Invested in America

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Re: COMMENTS REGARDING NASAA'S PROPOSED MODEL LEGISLATION OR REGULATION TO PROTECT VULNERABLE ADULTS FROM FINANCIAL EXPLOITATION

Dear Ms. Egan, Ms. Struck and Mr. Staley:

Thank you for the opportunity to submit these comments regarding NASAA's proposed Model Legislation or Regulation to Protect Vulnerable Adults from Financial Exploitation ("the Model") on behalf of the Securities Industry and Financial Markets Association[1] (SIFMA). We join our member firms in appreciation of the important work state securities regulators do with our firms to help us protect our clients – especially our senior investors. We also share NASAA's view that more can be done to protect senior investors – particularly if state regulators and the securities industry work together toward that goal.

Senior financial exploitation is a problem that costs senior investors an estimated $2.9 billion annually[2] – funds that many were relying on to support them in retirement. Moreover, with 10,000 Americans turning 65 every day and an estimated 1 in 5 Americans aged 65 or older being victimized by financial fraud, this problem will continue to grow. Complicating these protection efforts is the fact that only an estimated 1 in 44 cases of financial elder abuse is reported and the fact that 55% of financial abuse in the United States is committed by family members, caregivers and friends.

Senior financial exploitation is a serious threat to every American, and with your 2008 release of the Model rule on Senior-Specific Certifications & Designations, last year's establishment of your Board-level Committee on Senior Issues & Diminished Capacity, and your work on this Model, it is clear that state securities regulators have made a commitment to bring their frontline investor protection expertise to bear on the unique challenges of senior investor protection.

[1]SIFMA is the voice of the U.S. securities industry, representing the broker-dealers, banks and asset managers whose 889,000 employees provide access to the capital markets, raising over $2.4 trillion for businesses and municipalities in the U.S., serving clients with over $16 trillion in assets and managing more than $62 trillion in assets for individual and institutional clients including mutual funds and retirement plans. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit http://www.sifma.org.
[2] "Broken Trust: Elders, Family, and Finances," MetLife, March 2009.

For our part, SIFMA and our member firms have also been actively working on senior investor protection issues. We have a Senior Issues committee made up of 32 distinct member firms, have worked with 3 states to enact state-specific senior investor protection laws, and have instituted an annual Senior Investors Forum bringing together scientific experts, regulators (state, federal and SRO) and the financial services industry to discuss policies, innovative practices, ongoing training, compliance, and stakeholder coordination, as well as the science and demographics of cognitive decline. We also are also working to increase funding for the investigation of financial abuse and advocating for streamlining APS reporting.

As noted above, three states have enacted laws designed to provide securities firms with stronger tools to protect their senior clients: Washington State, Delaware and Missouri. As more states and securities regulators consider similar proposals in 2016, many will look to NASAA's Model for guidance. Moreover, FINRA released Regulatory Notice 15-37 this month (October 2015), which addresses many of the same issues as this Model from a nationwide perspective.

As state proposals are poised to multiply rapidly, and FINRA issues a rulemaking to address this issue, we have come to a particularly important juncture. Now more than ever, it is vital to ensure effective coordination between NASAA and FINRA, the industry's two frontline regulators. Ensuring coordination at both the state and national level is necessary to establish an efficient legal framework that will effectively protect senior and vulnerable investors from financial exploitation, and also provide compliance clarity for firms.

In this comment letter, SIFMA identifies several opportunities where the Model could promote consistency with the FINRA proposal and benefit all parties involved – particularly the senior and vulnerable investors we are all seeking to protect: (1) a focus on firm-level, instead of individual, reporting (§A(3)a); (2) the use of voluntary, instead of mandatory, reporting (§§A(3)b-c); (3) the use of universally appropriate delay-related time periods (§A(2)); (4) the use of a consistent "reasonableness" legal standard (§B(1)); and (5) clarification of the third party disclosure provisions in §5 of the Model to permit contact of third parties beyond those designated in writing, without requiring the collection and documentation of such information (§A(5)).

These are only a few examples of opportunities for coordination, and SIFMA urges NASAA and FINRA to meet and work closely together to strengthen the regulatory coordination between two of the leading regulatory entities in this space.

