

# Holland & Knight

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## Memorandum

Date: October 15, 2015

To: Charles Sabatino, ABA Commission on Law and Aging

From: Bruce S. Ross  
Robert Barton  
Richard W. Petty  
Holland & Knight LLP

Re: Preliminary Comments to NASAA'S Proposed Model Legislation or Regulation to Protect Vulnerable Adults From Financial Exploitation

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The following is the text of **NASAA'S Proposed Model Legislation or Regulation to Protect Vulnerable Adults From Financial Exploitation** together with Holland & Knight LLP's commentary in red font:

**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.

**Comment 1:** While the short title includes the term “vulnerable adults,” the term “vulnerable” is not used throughout the Act. Suggest using the term “vulnerable adult” rather than “eligible adult”

**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]

**Comment 2:** This subdivision is ambiguous as to which age controls if a state's APS statute differs from the prescribed sixty-year old standard. If the drafter intends that state law would supersede the sixty-year old standard, then the Act should make that clear.

- (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.

**Comment 3:** Suggest adding “control” to i and ii. Suggest include concealment or re-titling of assets in (a).

**Comment 4:** This definition of “financial exploitation” seems insufficient as it fails to consider acts such as providing assistance to a wrongful actor. Consider incorporating a definition similar to how “financial abuse” is used in California Welfare & Institutions Code section 15610.30. California Welfare & Institutions Code section 15610.30 states the following:

(a) “Financial abuse” of an elder or dependent adult occurs when a person or entity does any of the following:

(1) Takes, secretes, appropriates, obtains, or retains real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both.

(2) Assists in taking, secreting, appropriating, obtaining, or retaining real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both.

(3) Takes, secretes, appropriates, obtains, or retains, or assists in taking, secreting, appropriating, obtaining, or retaining, real or personal property of an elder or dependent adult by undue influence, as defined in Section 15610.70.

(b) A person or entity shall be deemed to have taken, secreted, appropriated, obtained, or retained property for a wrongful use if, among other things, the person or entity takes, secretes, appropriates, obtains, or retains the property and the person or entity knew or should have known that this conduct is likely to be harmful to the elder or dependent adult.

(c) For purposes of this section, a person or entity takes, secretes, appropriates, obtains, or retains real or personal property when an elder or dependent adult is deprived of any property right, including by means of an agreement, donative transfer, or testamentary bequest, regardless of whether the property is held directly or by a representative of an elder or dependent adult.

(d) For purposes of this section, “representative” means a person or entity that is either of the following:

(1) A conservator, trustee, or other representative of the estate of an elder or dependent adult.

(2) An attorney-in-fact of an elder or dependent adult who acts within the authority of the power of attorney.

(5) “**Investment Advisor**” 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”).

**Comment 5:** The term “promptly” should be qualified. Consider revising this Section as follows “. . . the qualified employee shall notify [the Agencies] no later than two business days from the date of discovery.” Such a revision would provide greater clarity of the qualified employee’s duties.

**Comment 6:** The terms “reasonable” and “reasonably” should be defined in Section 2. As drafted, it is unclear whether this is an objective or subjective standard, making it impossible to determine the qualified employee’s duty and what constitutes a breach of that duty. Individuals defined under the term “qualified employee” include professionals of various skillsets and levels of sophistication. Is the standard what a reasonably qualified employee would believe? Or is the standard what a reasonably qualified employee with like-experience and like-skill would have believed? The latter standard would be more ideal as it better shields the qualified employee from liability by not forcing him or her to make decisions in situations where he or she has no expertise. Similarly, this definition can also be applied to any references of “reasonable care.”

**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.

**Comment 7:** Qualify the title of this Section to “Immunity for Government Disclosure.” Providing greater specificity would make the section clearer and would make it easier to find through an index or the Act’s table of contents.

**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.

**Comment 8:** This Section is ambiguous as to who would qualify as a “third party previously designated by the eligible adult.” For example: does this entail that the third party must be one who is named under a power of attorney? Does it apply to third parties who are designated orally? Providing greater clarity to this Section or defining the term “third party previously designated” would resolve this issue.

There should also be some guidance as to how this is accomplished. In addition, disclosure also should not be made to someone who is suspected of being complicit in the financial exploitation or to someone who the qualified employee believes is likely to “tip off” the abuser

**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.

**Comment 9:** Qualify the title of this Section to “Immunity for Third-Party Disclosure.” Providing greater specificity would make the section more clear and would make it easier to find through an index or the Act’s table of contents.

**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.

**Comment 10:** This subdivision fails to provide any guidelines for how an internal review should be conducted. It is advisable either to include some direction (such as following state guidelines) or, if the drafter intends to follow any statutory guidelines for an internal review, to have the statute expressly included.

In addition, suggest expanding the scope to those complicit in the exploitation and those who are likely to “tip off” the abuser.

**Comment 11:** If the qualified employee reasonably believes there is financial exploitation, it should be mandatory that disbursements be delayed. The current subdivision makes delayed disbursements only discretionary. Thus, the term “may” should be revised to “shall” to reflect the mandatory language.

**Comment 12:** If the result of the internal review is that there is no suspected or attempted financial exploitation, what should they be reporting to the Agencies, if anything? The eligible adult should still have some expectation of privacy

(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 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.

**Comment 13:** Seven business days to begin an internal review and ten business days to release funds seems unworkable. Changing the provision to five business days to initiate an internal review and fifteen days to release funds would provide a more reasonable and workable timeframe.

(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 liability that might otherwise arise from such delay in a disbursement in accordance with this section.

**Comment 14:** Qualify the title of this Section to “Immunity for Delayed Disbursements.” Providing greater specificity would make the section more clear and would make it easier to find through an index or the Act’s table of contents.

**Comment 15:** Is this intentionally limited to administrative liability here? It seems that civil liability would be the broker-dealer or investment adviser's bigger concern when delaying distributions. I can see situations where the delay would do financial damage and the eligible adult would want compensation. This could almost render the statute useless.

**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, 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 record 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.

**Comment 16:** This Section appears to imply confidentiality based on the fact that records "shall not be considered a public record . . ." It is advisable to add a confidentiality provision to clarify any ambiguity in the phrasing and ensure that records remain private.

**Comment 17:** The term "financial impairment" should be deleted since it is not defined in Section 2 of the Act. Once the definition of "financial exploitation" is revised to reflect California Welfare & Institutions Code section 15610.30, only the term "financial exploitation" is necessary.

**Comment 18:** Consider whether the use of the information obtained from the records should be limited to the proceedings to protect the eligible adult. Imagine a situation where the agencies uncover wrongdoing by the eligible adult as a result of the disclosure. Should they then be able to turn that information over to the proper authorities? I think that the ability to do so could undermine the effectiveness of the statute. Financial advisors will often be reluctant to sacrifice their clients' privacy.