult” is defined as an adult who, because of a mental or physical impairment or advanced age, is unable to protect himself or herself from covered financial exploitation.¹¹ “Adult protective services” is defined as the office, division, or unit under the department of health and human services that is charged with investigation of abuse, neglect, or exploitation of vulnerable persons under the Michigan Social Welfare Act, MCL 400.1 *et seq.*¹² “Law enforcement agency” is defined as a local or county police agency or the Michigan State Police.¹³

Finally, the Act’s training and reporting requirements apply to any “financial institution,” as defined in section 4 of the Michigan Strategic Fund Act, which includes a state or nationally chartered bank or a state or federally chartered savings and loan association, savings bank, or credit union, whose deposits are insured by an agency of the United States government and that maintains a principal office or branch office in this state under the laws of this state or the United States.¹⁴ The definition encompasses all state and federal insured depository institutions that maintain a branch office in Michigan even if chartered or headquartered in another state.

Training and Reporting Requirements

The Act requires all financial institutions to develop and implement a policy for training “relevant employees” to recognize signs of covered financial exploitation of members or customers of the financial institution and for reporting such exploitation to a law enforcement agency or adult protective services.¹⁵ Relevant employees do not necessarily include all employees but likely include, at a minimum, those that have customer exposure, e.g., tellers, universal bankers, customer service representatives, etc., and back room-operations personnel responsible for reviewing statements or transactions and monitoring for suspicious activities.

The required policy must, at a minimum, include training on and procedures for reporting covered financial exploitation of vul-

nerable adults, but may include any other category of members or customers or to all members or customers generally, and must provide for all of the following:

- Employee training, including, but not limited to, instruction on all of the following (i) common types of covered financial exploitation, (ii) signs of potential covered financial exploitation, (iii) relevant federal financial institution regulatory agency opinions or guidance on elder financial exploitation, and (iv) internal procedures developed to respond to suspected covered financial exploitation;
- Procedures to follow when covered financial exploitation of a member or customer is suspected or detected;
- Procedures to follow when, after examination or investigation, covered financial exploitation of a member or customer is no longer suspected or detected;
- Procedures to follow for delaying or placing a freeze on transactions or assets relative to a member’s or customer’s accounts, individually or jointly held, if covered financial exploitation is suspected or detected;
- Designation of one or more employees to make reports required under the Act; and
- A provision requiring reporting of suspected or detected covered financial exploitation of a member or customer to a law enforcement agency or adult protective services.¹⁶

If a financial institution elects to report to adult protective services instead of a law enforcement agency, a report made to adult protective services must be made according to procedures established by adult protective services. In determining whether and to what entity to make a report, the policy must, at a minimum, require (i) consideration of relevant federal advisory opinions or guidance on elder financial exploitation and applicable employee training; (ii) consideration of the safety of employees, the customer or member that the financial institution believes is the target of covered financial exploitation, or other customers or members; (iii) consideration of the need and ability to preserve funds or assets of the customer or member that the financial institution believes is the target of covered financial exploitation; and

(iv) consideration of whether the institution can discern, from available facts and knowledge of the member or customer that is the potential victim of covered financial exploitation, that the member or customer is an adult in need of protective services under the Social Welfare Act.¹⁷

A financial institution is not required to make a report of suspected or detected covered financial exploitation under any policy adopted pursuant to the Act if, after investigation and or examination of available facts, the institution makes a determination that covered financial exploitation has not occurred or is not occurring and no action is necessary.¹⁸ A report of suspected or detected covered financial exploitation made by a financial institution under the policy adopted pursuant to the Act must include the name of the individual believed to be the victim, a description of the suspected or detected covered financial exploitation, and a designated contact at the financial institution.¹⁹

Requirements Imposed Upon Law

Enforcement and Adult Protective Services

Within ten business days after receiving a report of suspected or detected covered financial exploitation from a financial institution under the Act, the law enforcement or adult protective services agency that received the report is required to provide written notification to the designated contact for the reporting financial institution that clearly indicates whether the reported incident is under investigation or has been referred to a law enforcement agency for investigation.²⁰ As soon as practicable after the investigation, the law enforcement or adult protective services agency that received the report is further required to notify the financial institution of the disposition of the reported incident.²¹

Also within ten business days after it receives a report of suspected or detected covered financial exploitation from a financial institution under the Act, the law enforcement or adult protective services agency that received the report must notify the office of the county prosecutor. This notification must be made in the manner prescribed by the Michigan Attorney General and must include the report received from the financial institution and a description of the actions taken or response to the report by the law enforcement agency or adult protective services.²² If a financial institution that attempts to make a report is unable to establish communication

with a law enforcement or adult protective services agency, or if the law enforcement or adult protective services agency that received a report from the financial institution fails to provide to the required response to the reporting financial institution, the financial institution may (but is not required to) notify the office of the county prosecutor directly.²³