Moreover, there are a number of small changes (or clarifications) to the Model that, based on the experience of SIFMA and its member firms' efforts to protect its clients to date, will serve to magnify the effectiveness of any law enacting NASAA's Model, as well as a few technical adjustments to the language which will allow the mechanisms included in this Model to function more effectively.

A. Strengthening Senior and Vulnerable Investor Protections:

1. The Importance of Recognizing the Efforts of All Parties in Any Effective Senior Investor Protection Framework

One of our most foundational issues relates to the conduct of investigations detailed within the four corners of the Model. Specifically, the proposal directly references the need for firms to initiate an internal investigation of a suspect disbursement and provide the results of such investigation to the agencies,[3] without recognizing the existence of a possible investigation by an agency, or the extension of any immunity provision[4] to a firm's final decision when a transaction is determined to be exploitative of an "eligible adult."[5] SIFMA believes that, due to the nature of all model proposals, this creates a need to develop provisions instructive to legislators using the Model to craft their own state-specific senior investor protection laws.

In each of the states where similar proposals were enacted into law (Washington State, Delaware[6] and Missouri), the senior investor protection initiative grew out of an organic partnership between regulators, industry members and APS organizations. Through these partnerships, the desire of the agencies to investigate reported instances of exploitation and provide (possibly informal) guidance to member firms was made abundantly clear, and – perhaps most importantly – understandings were formed about what would happen when one of the partners (the regulator, APS or the firm) found an instance of financial exploitation.

However, when individual state legislatures consider a model piece of legislation, those vital discussions may not occur until too late in the process. Further, given the weight of a model from NASAA and the high likelihood that a NASAA Model is enacted in a state without the extensive surrounding conversations, we believe it is imperative that these matters be clearly addressed within the four corners of any model.

This is particularly important because, without either: (1) receipt of guidance from the agencies directing a firm to place a 'full stop' on a transaction when the agencies determine it to be exploitative of an eligible adult; or (2) immunity from administrative or civil liability when a firm places a 'full stop' on a transaction a firm determines to be exploitative of an eligible adult as a result of its internal investigation, this Model may not change the existing legal landscape in any meaningful way, nor be able to effectively protect senior investors in the way we all intend.

a. The Importance of Recognizing the Agencies' Vital Role in Any Effective Senior Investor Protection Framework

As mentioned above, the current Model does not directly reference an investigation by either of the agencies, but directly addresses a firm's internal investigation in §7(1)(b)iii, inferring that the burden of the investigation is solely on the firm. Not only have state securities regulators traditionally served a robust, frontline role in protecting investors, they are highly effective at investigating

[3] §7(1)(b)iii of the Model.
[4] §§4, 6 and 8 of the Model.
[5] §2(3) of the Model.
[6] In fact, Delaware specifically references both an agency investigation and guidance to firms in §3910(c) of Title 31 of the Delaware Code.

securities fraud and exploitation and have expressed a clear desire to investigate reported cases of suspected exploitation. However, the current Model does not specifically recognize any investigatory role for these offices. State securities regulators have extensive experience in securities investigation, much greater authority and access to information than individual industry members and, in many cases, their offices are specifically designed to perform this type of investor protection. For these reasons, a parallel investigation by the agencies is vitally important in any investor protection effort and SIFMA believes that the existence of a possible agency investigation and the ability of the agencies to provide feedback to member firms need to be explicitly referenced in the Model.

Moreover, a direct reference to guidance from the agencies will likely serve to alleviate certain privacy concerns of APS organizations. In a large number of instances, securities firms have reported suspected financial abuse to APS organizations across the nation that have not been a part of the senior investor protection initiative development process, and are subsequently unable to receive feedback on an investigation (and many APS organizations refuse to acknowledge whether an investigation has been opened). In certain cases, without knowledge of the status or results of an APS investigation, firms are unnecessarily hindered in acting to protect an eligible adult's assets, and are required to execute orders to the detriment of a senior or vulnerable investor. Further, the closing of this "feedback loop" was highlighted as a "recommended practice" at a 2015 Senate Committee on Aging hearing discussing senior financial exploitation.[7] The inclusion of a provision permitting feedback should serve to alleviate that issue, and fundamentally improve the senior investor protection process. To this same end, SIFMA would request that §9 of the Model be amended to reflect two-way disclosures, ensuring that all shared information is exempt from state public record laws.

