

NOTICE OF REQUEST FOR COMMENTS REGARDING NASAA'S PROPOSED MODEL LEGISLATION OR REGULATION TO PROTECT VULNERABLE ADULTS FROM FINANCIAL EXPLOITATION

September 29, 2015

The Board of Directors of the North American Securities Administrators Association, Inc. ("NASAA") is seeking comment on proposed model legislation to protect vulnerable adults from financial exploitation.¹ As explained more fully below, the proposed Model Act gives industry participants and state regulators new tools to help detect and prevent financial exploitation of vulnerable adults.

Public Comment Period

The public comment period is from September 29, 2015 to October 29, 2015. To facilitate consideration of comments, please send comments to Lynne Egan (MT), Chair, Senior Issues/Diminished Capacity Committee (legan@mt.gov); Patricia Struck (WI), Vice-chair, Senior Issues/Diminished Capacity Committee (patricia.struck@dfi.wisconsin.gov); and Christopher Staley, Counsel, NASAA (cs@nasaa.org).

We encourage, but do not require, comments to be submitted by e-mail. Hard copy comments may be submitted at the address below.

NASAA Legal Department
Christopher Staley, Counsel
NASAA
750 First Street, NE, Suite 1140
Washington, DC 20002

Note: After the comment period has closed, NASAA will post to its website the comments it receives as submitted by the authors. Parties should therefore only submit information that they wish to make publicly available. Further, the following notice will appear on NASAA's website where comments are posted: *NASAA, its agents, and employees accept no responsibility for the content of the comments posted on this Web page. The views, expressions, and opinions expressed in the comments are solely those of the author(s).*

Background

Protecting senior investors from financial exploitation long has been a primary focus of NASAA members. The NASAA Committee on Senior Issues and Diminished Capacity ("Seniors Committee"), formed in 2014, is the latest in a series of initiatives from NASAA members to protect senior investors since the launch of the Senior Investor Resource Center in 2003 and the adoption of a model rule on the use of senior-specific certifications and professional designations in 2008. In addition, NASAA members actively bring important

¹ The proposed model may be adopted as legislation or implemented as a regulation. For ease of reference, it will be referred to herein as the "Model Act."

investor protection and awareness information to seniors in each of our jurisdictions through workshops, forums, and other public events.

The Seniors Committee has continued this work through its Model Legislation and Regulation Working Group developing the attached Model Act for use by NASAA Members. The title of the Model is “An Act to Protect Vulnerable Adults from Financial Exploitation.”

Defined Terms Within the Model Act

Relevant definitions of terms used throughout the Model Act are found in Section 2. The Model Act, as written, would apply to adults 60 years or older or those adults that would be subject to the provisions of a state’s adult protective services statute (“APS”).

Financial exploitation is also defined in the Model Act and includes, among other things, the wrongful taking or withholding of assets of an eligible adult including the misuse of a power of attorney or guardianship that deprives the eligible adult of use or possession of his or her assets.

The Model Act uses the term “qualified employee” to include broker-dealer agents, investment adviser representatives, and those persons that serve in a supervisory, compliance, or legal capacity for broker-dealers and investment advisers. This definition is important as qualified employees are charged with certain responsibilities under the Model Act in instances of suspected financial exploitation of an eligible adult.

Governmental, Family and Third Party Disclosures

The Model Act mandates reporting to the state securities regulator and state adult protective services agency when the qualified employee has a reasonable belief that financial exploitation of an eligible adult has been attempted or has occurred. The Model Act also authorizes disclosure to third parties only in instances where an eligible adult has previously designated the third party to whom disclosure may be made. Importantly, the Model Act directs that disclosure may not be made to the third party if the qualified employee suspects the third party of the financial exploitation.

Delaying Disbursements

The Model Act provides broker-dealers and investment advisers with the authority to delay disbursing funds from an eligible adult’s account if the broker-dealer or investment adviser reasonably believes that such disbursement will result in the financial exploitation of the eligible adult. If the broker-dealer or investment adviser delays a disbursement it must notify persons authorized to transact business on the account (unless such persons are suspected of the financial exploitation), notify the state securities commissioner and adult protective services, and undertake an internal review of the suspected exploitation. The Model Act provides timelines for the notifications described above and limits the time of the delay.

To the extent that federal laws or regulations dictate when broker-dealers and investment advisers must execute transactions, the Model Act refers only to disbursements in an effort to avoid or minimize conflict with any such laws or regulations.

Immunity Provisions

The Model Act contains immunity provisions tied to the reporting of suspected financial abuse to governmental agencies, designated third parties, and for delaying disbursements. The immunity provisions allow for immunity from administrative and civil liability for qualified employees, broker-dealers, or investment advisers who, in good faith and exercising reasonable care, comply with the provisions of the Model Act.

Records

The Model Act permits broad access to the records of broker-dealers and investment advisers by agencies in cases of suspected or attempted financial exploitation. The Model Act clarifies that such access shall not subject the records of the broker-dealer or investment adviser to the state's public records laws. This provision is meant to facilitate disclosure to APS agencies and does not diminish the current authority of securities regulators to examine or obtain the records of broker-dealers or investment advisers.

