



National Association of Insurance and Financial Advisors

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October 27, 2015

North American Securities Administrators Association (NASAA) Legal Department
Attn: Christopher Staley, Counsel
NASAA
750 First Street, NE, Suite 1140
Washington, D.C. 20002

Re: NAIFA Comments on the Draft NASAA Model Legislation “An Act to Protect Vulnerable Adults from Financial Exploitation.”

Dear Mr. Staley:

The National Association of Insurance and Financial Advisors (NAIFA) submits the following comments on the draft NASAA model legislation “An Act to Protect Vulnerable Adults from Financial Exploitation” (Model Act). NAIFA commends NASAA for developing this Model Act and for seeking the perspectives of interested parties as this Model undergoes continued development.

Founded in 1890 as The National Association of Life Underwriters (NALU), NAIFA is one of the nation’s oldest and largest associations representing the interests of insurance professionals from every Congressional district in the United States. NAIFA members assist consumers by focusing their practices on one or more of the following: life insurance and annuities, health insurance and employee benefits, multiline, and financial advising and investments. NAIFA’s mission is to advocate for a positive legislative and regulatory environment, enhance business and professional skills, and promote the ethical conduct of its members.

We applaud NASAA for developing the Model Act which is designed to protect seniors from becoming victims of financial exploitation. As some recent studies from industry trade associations and consumer organizations have concluded, financial exploitation of seniors is already a significant problem which could worsen given the demographic trends of an increasingly aging population. To address this issue, some states have recently enacted laws designed to protect seniors from being victims of financial fraud – especially those seniors suffering from mental decline. These state laws typically call for financial advisors and their firms to report possible financial exploitation of a senior client to state authorities who can then conduct an appropriate investigation. Some of these state laws also permit the firms to delay a request for disbursement of funds for a specified number of days while the appropriate state agencies review the disbursement for possible financial exploitation. These laws also provide advisors and firms with immunity from liability for taking steps to protect their client’s financial assets by following the provisions of the law. The concepts of some of these state laws are embodied in the draft Model Act.

While NAIFA supports the intent of the Model Act to protect seniors from financial exploitation, we have concerns with some of its provisions and how it may affect agents (also commonly referred to as “registered representatives”) and investment advisor representatives (collectively, “Advisors”) if enacted into law in the states, particularly: 1) the mandatory nature of the reporting requirement; 2) the reporting process to notify state authorities outlined in Section 3; and 3) the provision permitting broker-dealers and investment advisers to delay a disbursement request if financial exploitation of a senior client is suspected. We describe our specific concerns below in more detail and also suggest new language for your consideration.

Mandatory Reporting Requirement

NAIFA is concerned with the mandatory nature of the proposed reporting requirement on advisors and other “qualified employees” set forth in Section 3 of the Model Act, which mandates that qualified employees must report to the Agencies instances where financial exploitation of a senior client is suspected. We believe this requirement could potentially expose advisors to liability not covered under the immunity provisions in the Model, and it could also result in the over-reporting of transactions that may not be connected with financial exploitation.

Despite the language in the draft Model Act to shield these individuals from liability for complying with the Model Act’s provisions, the proposed mandatory reporting process could inadvertently open up advisors and firms to *more* liability. For example, an advisor may receive a request from an Eligible Adult client for a disbursement of funds which the advisor in his/her reasonable judgment does not believe is connected with any attempt to financially exploit that client and therefore does not report the disbursement request to state authorities. However, if in hindsight the disbursement is later discovered to be connected with financial exploitation and resulted in the unauthorized taking of some of the client’s financial holdings, an advisor could be accused by the client’s family or legal representative of not having complied with the Model Act’s mandatory reporting requirement. Under these circumstances, the Model Act’s immunity provisions would not protect the advisor from potential liability.

A mandatory notification requirement could also result in an excessive number of agency notifications being made, and many of these notifications will likely be made based only on limited evidence or suspicion in an attempt to avoid a subsequent determination of liability for failing to comply with Section 3. Before reporting any suspicious financial activity, it is critical that advisors and their firms first make a careful and necessarily subjective judgment based on limited information contained in a request for disbursement about possible financial exploitation of one of their senior clients. Any reporting of a questionable disbursement request and subsequent delay of executing that request could have serious financial consequences to the client. To better protect their clients’ assets from financial loss, advisors and firms should have flexibility in determining whether a disbursement request is connected with financial exploitation since reporting and delaying such request could potentially devalue a client’s potential investment. We believe a voluntary reporting provision would be more effective than a mandatory provision in accomplishing this goal.

Notifying State Authorities and Third Parties

We are also concerned that the Model Act, via Sections 3 and 5, authorizes the advisor and other qualified employees to notify the Agencies and designated third parties if financial exploitation is suspected. To help ensure that a client’s disbursement is, in fact, connected to such exploitation, we

believe advisors should first report suspicious requests to the supervisory, legal and/or compliance personnel at their broker dealer or investment advisor firms, who should review the matter and ultimately decide if it should be reported to authorities. The final determination of possible suspected financial exploitation should be made by specific individuals at financial firms who specialize in anti-fraud law and detecting suspicious financial activity rather than by advisors who likely do not have such expertise. This process would ensure that the suspected financial exploitation is subject to additional and more detailed review by company experts that can discern if financial exploitation may be occurring. If, after further review, the firm's appropriate staff reasonably believes that financial exploitation of a senior client may have occurred, has been attempted, or is occurring, the qualified employee and/or the broker dealer/ investment adviser firm could then notify the state authorities noted in the Model Act.