Additionally, the requirement for firms to "immediately [initiate] an internal review"[8] is unnecessarily duplicative. Once a possibly suspect transaction is identified, firms initiate an internal review to determine if the transaction is in fact suspicious and whether the facts surrounding the transaction rise to the level sufficient to support a report to the agencies. The Model already tacitly requires firms to initiate an internal review **prior** to the placement of any delay. By providing for disclosure of a suspect disbursement to either the government[9] or a third-party[10] when there is a "reasonable [belief of] financial exploitation of an eligible adult […],"[11] the Model already requires an internal review to exist to determine whether the facts and circumstances constitute a "reasonable belief." By explicitly requiring an investigation in §7(1)(b)iii, the Model creates unnecessary duplication and confusion. For example, would 7(1)(b)iii require an additional investigation for the sole purpose of §7 reporting? What happens in clear situations of financial exploitation where a firm provides a full initial report containing the results of an investigation along with its initial notice to the agencies of a delay required by §7(1)(b)ii?

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7 U.S. Senate Committee on Aging, "Broken Trust: Combating Financial Exploitation of Vulnerable Seniors," February 4, 2015.

8 §7(1)(b)iii of the Model.

9 §3 of the Model.

10 §5 of the Model.

11 §§3 and 5 of the Model.

b. The Importance of Ensuring Investors Are Fully Protected When Financial Exploitation of an Eligible Adult is Found, Even When the Agencies Do Not Act

Perhaps the most important understanding that has evolved out of the regulator-APS-industry partnerships in Washington State, Delaware and Missouri, is the understanding of what will happen when a firm finds financial exploitation. Unfortunately, the only remedy (beyond the delay and reporting provisions) currently provided in the Model for situations where financial exploitation of an eligible adult is discovered is the receipt of a court order.[12] This means that, under the Model, firms would be required to seek a court order every time financial exploitation is discovered and persists after the time limits provided for in the Model. As noted above, senior financial exploitation is a nearly $3 billion industry and this mechanism would likely add tens of thousands of cases to already overburdened civil courts nationwide. Moreover, the Model would require the receipt of such an order within 10 days (20 days with an agency extension) – an unworkable time frame in almost all state courts (discussed further in §A(2)c below).

SIFMA's member firms routinely identify, investigate and report cases of suspected financial exploitation to the government. However, should the agencies be unable to investigate or provide guidance to the firm (for whatever reason), the next steps (whatever those may be) must be taken by the firm. While some firms may provide for this situation in their individual account agreements, it is important that no firm should feel obligated to execute an exploitative transaction.

Currently, should neither of the agencies provide guidance to firms within the stated time period which allows them to refuse an exploitative transaction, a firm is vulnerable to liability for refusing the exploitative transaction. As written, firms "shall be immune from administrative or civil liability that might otherwise arise […]" for: (1) reporting to the agencies;[13] (2) reporting to a third party;[14] or (3) delaying a disbursement,[15] but firms remain vulnerable to such liability if they choose to continue to refuse an exploitative disbursement absent direction from a governmental authority.

If this Model is to have a meaningful effect in protecting senior investors beyond the existing law, and ensuring that those investors are sufficiently protected regardless of agency action, the immunity provisions[16] should be extended to cover the final decision of a firm when financial exploitation of an eligible adult is found. It is important to note that any concerns related to providing firms with this authority are already addressed in the Model by §7(2)(b), which allows the agencies to issue an order terminating a delay at any time.

Further, SIFMA urges NASAA to include language that ensures that any law enacted in conformity with this Model does not limit a firm's rights under existing law, or by agreement with its customers (e.g. through account agreements) to refuse to execute exploitative transactions.

[12] §7(3) of the Model.
[13] §4 of the Model.
[14] §6 of the Model.
[15] §8 of the Model.
[16] §§4, 6 and 8 of the Model.