The text of the Model Act begins on the following page.

Section 1. Short title. Sections ___ to ___ may be cited as “An Act to Protect Vulnerable Adults from Financial Exploitation” and in this chapter as this act.

Section 2. Definitions. In this act, unless the context otherwise requires:

- (1) “**Agent**” shall have the same meaning as in [insert state code section].
- (2) “**Broker-dealer**” shall have the same meaning as in [insert state code section].
- (3) “**Eligible adult**” means:
 - (a) a person sixty years of age or older; or
 - (b) a person subject to [insert state APS statute]
- (4) “**Financial exploitation**” means:
 - (a) the wrongful or unauthorized taking, withholding, appropriation, or use of money, assets or property of an eligible adult; or
 - (b) any act or omission taken by a person, including through the use of a power of attorney or guardianship of an eligible adult, to:
 - i. Obtain control, through deception, intimidation or undue influence, over the eligible adult’s money, assets or property to deprive the eligible adult of the ownership, use, benefit or possession of his or her money, assets or property; or
 - ii. Convert money, assets or property of the eligible adult to deprive such eligible adult of the ownership, use, benefit or possession of his or her money, assets or property.
- (5) “**Investment Adviser**” shall have the same meaning as in [insert state code section].
- (6) “**Investment Adviser Representative**” shall have the same meaning as in [insert state code section].
- (7) “**Qualified employee**” means any agent, investment adviser representative or person who serves in a supervisory, compliance, or legal capacity for a broker-dealer or investment adviser.

Section 3. Governmental Disclosures. If a qualified employee reasonably believes that financial exploitation of an eligible adult may have occurred, may have been attempted, or is being attempted, the qualified employee shall promptly notify Adult Protective Services and the commissioner of securities (collectively “the Agencies”).

Section 4. Immunity. A qualified employee that in good faith and exercising reasonable care makes a disclosure of information pursuant to section 3 shall be immune from administrative or civil liability that might otherwise arise from such disclosure or for any failure to notify the customer of the disclosure.

Section 5. Third-Party Disclosures. If a qualified employee reasonably believes that financial exploitation of an eligible adult may have occurred, may have been attempted, or is being attempted, a qualified employee may notify any third party previously designated by the eligible adult. Disclosure may not be made to any designated third party that is suspected of financial exploitation or other abuse of the eligible adult.

Section 6. Immunity. A qualified employee that, in good faith and exercising reasonable care, complies with section 5 shall be immune from any administrative or civil liability that might otherwise arise from such disclosure.

Section 7. Delaying Disbursements. (1) A broker-dealer or, investment adviser may delay a disbursement from an account of an eligible adult or an account on which an eligible adult is a beneficiary if:

- (a) the broker-dealer, investment adviser, or qualified employee reasonably believes that the requested disbursement will result in financial exploitation of an eligible adult; and
- (b) the broker-dealer or investment adviser:
 - i. Immediately, but in no event more than two business days after the requested disbursement provides written notification of the delay and the reason for the delay to all parties authorized to transact business on the account, unless any such party is reasonably believed to have engaged in suspected or attempted financial exploitation of the eligible adult;
 - ii. Immediately, but in no event more than two business days after the requested disbursement, notifies the Agencies; and
 - iii. Immediately initiates an internal review of the suspected or attempted financial exploitation of the eligible adult and reports any results to the Agencies within seven business days.

(2) Any delay of a disbursement as authorized by this section will expire upon the sooner of:

- (a) a determination by the broker-dealer or investment adviser that the disbursement will not result in financial exploitation of the eligible adult; or
- (b) ten business days after the date on which the broker-dealer or investment adviser first delayed disbursement of the funds, unless either of the agencies requests that the

broker-dealer or investment adviser extend the delay, in which case the delay shall expire no more than twenty business days after the date on which the broker-dealer or investment adviser first delayed disbursement of the funds unless sooner terminated by either of the agencies or an order of a court of competent jurisdiction.

- (3) A court of competent jurisdiction may enter an order extending the delay of the disbursement of funds or may order other protective relief.

Section 8. Immunity. A broker-dealer or investment adviser that, in good faith and exercising reasonable care, complies with section 7 shall be immune from any administrative or civil liability that might otherwise arise from such delay in a disbursement in accordance with this section.

Section 9. Records. A broker-dealer or investment adviser may provide access to or copies of records that are relevant to the suspected or attempted financial exploitation of an eligible adult to agencies charged with administering state adult protective services laws and to law enforcement, either as part of a referral to the agency or to law enforcement, or upon request of the agency or law enforcement pursuant to an investigation. The records may include historical records as well as records relating to the most recent transaction or transactions that may comprise financial exploitation of an eligible adult or the financial impairment of an adult. All records made available to agencies under this section shall not be considered a public record as defined in [State public records law]. Nothing in this provision shall limit or otherwise impede the authority of the state securities commissioner to access or examine the books and records of broker-dealers and investment advisers as otherwise provided by law.