CARLTON FIELDS

Protecting At-Risk Seniors from Financial Exploitation

October 01, 2018

Senior Safe Act

The Senior Safe Act (12 U.S.C. § 3423) took effect May 24. The Act "extends immunity from liability to certain individuals employed at financial institutions who, in good faith and with reasonable care, disclose the suspected exploitation of a senior citizen to a regulatory or law-enforcement agency." Subject to certain conditions, this immunity also extends to the financial institution itself, such as an insurance company or agency, broker-dealer, investment advisory firm, transfer agent, or bank.

Specifically, the Act grants immunity from liability, "including in any civil or administrative proceeding," if the individual:
makes the disclosure in good faith and with reasonable care.

- is (i) a registered representative, insurance producer, or investment adviser representative affiliated or associated with the institution or (ii) performs a supervisory, legal, or compliance function for the institution.
- may (i) come into contact with a senior citizen as part of the individual's professional duties or (ii) review or approve the financial documents, records, or transactions of a senior citizen in connection with providing financial services to that citizen.
- has received training related to reporting suspected financial exploitation of senior citizens and the financial institution maintains certain records of such training.

Accordingly, the Act alleviates any potential legal exposure when such individuals share a senior citizen's non-public personal information with a state adult protective services agency or other regulatory or law-enforcement agencies and such sharing is not covered by any other exception to applicable privacy law restrictions.

The financial institution, or a third-party it selects, may provide the required training. Many broker-dealers, investment advisers, and insurance companies may already train their registered representatives, investment adviser representatives, and insurance producers, respectively, on financial exploitation of seniors. The required training should:

> instruct any individual attending the training on how to identify and report the suspected exploitation of a senior citizen internally and, as appropriate, to government officials or law enforcement authorities, including common signs that indicate the financial exploitation of a senior citizen; … discuss the need to protect the privacy and respect the integrity of each individual customer of the covered financial institution; and … be appropriate to the job responsibilities of the individual attending the training.

Unlike the FINRA rules discussed below and a recently adopted model regulation of the North American Securities Administrators Association, the Senior Safe Act does not protect broker-dealers and investment advisers from any liability for temporarily holding disbursements of funds based on a reasonable belief that a senior citizen is being exploited.

SEC Staff No-Action Letter

On June 1, the SEC Division of Investment Management staff issued a no-action letter to the Investment Company Institute (ICI) under Section 22(e) of the Investment Company Act of 1940 that follows from FINRA Rule 2165. That rule permits a broker-dealer that suspects financial exploitation to put a hold on disbursements of funds to its customers who are seniors or have certain other types of potential vulnerabilities (collectively, “vulnerable adults”).

In particular, the staff provided assurance that it would not recommend enforcement action to the SEC against an open-end mutual fund or its SEC-registered transfer agent if, subject to certain conditions, it temporarily delays for more than seven days the disbursement of redemption proceeds from the mutual fund account of a vulnerable adult held directly through the transfer agent based on a reasonable belief that financial exploitation of that customer has occurred, is occurring, has been attempted, or will be attempted.

Section 22(e) of the 1940 Act prohibits a registered investment company from suspending the right or postponing payment of the redemption proceeds for more than seven days after the tender of a redeemable security to the company or its designated agent for that purpose for redemption.

Since the mutual fund accounts at issue in the ICI letter are held directly with the mutual fund through the fund’s transfer agent responsible for opening and servicing the accounts, and not in a customer account with a broker-dealer, FINRA Rule 2165 does not apply. Similar to registered representatives who suspect financial exploitation, however, the incoming letter states that mutual fund transfer agents, on behalf of the funds, may wish to protect vulnerable adults from financial exploitation to the same extent that broker-dealers may do so under FINRA Rule 2165.

The ICI letter is limited to open-end investment companies and does not address insurance company separate accounts that are organized as unit investment trusts. Similar to mutual funds held directly with the fund through its transfer agent, variable annuity and variable life insurance policies are typically held directly with the insurance company. When an insurance company suspects financial exploitation, it currently has no relief from Section 22(e) that specifically entitles it to hold disbursements for more than seven days. We understand the SEC staff may be considering a similar request for no-action that would cover unit investment trusts. Even without no-action relief, however, insurers may be able to rely on an exemption provided by 1940 Act Rule 6e-2(b)(12)(ii) or 6e-3(T)(b)(12)(iii) for holds on disbursements of variable life insurance (though not variable annuity) proceeds.

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