2. The Importance of Timeframes that are Workable in All 50 States

Currently, the Model limits the time period of a delay to 10 business days, or 20 business days by request of one of the agencies. These time constraints are widely considered unworkable at a national level for multiple reasons: (1) the time period is insufficient to allow for a sufficient investigation in cases of complex fraud; (2) the 10 business day extension unnecessarily limits the authority and discretion of the state securities regulator; and (3) the 20 business day total limit is – by definition – too short of a time frame to secure a court order in many jurisdictions.

a. The Time Period is Insufficient for Complex Exploitation Cases

While many cases of financial exploitation can be investigated and a final determination can be made within the 20 day time period (such as exploitation from known scams), more than half of all financial exploitation is perpetrated by friends, family members or caregivers[17] and these cases often result in incredibly complex situations that routinely require more than 20 business days to investigate. Moreover, APS organizations and securities regulators across the country have a tend to face resource challenges which limit their ability to investigate reported cases of suspected financial exploitation and provide guidance to firms[18] within such a tight and limited time frame.

We recognize that a 10 business day time period, without the possibility of a non-judicial extension, is present in the Missouri law, though this is a result of unique structures and capacities in place in Missouri that are non-existent or non-applicable in the majority of states.[19] Across the nation, many agencies do not have the same robust capability or judicial procedures (discussed further in §A(2)c below), and other jurisdictions have opted for longer time frames.

For example, the recent FINRA proposal[20]on senior investors provides for a 30 business day delay (an initial delay of 15 business days, renewable for another 15 business days at the <u>firm's</u> discretion if the facts warrant an extension). Additionally, the Delaware law[21] provides for an initial delay of 10 business days, which is automatically renewable for up to 30 business days if the firm did not receive guidance within that time frame.

b. The 10 Business Day Extension Unnecessarily Limits the Authority of State Securities Regulators

As the frontline investigators of state securities matters, many state securities regulators are granted broad discretion in the performance of their duties. Under §7(2)(b) of the Model, a state securities regulator's discretion would be curtailed, and the regulator would be limited – by law – to providing a single, 10 business day exemption.

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17 "Broken Trust: Elders, Family, and Finances," MetLife, March 2009.

18 The importance of which is discussed in §A(1)a of this letter.

19 For example, during negotiations in Missouri, the state's agencies made assurances that they had the capacity and capability to investigate and return guidance on most every case within 10 business days, and for those where the 10 business day time period was insufficient, the agencies stated they would be able to seek an emergency court order to extend the time period – a court order that could be secured on short notice in that particular jurisdiction.

20 FINRA Regulatory Notice 15-37.

21 §3910(c) of Title 31 of the Delaware Code.

As many regulators know all too well, there is no "one size fits all" solution to investigating fraud and financial exploitation – especially in the complex situations that tend to arise in the financial exploitation of a close relative. Each of these cases is unique and all of them must be approached on a case-by-case basis. While some cases may only require a 2 or 3 day extension, other particularly complex cases may require extensions beyond the stated timeframe provided in the Model (regardless of the final timeframes NASAA chooses). For this reason, the regulator should be able to determine the specific length of any extension beyond the specific time limits set forth in the Model, based on the immediate facts of the particular situation. Such a process is likely to result in a far more fair and equitable outcome than the application of a flat 10 business day legal mandate.

c. The Time Frame is Too Short to Secure a Court Order in Many Jurisdictions

As discussed in Sections A(1)b and A(2)a above, the maximum time limit of 20 business days is too short to secure a court order[22] in many jurisdictions. While some states, like Missouri, are able to provide a court order under emergency provisions on a short turn around, that is not the case in many states. For example, when this issue came up in Florida, a member of the Florida bar noted that senior financial exploitation orders fall under the non-emergency docket, where it takes a minimum of 21 business days to receive a hearing date. As a Model, this proposal must account for variations in judicial procedures across the 50 states, and therefore SIFMA respectfully requests a longer time frame that would be effective across those different jurisdictions.

d. Proposed Solutions

As discussed in §A(2)b above, there is no "one size fits all" solution to investigating fraud and financial exploitation. The specific facts and situations can vary greatly from one case to the next, and even two similar cases that seem simple on the surface can have substantially different levels of investigatory complications. For example, a situation where a senior client has never traveled outside of the country but wishes to liquidate his or her retirement account to remit advance-taxes due on foreign lottery winnings is a relatively straight-forward case of exploitation. However, if that same senior client has traveled to that foreign country repeatedly, is engaged to a national of that foreign country, and has family members who are asserting kidnapping claims, the result is a much more complicated investigation that requires coordination with the FBI, the U.S. State Dept., and foreign law enforcement. Such a case can take many weeks – or even several months – to investigate.

