

NASAA Model Legislation or Regulation to
Protect Vulnerable Adults from Financial
Exploitation | Adopted January 22, 2016

LEGISLATIVE TEXT & UPDATED COMMENTARY
FOR 2017 LEGISLATIVE SESSION

NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION



ABOUT NASAA

The oldest international organization devoted to investor protection, the North American Securities Administrators, Inc. was organized in 1919. Its membership consists of the securities administrators in the 50 states, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, Canada and Mexico. NASAA is the voice of securities agencies responsible for grass-roots investor protection and responsible capital formation.

State securities regulators have a long-standing commitment to protecting investors, especially elderly investors. State securities regulators often initiate investigations as a result of complaints from investors who believe they have been wronged by a professional in (or claiming to be part of) the securities industry. Many in our elderly population are vulnerable due to social isolation and distance from family, caregivers, and other social support networks. NASAA's members are keenly aware of this and they interact with senior investors on a regular basis, whether through investor education events or in response to investors' questions.

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Background: The need for new tools to help detect and prevent financial exploitation of vulnerable adults

Financial exploitation is the fastest growing category of elder abuse in many states. According to the 2010 Investor Protection Trust Elder Fraud Survey, one out of every five citizens over the age of 65 has been victimized by a financial fraud.¹ These frauds can be perpetrated by strangers, con artists, or even by family members and caregivers in whom the elderly have placed their trust.

State securities regulators are committed to protecting retail investors and are often well positioned to intercede on behalf of vulnerable seniors. However, to be successful in combating senior financial exploitation, securities regulators must be made aware of it. State legislatures should assist in this effort by enacting policies that will break down unwarranted barriers to the sharing of information about financial exploitation and inspire action by financial services professionals who are positioned to identify red flags. In this regard, the enclosed NASAA Model Act to Protect Vulnerable Adults from Financial Exploitation (“Model Act” or “Act”) represents an important and significant step forward.

The Model Act originated as an initiative of NASAA’s Committee on Senior Issues and Diminished Capacity (“Seniors Committee” or “Committee”).² The Seniors Committee, formed in 2014, is the latest in a series of initiatives from NASAA and its 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. The most effective way to address the protection of seniors and vulnerable adults is through a holistic approach, and the Seniors Committee is advised by an Advisory Council drawing from representatives from industry, academia, regulatory agencies and elder advocates.³

On September 29, 2015, a draft of the proposed Model Act was released for a 30-day public comment period.⁴ The Committee received and considered comments from various interested parties and considered a similar proposal contained in Regulatory Notice 15-37 issued by the Financial Industry Regulatory Authority (“FINRA”).⁵ Furthermore, in light of federal legislation proposed in October 2015,⁶ the Committee conducted further internal review in late 2015 and revised several elements of the Model Act. On December 22, 2015, NASAA’s Board of Directors approved the Committee’s request to submit the proposed Model Act to the NASAA membership for consideration. On January 22, 2016, NASAA members voted to approve the Model Act.

The NASAA Model Act applies to broker-dealers and investment advisers, including certain qualified individuals (broker-dealer agents, investment adviser representatives and persons serving in a supervisory, compliance, or legal capacity for a broker-dealer or investment adviser). The provisions of the Model Act could be adopted by a jurisdiction statutorily as part of a jurisdiction’s existing securities laws or, potentially, through regulation. The Model Act has five core features. Taken together, these provisions clarify and more closely align the interests and responsibilities of financial professionals, regulators, and law enforcement in regard to the reporting and prevention of senior financial exploitation. These features include:

- (1) A mandatory reporting requirement applicable to qualified individuals of broker-dealers and investment advisers;
- (2) Notification to third-parties of potential financial exploitation with advance consent of the investor;
- (3) The authority to temporarily delay disbursement of funds;

- (4) Immunity from civil and administrative liability for reporting, notifications, and delays; and,
- (5) Mandatory sharing of records related to exploitation with law enforcement and state adult protective services agencies.