Nondisclosure and FOIA Exemption

The Act prohibits any law enforcement agency, adult protective services agency, or county prosecutor from disclosing the identity of any individual or financial institution that reports suspected or detected covered financial exploitation under the Act without obtaining the consent of the reporting individual or financial institution.²⁴ The restriction against disclosure does not apply to a disclosure between agencies or as is required in a civil or criminal proceeding. In addition, disclosure of the victim of the suspected or detected covered financial exploitation or their personal or account information may not be disclosed by law enforcement, adult protective services, or the county prosecutor without the victim's consent, except as required in a report made pursuant to the Act or in a civil or criminal proceeding.²⁵ The identity of an individual or financial institution making a report of suspected or detected covered financial exploitation under the Act as well as the identity of an individual that is the suspected or confirmed victim of covered financial exploitation is also expressly exempted by the Act from disclosure under the Freedom of Information Act.²⁶

Investigation and Authority to Delay

Transaction Processing

Under the Act, if a financial institution suspects or detects covered financial exploitation of a member or customer, the financial institution is authorized (but not required) to delay the processing of the related transaction to allow further investigation or examination of available facts.²⁷ If, upon investigation, the financial institution still suspects or has detected covered financial exploitation of its member or customer, the financial institution is permitted (but not required) to either continue to delay the processing of the related transaction or place a hold or "freeze" on any transactions or assets related to the member's or customer's accounts, whether individually or jointly held. Any delay or freeze placed

If a financial institution elects to report to adult protective services instead of a law enforcement agency, a report made to adult protective services must be made according to procedures established by adult protective services.

by the financial institution must be done in accordance with the terms of any account or service agreement between the member or customer and the financial institution.²⁸ In the event there is no agreement applicable, the financial institution may delay a transaction or freeze any transactions or assets relative the member's or customer's accounts, whether individually or jointly held, for up to ten business days or as provided in any applicable court order.²⁹

In the event a financial institution is informed by a law enforcement or adult protective services agency that suspected or detected covered financial exploitation that has been reported is under investigation, the financial institution may extend the period of any delay or freeze until the financial institution is informed of the dismissal of the reported incident or the financial institution reasonably believes there is no continued risk of covered financial exploitation to the customer or member, whichever is later.³⁰ If a financial institution has imposed a delay or freeze as authorized by the Act due to suspected or detected covered financial exploitation, the financial institution may provide for the processing of any transaction necessary to preserve the health, safety, or financial well-being of the member or customer during the period of the delay or freeze, unless the transaction is related to the suspected or detected covered financial exploitation or the financial institution is otherwise directed by court order.³¹

Enforcement of the Act and Limitations of Liability

The Act provides that compliance with its provisions by financial institutions shall be enforced only by financial institution regulatory authorities that have examination and enforcement authority over the institutions (rather than local law enforcement).³² This provision ensures a centralized and more uniform enforcement effort versus the potential of disparate and inconsistent enforcement from multiple law enforcement agencies acting within the various jurisdictions where a financial institution may do business.

In the case of a Michigan chartered bank or credit union, or a bank or credit union chartered by another state and that maintains an office in Michigan, the enforcement authority rests with the Michigan Department of Insurance and Financial Services. In the case of a national bank or a federal credit union head-

quartered in Michigan, this authority would rest with the Office of the Comptroller of the Currency and the National Credit Union Administration, respectively. In addition, in the case of state chartered banks, the Federal Deposit Insurance Corporation and the Federal Reserve System may refer to the Michigan Department of Financial and Insurance Services a suspected violation of the Act discovered in the course of their shared supervision of state banks.³³

Importantly for financial institutions, the Act expressly provides that except with regard to the examination and enforcement authority of the financial institution regulatory authorities, a financial institution and any of its employees, officers, directors, or affiliates are immune from any liability or penalty under law or regulation of the State of Michigan or a local unit of government for any action, determination, omission, or process under the Act or under a policy governed by the Act.³⁴ Although not expressed in the statute, this grant of immunity is likely subject to an implied requirement that the action, determination, omission, or process of the financial institution was in good faith. In addition, the Act expressly provides that there is no private right of action against a financial institution or any of its employees, officers, directors, or affiliates, either in law or in equity, for any action, determination, omission, or practice under the Act or a policy governed by the Act.³⁵

Recommended Amendment to the Act

Although ostensibly an act to address elder or vulnerable adult abuse, the current definition of "covered financial exploitation" is not limited to exploitation of such individuals. As previously noted, "covered financial exploitation" is defined as financial exploitation of an individual through deception, manipulation, coercion, intimidation, or improper leveraging of a caregiver relationship.³⁶ While the definition includes the improper leveraging of a caregiver relationship, it is not limited to financial exploitation of vulnerable adults or exploitation by a caregiver and includes, more broadly, financial exploitation "... of an individual through deception, manipulation, coercion, intimidation" As currently defined, "covered financial exploitation" could include many types of cases of financial deception, manipulation, coercion, or intimidation of individuals who are not vulnerable adults. Common examples of