For the reasons above, and in the interest of regulatory coordination, SIFMA urges NASAA to consider utilizing the time frames for delay found in FINRA Regulatory Notice 15-37.[23] This would allow firms to place an initial 15 business day hold, which a firm could extend for an additional 15 business days if warranted by the facts. SIFMA believes that this time period, coupled with the agencies' ability to provide further extensions when warranted by the facts and circumstances, would provide firms with a reasonable time period in which to investigate possible cases of financial exploitation and seek a non-emergency court order when appropriate, while not limiting the existing authority of state securities regulators. Additionally, achieving uniformity between state laws and the rules of the industry's Self-Regulatory Organization (SRO) would increase the ability for the state regulators and FINRA to coordinate investor protection actions and result in a system that is more efficient for both the state and industry members.

[22] Currently the only avenue of permanent relief available under this Model.
[23] FINRA Reg Notice 15-37, §2165(b)(2)-(3).

Alternatively, should NASAA prefer to use a Model time limit based on an existing state law, SIFMA notes the well-crafted schedule in place in the Delaware law, which should provide for sufficient time to secure a non-emergency court order in the majority of jurisdictions:[24] an initial 10 business day delay, which can extend for an additional 30 business days if the firm receives no guidance from the agencies during that time.

Regardless of the specific time frame NASAA chooses to utilize, SIFMA respectfully requests that individual state securities regulators be permitted to use the full authority of their office and set the length of any extensions beyond the Model-designated timeframes at their discretion.

3. The Reporting Requirements Should Reflect the Realities on the Ground Across All Jurisdictions

§3 of the Model states that, "[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 [the agencies]." However, SIFMA believes that a few changes to this language will create significantly more effective laws: (1) the language should require reporting at the firm level, not the individual level; (2) requiring mandatory reporting to the agencies is incompatible with the existing structures in many jurisdictions; and (3) mandatory reporting creates unnecessary burdens for the agencies, as well as the firms.

a. Reporting at the Individual Level is Unnecessary and Incompatible with Current Procedures

The Model defines a "Qualified Employee" as, "any agent, investment adviser representative or person who serves in a supervisory, compliance, or legal capacity for a broker-dealer or investment adviser."[25] By including both agents and investment adviser representative (individuals), as well as supervisory, compliance or legal staff (firm-level operators) in the definition of "Qualified Employee," the Model requires reporting from both individual and firm-level sources.

Most firms have a pre-determined escalation process for cases of suspected financial exploitation, which involves broker-dealer agents and investment adviser representatives escalating suspicious transactions to supervisory, compliance or legal staff. In mandating reporting by agents and investment adviser representatives, the Model would compel these individuals to either circumvent established reporting procedures put in place to properly vet suspicious transactions and avoid unnecessarily delaying legitimate transactions, or would require two reports to be made for the same incident (one at the individual level and one at the firm level). Therefore, SIFMA respectfully requests that §3 of the Model only apply to broker-dealers and investment advisers, consistent with the provisions in §7(1) of the Model.