An explanation of the rationale for these provisions and the interplay between them is discussed in the commentary to each section of the Model Act. Additional information about many of the policy recommendations embodied in the Model Act is included in the Endnotes to this report.

Since publication of the Model Act, two states – Alabama,⁷ and Indiana,⁸ have enacted statutes that contain provisions similar to those found in the Model Act including mandatory reporting to state securities regulators along with APS offices. Additionally, Vermont⁹ has adopted the Model Act by regulation. A fourth state, – Louisiana¹⁰ – has passed legislation that protects voluntary disclosures.

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-five years of age or older; or
 - (b) a person subject to [insert state Adult Protective Services 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, guardianship, or conservatorship 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 individual”** means any agent, investment adviser representative or person who serves in a supervisory, compliance, or legal capacity for a broker-dealer or investment adviser.

Commentary:

Relevant definitions of terms used throughout the Model Act are found in Section 2. The definition of “eligible adult” includes any natural person who, at the time of the suspected financial exploitation, is 65 years or older or is subject to the provisions of a state’s adult protective services (“APS”) statute.¹¹

The term “qualified individual” consists of those persons charged with certain responsibilities and provided certain immunities under the Model Act. Qualified individuals include “agents” and “investment adviser representatives” (or similar terms) as defined in a jurisdiction’s securities laws. Qualified individuals also include persons serving in a supervisory, compliance, or legal capacity for a broker-dealer or investment adviser. Qualified individuals may be registered in any capacity with the jurisdiction or physically located in the jurisdiction. A broker-dealer or investment adviser employing or supervising such qualified individuals also may be registered or located in the jurisdiction.¹²

The term “financial exploitation” is intended to be interpreted broadly and to include any unlawful or unauthorized taking, withholding or deprivation of beneficial ownership rights in any money, assets or property in which an eligible adult has a lawful property interest. The elements of wrongfulness in the definition of financial exploitation are intended to be subjective, not objective, standards – i.e., it is “financial exploitation” within the meaning of the Model Act if a qualified individual subjectively believes that an unlawful or unauthorized taking, withholding or deprivation of beneficial ownership rights has occurred, regardless of whether

that person's belief is objectively correct. (Objective considerations are reflected in the Model Act's operative provisions.)

Section 3. Governmental Disclosures

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

Commentary:

Section 3 mandates reporting to a jurisdiction's securities regulator (or like agency) and to a jurisdiction's APS (or like agency) whenever a qualified individual “reasonably believes” that financial exploitation of an eligible adult may have occurred or been attempted, or currently is being attempted.

“Reasonable belief” is intended to be both a subjective and objective standard – i.e., a qualified individual must have a subjective belief in the existence of the financial exploitation, and this belief must be objectively reasonable. Section 3 requires a notification when a qualified individual reasonably believes financial exploitation “may have” occurred or been attempted. The presence of this “reasonable belief” element in Section 3 should limit the number of unsubstantiated reports.

Violations of Section 3 would be actionable by state regulatory authorities. Because the Model Act is drafted for potential adoption as a statute or as a regulation, jurisdictions should determine whether any appropriate conforming provisions are required to clarify the appropriate regulatory authority for enforcement of Section 3 and the potential consequences for violations.

The issue of mandatory versus permissive reporting received significant comment from the public.¹³ Some commenters, primarily industry trade groups, advocated for a permissive reporting standard while others, including consumer advocates and adult protective service professionals, supported mandatory reporting. The Seniors Committee carefully weighed the arguments and ultimately declined to shift to a permissive reporting regime on the grounds that the reporting mandate in Section 3 is indispensable to the Act's goal of enhancing protection for seniors and other vulnerable adults.