The restriction against disclosure does not apply to a disclosure between agencies or as is required in a civil or criminal proceeding.

financial exploitation through deception that could be financial exploitation as currently defined, include counterfeit-cashier's check schemes,³⁷ real-estate-closing escrow fraud,³⁸ and online-banking fraud effected with compromised credentials obtained via phishing.³⁹ None of these cases would typically involve the type of victim the Elder Abuse Task Force was tasked to protect. To limit the scope and sharpen the focus of the Act on the protection of vulnerable adults, the author suggests an amendment to the Act revising the definition of "covered financial exploitation" in section 3 of the Act by substituting "vulnerable adult" for "individual," thereby limiting "covered financial exploitation" to the financial exploitation of vulnerable adults.

Conclusion

The Financial Exploitation Prevention Act is the product of a collaborative effort to address financial exploitation of the elderly and other vulnerable adults. By soliciting the feedback of law enforcement, adult protective services, financial institution industry representatives, and other constituencies in the drafting process, the result achieved is an arguably measured and tailored law, rather than a top down one size fits all law with attendant unintended consequences. The Act wisely includes liability protections for financial institutions whose involvement is central to detecting and preventing financial exploitation. These protections encourage financial institutions to actively be a part of the solution. According to the Michigan Bankers Association, Michigan financial institutions have referred to adult protective services on average over 300 cases of suspected financial exploitation each month since the Act became effective.⁴⁰

In addition, unlike some mandates that require financial institutions to report data or transaction experience to the government never to be seen or heard about again, the Act attempts to ensure a level of government accountability by requiring adult protective services and law enforcement agencies receiving reports to inform the reporter of the status of any investigation of the incident and the ultimate disposition. While perhaps not perfect, the Act is a laudable effort to curb the increasing risks of financial exploitation for Michigan's population of senior citizens and other vulnerable adults so deserving and in need of protection.

NOTES

1. Michigan Attorney General website (www.michigan.gov/ag/initiatives/elder-abuse).
2. National Council on Aging website (www.ncoa.org/article/get-the-facts-on-elder-abuse).
3. American Bankers Association website (www.aba.com/news-research/research-analysis/safeguarding-americas-seniors).
4. MCL 750.174a.
5. National Council on Aging website (www.ncoa.org/article/get-the-facts-on-elder-abuse).
6. 2020 PA 344; MCL 487.2081, *et seq.*
7. MCL 487.2083(c).
8. MCL 487.2083(e).
9. MCL 487.2083(d).
10. MCL 487.2083(h).
11. MCL 487.2083(i).
12. MCL 487.2083(a).
13. MCL 487.2083(g).
14. MCL 125.2004(c).
15. MCL 487.2085(1).
16. *Id.*
17. MCL 487.2085(1)(F); MCL 400.11.
18. MCL 487.2085(2).
19. MCL 487.2085(3).
20. MCL 487.2085(4).
21. *Id.*
22. MCL 487.2085(5).
23. MCL 487.2085(6).
24. MCL 487.2085(7).
25. *Id.*
26. MCL 487.2085(8).
27. MCL 487.2087(1).
28. *Id.*
29. *Id.*
30. MCL 487.2087(2).
31. MCL 487.2087(3).
32. MCL 487.2089(1).
33. MCL 487.2089(3).
34. MCL 487.2089(4).
35. MCL 487.2089(5).
36. In fact, other than being defined in section 3, the term "vulnerable adult" is only used once in the Act in section 5 describing the required content of financial institution policies to be adopted under the Act. MCL 487.2085(2).
37. In this scam, an individual (too often an attorney) is solicited by a stranger to accept a large settlement or transaction payment by cashier's check on behalf of the stranger in return for a sizeable and generally unearned fee, which the individual is to retain from the cashier's check proceeds. The individual is urged by the stranger to immediately wire transfer the stranger's portion of the funds to a usually foreign bank account, where the funds are quickly withdrawn before the cashier's check is returned from the purported issuing bank as counterfeit.
38. In this scam, fraudsters induce a real estate purchaser or lender to wire transfer closing funds to an imposter account. They'll often set up a fake website under a name similar to the title company handling the escrow. A slight difference in the URL, in what otherwise looks to be a legitimate site, is overlooked. Fraudsters then email instructions to wire closing funds to a fraudulent account.
39. In this scam, an individual receives an email from a purportedly familiar or innocent source, is duped into clicking on a link in the email, unknowingly down-

The Financial Exploitation Prevention Act is the product of a collaborative effort to address financial exploitation of the elderly and other vulnerable adults.

loading and installing malware on their device which gathers personal information enabling an online banking account takeover.

40. Michigan Bankers Association website (www.mibankers.com) FEPA Statistics.



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