[24] §3910(c) of Title 31 of the Delaware Code.
[25] §2(7) of the Model.

b. Mandatory Reporting to the Agencies is Incompatible with Existing Structures in Many Jurisdictions

As previously discussed, it is important for a NASAA Model to account for the variations among the 50 states. In this case, there are a number of APS organizations which either do not have jurisdiction over financial exploitation cases, or cannot address financial exploitation cases due to a lack of funding.[26] In these cases, mandating possibly tens of thousands of reports to be made to organizations that do not have the jurisdiction, capacity, or capability to intake and process the reports is unnecessarily burdensome on the already over-burdened agencies, as well as the firms.

c. Mandatory Reporting Creates Costly, Unnecessary Burdens for the Agencies and Firms

It is a nearly universal practice for securities firms to report cases of suspected financial abuse in all jurisdictions. However, specific reporting practices tend to vary greatly between voluntary and mandatory reporting jurisdictions. In mandatory reporting jurisdictions, firms generally report cases of suspected financial exploitation as soon as facts support a "reasonable belief" that exploitation "may" occur. In many cases, this is as soon as a 'red flag' appears.

Alternatively, in voluntary reporting jurisdictions, firms will perform a more thorough investigation and will only report cases when there is a certain degree of confidence that exploitation is likely to occur. It is estimated that roughly 40 – 50% of all 'red flags' are false positives, and by culling these false positives before reporting to the appropriate agencies, it significantly reduces an unnecessary burden placed on the already strained agencies. Moreover, the reports sent to the agencies in voluntary reporting jurisdictions tend to have far more content, with a lot of the investigatory 'leg work' already being completed by the securities firm, thus further reducing the burden placed on the agencies and increasing the amount of resources they are able to dedicate to cases involving actual financial exploitation. Therefore, SIFMA respectfully requests that NASAA utilize a voluntary reporting standard in §3 of the Model.

Notably, voluntary reporting is supported by the National Adult Protective Services Association (NAPSA), and is the reporting structure that would be used under FINRA Reg. Notice 15-37.[27]

4. A Focus on Transactions Would Provide Significantly Greater Investor Protections

SIFMA believes that focusing on "disbursements" unnecessarily limits the protections provided by this Model; instead, SIFMA encourages NASAA to consider addressing "transactions," (as in the Delaware law) which would provide significantly more robust protections for senior investors and vulnerable adults. For example, under the current language in the Model, should an exploitative liquidation of investments occur, the firm would only be protected by the Model when they refuse to disburse the fruits of the exploitative sale, but would receive no protections for refusing the initial sale of the investment – an action that can be almost as damaging to an investor as the disbursement, and can trigger significant tax consequences, fees or other negative financial implications for the senior or vulnerable investor because the transaction may not be suitable or may be inconsistent with a client's risk tolerance, exposing the senior or vulnerable investor to financial losses.

[26] These jurisdictions include Kentucky, Tennessee and Iowa (which has jurisdiction over financial exploitation, but only applies to 'dependents'). *See* Ky. Rev. Stat. Ann. §209.020; T.C.A. §71-6-102; Iowa Code §§235B.1 et seq.
[27] FINRA Reg Notice 15-37.

Other examples of exploitative, non-disbursement transactions include: the buying of an investment product for the benefit of the wrong-doer, a change in ownership of an account, a change in the beneficiary of an account, or the incursion of penalties due to another change in the account (such as annuity-related surrender charges).

5. Clarification is Needed Regarding the Notification of Third Parties

According to the National Council on Aging, social isolation is one of the leading factors in the abuse of vulnerable adults.[28] It is important to note that, generally, social isolation does not mean a complete lack of social relationships, but merely the existence of minimal social contacts which shields perpetrators from scrutiny.[29] In the case of senior and vulnerable investors, this isolation can often translate into an unwillingness or inability to secure a power of attorney or provide an emergency contact. However, due to the long-lasting relationships Financial Advisors often form with their clients (including some multi-generational relationships), advisors can be aware of an individual that is trusted by their vulnerable client, but not placed on any official documentation with the Firm (such as a neighbor with a healthcare proxy or a family member whose relationship with the client is complicated by long distances).

Often times, the exploitation of seniors and vulnerable investors can be directly prevented by reaching out to one of these trusted individuals in a timely fashion, regardless of the individual's status on the account in question. Moreover, this capability magnifies in importance when an individual's identified emergency contact is the individual suspected of abuse. In these cases, being able to reach out to a separate individual in a timely fashion can bring about the best resolution for the adult being exploited. This is a consideration that is recognized by both FINRA[30] and Missouri[31] in their respective senior investor protection initiatives.