Far too many instances of elder abuse go unreported.¹⁴ A mandatory reasonable belief reporting requirement coupled with immunity for reporting provides an appropriate balance of incentives to encourage broker-dealers and investment advisers to report potential financial exploitation. Time is of the essence when one considers financial exploitation, as it is often accompanied by some other form of elder abuse or neglect. Mandatory reporting ensures that the proper regulatory agencies are alerted to cases of potential financial exploitation as early as possible, when their intervention may be able to prevent harm or limit the damage to victims of financial exploitation. The ability to have a regulator assess the situation and determine whether additional resources should be brought to bear is also a key component of any approach intended to provide meaningful protection to vulnerable investors.

Section 4. Immunity for Governmental Disclosures

A qualified individual 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.

Commentary:

Section 4 grants immunity from potential administrative or civil liability to a qualified individual for making a report pursuant to Section 3. The individual must have acted in “good faith” and exercised “reasonable care” in making the Section 3 report. These are intended to be objective, not subjective, standards. But Section 4 grants no immunity from any potential criminal liability.¹⁵ Section 4 furthermore confers no civil or administrative immunity with respect to prior misconduct by the reporting individual – i.e., an individual cannot engage in wrongful conduct, report that wrongful conduct pursuant to Section 3, and then seek civil or administrative immunity for the prior wrongful conduct under Section 4.

Section 5. Third-Party Disclosures

If a qualified individual reasonably believes that financial exploitation of an eligible adult may have occurred, may have been attempted, or is being attempted, a qualified individual 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.

Commentary:

To the greatest possible extent, seniors and other vulnerable adults should themselves be making decisions about whom a financial services professional should contact in the event of suspected financial exploitation. Section 5 of the Model Act provides that where a qualified individual would be required to make a report pursuant to Section 3, the qualified individual may also make a notification to the same extent to any such person as has previously been designated by the eligible adult. The disclosure may not be made, though, if the qualified individual suspects the designated person of being involved in, or aware of, the suspected financial exploitation or otherwise suspects the designated person as having engaged in abuse of the eligible adult. A goal of the Model Act is to encourage seniors and other vulnerable adults to designate persons in whom they trust to receive notices of potential financial exploitation. Further, broker-dealers

and investment advisers should do what they can to encourage seniors and other potentially vulnerable clients to identify appropriate points-of-contact for situations such as suspected exploitation or diminished capacity in advance of its occurrence. By providing immunity only for the notification of third parties that have been previously designated by the vulnerable adult, Section 5 will encourage financial professionals to have these important conversations prior to any potential exploitation.¹⁶

Section 6. Immunity for Third-Party Disclosures

A qualified individual 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.

Commentary:

Section 6 is intended to provide immunity to qualified individuals for making disclosures pursuant to Section 5 to the same extent as such immunity is conferred by Section 4 with respect to notifications made pursuant to Section 3.

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 individual reasonably believes, after initiating an internal review of the requested disbursement and the suspected financial exploitation, that the requested disbursement may 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. Continues its internal review of the suspected or attempted financial exploitation of the eligible adult, as necessary, and reports the investigation's results to the Agencies within seven business days after the requested disbursement.

(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) fifteen 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-five 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 based on the petition of the commissioner of securities, Adult Protective Services, the broker-dealer or investment adviser that initiated the delay under this Section 7, or other interested party.

Commentary:

Section 7 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 (or any

qualifying individuals therein) reasonably believes that such disbursement will result in the financial exploitation of the eligible adult. The broker-dealer or investment adviser shall direct that the funds be held in temporary escrow pending resolution of the disbursement decision. If a disbursement is delayed, notice must be provided within two days to all persons authorized to transact business on the account (unless any such person is suspected of financial exploitation) and to the state securities commissioner and APS agency. The broker-dealer or investment adviser must also undertake an internal review and report the results within seven days of the requested disbursement.¹⁷ The Committee considered some commenters' suggestions that the Model Act allow broker-dealers or investment advisers to delay the actual execution of transactions, but concluded that holding funds in temporary escrow would be preferable policy and, furthermore, that delaying executions could be inconsistent with applicable federal laws and regulations governing the execution of securities transactions.