Advisors can play a critical role in protecting their senior clients from financial exploitation. Many NAIFA members serve senior clients and want to be able to follow a process where industry can notify appropriate state authorities of possible financial exploitation of seniors to protect their clients from losing their critical assets to fraudsters. To address our concerns regarding the mandatory reporting process and the notification requirements outlined above, we suggest for your consideration the following revisions to the draft Model Act:

- Amend the definition of "Qualified Employee" found in Section 2(7) to omit the phrase "...agent, investment advisor, representative or..." so the definition reads as follows:

(7) "Qualified employee" means any person who serves in a supervisory, compliance, or legal capacity for a broker-dealer or investment adviser.

- Amend Section 3 – Governmental Disclosures – to read as follows:

Section. 3 Government Disclosures.

- (1) If an agent or investment adviser representative reasonably believes that financial exploitation of a client who is a qualified adult has occurred, may have been attempted, or is being attempted, the agent or investment adviser representative may notify a qualified employee.*
- (2) Upon receiving notice from an agent or investment adviser representative or otherwise reasonably believing that financial exploitation of an eligible adult may have occurred, may have been attempted, or is being attempted, a qualified employee may promptly notify Adult Protective Services and the commissioner of securities (Agencies).*

Delaying Disbursements

We are also concerned with some of the language in Section 7, which would permit a broker-dealer or investment adviser to temporarily delay a disbursement request provided they suspect the disbursement may result in the financial exploitation of the client and that the firm promptly informs state authorities of the decision to delay executing the client's request.

Section 7 (2) appears to indicate that if the 20 business day delay period has elapsed and the firm has not received direction from the agency as to whether or not to proceed with the disbursement, the firm

should nonetheless move ahead with the disbursement. This would potentially create a situation where the disbursement takes place without any determination by the appropriate authority that exploitation did not occur, which could potentially subject the qualified employee and/or firm to significant liability.

In light of this, NAIFA believes this Section can and should be clarified so there is no uncertainty as to how firms must handle a delayed disbursement request. We suggest that language be inserted into the Model Act to direct the appropriate state agencies to reach a conclusion on whether or not a reported transaction is connected to financial exploitation and inform the firm of such conclusion. Further, language should also be included *requiring* the firm to execute the client's request if the firm does not receive the required guidance from the agency upon expiration of the delay period. This express mandate would minimize any legal uncertainty as to how to proceed with a reported and delayed disbursement request. We therefore recommend the following revisions to Section 7:

- Insert a new subsection (2) which reads as follows (and renumber the succeeding subsections):

The appropriate agency, upon receiving a notice from a broker-dealer or investment adviser that the broker-dealer or investment adviser is delaying a client's request for disbursement of funds due to suspected financial exploitation, shall investigate the reported disbursement and determine if the broker-dealer or investment adviser should proceed with or continue to postpone the disbursement of funds. The agency shall deliver its determination in writing to the broker-dealer or investment adviser within the time period specified in subsection 3 below.

- Insert a new subpart (c) in renumbered subsection (3) which reads as follows:

Receiving a determination from the appropriate agency that that the qualified individual or firm should proceed with the requested disbursement of funds from the transaction.

- Insert a new subsection (5) which reads as follows:

If the appropriate agency has not delivered the written determination required under Section 7(2) of this Act within the twenty (20) business day time period specified in Section 7(3)(b), the qualified individual or firm shall proceed with the disbursement of funds.

We believe these changes to the Model Act will ensure that any suspected financial exploitation of a senior client is first subject to careful review by qualified personnel at broker-dealers and investment advisers who can then make a determination to report suspicious requests for disbursements to authorities and/or delay a requested disbursement for a reasonable period of time. These changes will also outline a process where agencies will provide clear and critical direction to broker-dealers and investment advisers regarding how to proceed with a disbursement request upon expiration of the delay period.

To assist you in reviewing our comments, attached to this letter is a red-lined version of the Model Act containing NAIFA's suggested revisions. We appreciate the opportunity to comment on the Model Act, and we thank you for your consideration of our views and suggestions. Please feel free to contact me if you have any questions.

Sincerely,

A handwritten signature in blue ink, appearing to read "Steve Kline". The signature is fluid and cursive, with the first name "Steve" written in a larger, more prominent script than the last name "Kline".

Steve Kline
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**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. (1) If an agent or investment adviser representative reasonably believes that financial exploitation of a client who is a qualified adult has occurred, may have been attempted, or is being attempted, the agent or investment adviser representative may notify a Qualified Employee.

~~(2) Upon receiving notice from an agent or investment adviser representative or otherwise reasonably believing that financial exploitation of an eligible adult may have occurred, may have been attempted, or is being attempted, 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 may 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) The appropriate agency, upon receiving a notice from a broker-dealer or investment adviser that the broker-dealer or investment adviser is delaying a client's request for disbursement of funds due to suspected financial exploitation, shall investigate the reported disbursement and determine if the broker-dealer or investment adviser should proceed with or continue to postpone the disbursement of funds. The agency shall deliver its determination in writing to the broker-dealer or investment adviser within the time period specified in subsection 3 below.

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~~(3)~~ 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.

(c) Receiving a determination from the appropriate agency that that the qualified individual or firm should proceed with the requested disbursement of funds from the transaction.

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~~(4)~~ A court of competent jurisdiction may enter an order extending the delay of the disbursement of funds or may order other protective relief.

(5) If the appropriate agency has not delivered the written determination required under Section 7(2) of this Act within the twenty (20) business day time period specified in subsection 3(b), the qualified individual or firm shall proceed with the disbursement of funds.

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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.