As such, SIFMA respectfully requests that NASAA clarify §5 of the Model to expressly permit a qualified employee to contact, on a voluntary basis, a known, trusted individual or immediate family member that may have been identified by the client, even if the contact was not officially designated in a form attached to the account.

Alternatively, if the intent of the Model is to only permit the contact of third parties authorized in writing, SIFMA would suggest consideration of the removal of Sections 5 and 6 from the Model in their entirety. If that is the case, §5 would be duplicative of existing law, providing no additional benefits while risking unintended consequences that may in fact limit a firm's existing capabilities.

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[28] "Elder Abuse Facts," National Council on Aging, available at: https://www.ncoa.org/public-policy-action/elder-justice/elder-abuse-facts/

[29] *See* "Social isolation in older adults: an evolutionary concept analysis," Nicholson NR, Jr, available at: http://www.ncbi.nlm.nih.gov/pubmed/19291185/; *See Also* "Elder Mistreatment: Abuse, Neglect, and Exploitation in an Aging America," Hafemeister, Thomas L., available at: http://www.ncbi.nlm.nih.gov/books/NBK98784/

[30] FINRA Regulatory 15-37, §2165(b)(1)(B)(ii).

[31] §409.610 of Missouri SSB 244 (2015).

B. Necessary Legal Adjustment to Ensure Effective Implementation of the Senior and Vulnerable Investor Protections:

In addition to the substantive suggestions discussed above, SIFMA has identified two areas where we believe technical adjustments to the language will ensure the efficient and effective implementation of the senior and vulnerable investor protections.

1. The Model Utilizes Legal Standards that are Inconsistent and Atypical for Securities Regulation

There are two distinct legal standards utilized in this Model that are either internally inconsistent or overly restrictive: (1) the "good faith and exercising reasonable care" standard, as used in Sections 4, 6 and 8 of this Model for immunity for a covered action; and (2) the "reasonably believes […] will […]" standard, as used in §7(1)(a) of the Model as the standard for initiating a delay. In addition to these standards, SIFMA would seek consistent liability protections between the Model and the majority of the existing state laws.

a. "Good faith and reasonable care" is Internally Inconsistent and Insufficiently Settled and Defined in Securities Law

The "good faith and reasonable care" standard used in Sections 4, 6 and 8 of this Model is not a generally settled standard, nor is it regularly used in securities law. Because this standard is atypical in securities law, there is a dearth of case law to guide courts in the use of this standard. As such, the use of this standard will create uncertainty and confusion surrounding industry reliance on any law enacted under this Model – a result that is contrary to the intent of this Model.

Moreover, the standard is internally inconsistent with the other standards used in Sections 3, 5 and 7. For example, §3 requires any qualified employee that "reasonably believes" that financial exploitation may occur to report such belief, but only provides the qualified employee with immunity from civil and administrative liability if the qualified employee makes that report "in good faith and exercising reasonable care." These are clearly two separate standards that govern the same action.[32]

If the Model is enacted, this will lead to one of two likely results: either the courts will simply apply the standard that is considered stricter (which may vary from jurisdiction to jurisdiction because neither standard is sufficiently defined in case law, causing significant inconsistency problems for firms operating in multiple states); or the courts will combine the standards to create a new, stricter standard that is beyond the intent of the drafters and unique within securities regulation.

As such, SIFMA suggests the use of a consistent "reasonableness" standard throughout the Model.[33]

[32] Which, in this instance, is a mandatory action.

[33] While the Missouri law has an inconsistency similar to the proposed Model, FINRA Regulatory Notice 15-37 uses a "reasonableness" standard throughout, and the Washington State and Delaware laws use "reasonableness" to govern specific actions while utilizing a lower, "good faith" standard for the provisions providing immunity.