Section 8. Immunity for Delaying Disbursements

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.

Commentary:

Section 8 is intended to provide immunity to broker-dealers and investment advisers (and any qualifying individuals therein) for delaying disbursements pursuant to Section 7.

Section 9. Records

A broker-dealer or investment adviser shall 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. 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.

Commentary:

Section 9 ensures appropriate access to the records of broker-dealers and investment advisers by agencies in cases of suspected or attempted financial exploitation by requiring that broker-dealers and investment advisers provide such records to APS agencies. Section 9 also clarifies that records shared by broker-dealers or investment advisers pursuant to the Act shall not be subject to state public records laws. This provision is intended to facilitate disclosure to APS agencies while maintaining the confidentiality of personal financial information. This provision does not diminish the authority of securities regulators to examine or obtain the records of broker-dealers or investment advisers under currently applicable law.¹⁸

Endnotes

¹ 2010 Investor Protection Trust Elder Fraud Survey, available at investorprotection.org/downloads/EIFFE_Survey_Report.pdf.

² For more information about the NASAA Seniors Committee, see serveourseniors.org/about/policy-makers/advisory-council/.

³ For more information about NASAA's Board-level Committee on Senior Issues and Diminished Capacity, see serveourseniors.org/about/policy-makers/advisory-council/.

⁴ See Notice of Request for Comments Regarding NASAA's Proposed Model Legislation or Regulation to Protect Vulnerable Adults from Financial Exploitation (Sept. 29, 2015), available at nasaa.org/37301/notice-of-request-for-comments-regarding-nasaas-proposed-model-legislation-of-regulation-to-protect-vulnerable-adults-from-financial-exploitation/.

⁵ FINRA Regulatory Notice 15-37, *Financial Exploitation of Seniors and Other Vulnerable Adults* (Nov. 30, 2015), available at finra.org/sites/default/files/notice_doc_file_ref/Regulatory-Notice-15-37.pdf.

⁶ See SeniorSafe Act of 2015, S.2216 / H.R. 4538, available at congress.gov/bill/114th-congress/senate-bill/2216/related-bills.

⁷ See SB 220, Alabama Regular Session 2016, available at <http://alisondb.legislature.state.al.us/ALISON/SearchableInstruments/2016rs/PrintFiles/SB220-enr.pdf>.

⁸ See SEA 221, Indiana Second Regular Session 2016, available at iga.in.gov/legislative/2016/bills/senate/221#document-72ee118f.

⁹ See Rule No. S-2016-01, Vermont Sec. Reg. § 8-5, available at dfr.vermont.gov/reg-bul-ord/vermont-securities-regulations.

¹⁰ See SB 338, Louisiana Regular Session 2016, available at egis.la.gov/legis/ViewDocument.aspx?d=1012781.

¹¹ The decision to affix the age at 65 reflects a desire to maximize the Model Act's consistency with related proposals that are now being developed by Congress, FINRA, and some state legislatures. As originally proposed, the Model Act would have applied to adults 60 years or older or those adults that would be subject to the provisions of a state's APS statute. Some commenters suggested adjusting the age to 65 to bring the Model Act in line with other frameworks aimed at protecting seniors from financial exploitation (including existing state definitions, federal legislation such as the proposed SeniorSafe Act, and FINRA Regulatory Notice 15-37), and the Seniors Committee and NASAA ultimately agreed.