Also in the interest of internal consistency, SIFMA brings your attention to the structure in Sections 3 – 9 of the Model. In Sections 3 – 8, the sections alternate between governing an action and a complementary section providing protections for taking the governed action; however, §9 has no such subsequent section providing a related protection. This leaves the status of an action under §9 (Records) of this Model uncertain. If firms were able to provide these records under existing law, there would be no need for this section to be present, and without a '§10' providing coverage for firms which act in accordance with §9, the legal status of the action is unclear given structure of previous sections. As such, in the interest of internal consistency and certainty, SIFMA would ask for the inclusion of a §10 providing immunity for actions taken in accordance with §9 of the Model.

b. The "reasonably believes […] will […]" Standard is too High, Will Likely Result in an Unintended Chilling Effect, and is Internally Inconsistent

Under the Model, in order for a broker-dealer or investment adviser to delay a disbursement, there must be a "reasonable [belief]" that the disbursement "will" result in financial exploitation of an eligible adult.[34] However, SIFMA believes that this standard (also atypical in securities law) requires too high of a certainty that the exploitation "will" occur without the delay, which may cause a chilling effect in the use of any law enacted according to this Model. Moreover, the "will" standard is inconsistent with the "may" standard related to "Governmental Disclosures."[35]
As such, the Model would likely create an environment where large numbers of suspected financial exploitation situations are reported to the agencies, but no delay is implemented, which would only allow for an investigation to occur after the exploitation – the very issue this Model is looking to address. As such, SIFMA respectfully requests that the "will" standard used in §7(1)(a) is synchronized with the §3 "may" standard.

c. To Remain Consistent with the Protections in the Majority of State Laws, the Model's Immunity Provisions Should Include Criminal Liability

In order to remain consistent with the protections afforded the majority of state laws (Washington State and Delaware), SIFMA suggests NASAA incorporate criminal liability in §§4, 6 and 8 of the Model.

2. The Term "Investment Adviser" Should be Sure to Include "Federally Covered Advisers"

The Model defines "investment adviser" by reference to state statute.[36] However, the definition of "investment adviser" in certain state statutes does not include "federally covered advisers," particularly in states which have implemented the Uniform Securities Act of 2002, which defines these two entities separately.[37] SIFMA believes the Model should emphasize the need for the definition to include federally covered advisers.

[34] §7(1)(a) of the Model.
[35] §3 of the Model.
[36] §2(5) of the Model.
[37] §102 of the Uniform Securities Act of 2002, as amended.

C. Single Access Portal for APS Reporting

Ensuring appropriate reporting of suspected financial exploitation is clearly a NASAA priority for senior investor protection efforts. To this end, SIFMA strongly supports APS proposals to create a single access portal for reporting incidents to APS organizations throughout the country. The design and organization of APS organizations varies greatly among the states: some agencies are within a state's 'Unit on Aging,' while others are independent state agencies, independent entities within another state agency, or one program in a larger state agencies.[38] Moreover, many APS agencies have jurisdiction over a specific county, city or other smaller jurisdiction – in California, each county has its own APS agency.[39]

Many times, finding the right agency to report to in a specific instance can be difficult and time consuming, and the dangers of reporting to an incorrect agency without the authority to investigate can cause delays with very real consequences for vulnerable adults.

In addition to streamlining the reporting process, a single reporting portal could also serve to streamline the feedback process and help securities regulators and APS organizations track reports nationwide, providing useful data for future investor protection efforts.

For these reasons, SIFMA is asking NASAA to lend its support to the development of a single-access reporting portal.

Thank you again for the opportunity to comment on the Model, which is a testament to the steadfast commitment of state securities regulators to protecting senior and vulnerable investors. SIFMA looks forward to working together to support additional states joining Washington State, Delaware and Missouri in implementing senior investor protections such as those outlined above. We would be happy to answer any questions, provide any additional information you seek or otherwise discuss our comments with you; please do not hesitate to contact either Marin Gibson (mgibson@sifma.org) at 212-313-1317 or Kyle Innes (kinnes@sifma.org) at 212-313-1211.

Sincerely,

/s/
Marin E. Gibson
Managing Director and Associate General Counsel
State Government Affairs

[38] "Adult Protective Services in 2012: Increasingly Vulnerable," National Association of States United for Aging and Disabilities, available at: http://www.nasuad.org/sites/nasuad/files/hcbs/files/218/10851/NASUAD_APS_Report.pdf
[39] "Adult Protective Services," California Department of Social Services, available at: http://www.cdss.ca.gov/agedblinddisabled/PG1298.htm