¹² As proposed for public comment, the Model Act used the term "qualified employee," however this term was revised in the final version of the Model to make clear that the Model Act does not only apply to employees of a broker-dealer or investment adviser, but also to any independent contractors that may be fulfilling any of the roles described in the definition. The use of the term also reflects the determination that requiring individual agent and adviser level reporting is appropriate given these individuals often have closer relationships with their clients and customers than does any firm or institution. Some commenters suggested that the Model Act limit the definition of qualified individual to only those employees of a broker-dealer or investment adviser that serve in a supervisory, compliance, or legal capacity, arguing that the duties of qualified employees and the decisions qualified employees must make regarding the sensitive issues surrounding potential financial exploitation are better suited for more senior, experienced personnel. Commenters also expressed a concern about multiple reports involving the same vulnerable adult. Other commenters felt the reporting personnel should be expanded. While the Committee considered these comments, the Committee ultimately determined that requiring individual agent and adviser level reporting is appropriate given these individuals often have closer relationships with their clients and customers.

¹³ Numerous states have enacted laws that mandate reporting of suspected elder financial exploitation by banks and other financial institutions prior to the Model Act, including California (CAL. WELF. & INST. CODE § 15630.1), Florida (FLA. STAT. § 415.1034), Georgia (GA. CODE § 30-5-4), Kansas (Kan. Stat. § 39-1431), and Mississippi (MISS. CODE § 43-47-4).

¹⁴ According to the National Association of Adult Protective Services (NAPSA), only one in 44 cases of financial abuse is ever reported. See: napsa-now.org/policy-advocacy/exploitation/.

¹⁵ The provision of criminal immunity was considered and rejected by the NASAA Committee prior to seeking public comment on the Model Act, and no commenters presented persuasive arguments for its addition. Indeed, neither the NASAA Committee nor commenters were able to envision a situation in which criminal liability would arise from either the reporting requirements of the Model Act or from the delay of a disbursement pursuant to Section 7. Some commenters sought further clarifications as to the applicability of the immunity provisions in Section 4 to specific actions brought by specific parties. Some commenters wanted clarification that the immunity provisions extended to actions brought by government entities, such as state securities regulators or APS agencies. Other commenters advocated for the inclusion of immunity from criminal liability. Still another commenter sought clarification as to the “good faith and reasonable care” standard, the extension of immunity beyond reporting and disbursement delays, and clarification that nothing in the Model Act would limit a firm’s options under existing law, such as the ability to utilize certain contractual provisions. However, the NASAA Committee concluded that the language in Section 4 fully encompassed the scope of all civil and administrative actions, and no further clarification was necessary.

¹⁶ NASAA believes financial services firms should be doing more to work with seniors and other potentially vulnerable clients to identify appropriate points-of-contact ahead of time in the event of suspected exploitation or diminished capacity, for example at the time an account is opened. Under Section 5, a disclosure may not be made to a third party if the qualified individual suspects the third party of being aware of or involved in the financial exploitation. This is important because research indicates that a high proportion of reported senior financial exploitation is perpetrated by friends or family members.

¹⁷ As initially proposed, the Model Act would have permitted an initial disbursement delay of 10 business days. The Committee increased this initial disbursement delay from 10 to 15 business days in the final version of the Act following public comment because a longer period would provide more time for broker-dealers or investment advisers to review the suspected financial exploitation. Section 7(1)(a) clarifies that a firm must conduct an internal review of the facts and circumstances in order to have a reasonable belief that financial exploitation may occur. Section 7(1)(b)(iii) clarifies that a firm must continue its review or investigation following a delayed disbursement and must report the results of that review or investigation to the Agencies. The Committee considered but declined some commenters’ recommendations to add a provision relating to governmental investigations. The Committee declined to expand the delay beyond a total of 25 business days (an initial 15-day delay at the firm’s discretion, followed by a potential 10-day extension at the request of a state securities regulator or adult protective services office) in view of comments from consumer advocates noting the potential harms investors could face if disbursements are delayed too long, such as bounced check fees, missed bill payments, and other financial hardships.

¹⁸ It is NASAA’s understanding that APS agencies often have difficulty obtaining records from financial firms in a timely fashion. Mandating record sharing will help forestall this potential problem. Given the often urgent nature of these matters, it is important to make clear in the Model that broker-dealers and investment advisers must comply with requests for information from APS agencies or law enforcement.