

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Commerce and Tourism

BILL: SB 662

INTRODUCER: Senators Stargel and Taddeo

SUBJECT: Protection for Vulnerable Investors

DATE: February 19, 2018

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Johnson</u>	<u>Knudson</u>	<u>BI</u>	Favorable
2.	<u>Little</u>	<u>McKay</u>	<u>CM</u>	Pre-meeting
3.	_____	_____	<u>RC</u>	_____

I. Summary:

SB 662 authorizes a dealer, investment advisor, or an associated person to place a temporary hold on a financial transaction under certain circumstances to prevent the exploitation of vulnerable adults and adults who are 65 years of age or older. To place a temporary hold, the dealer, investment advisor, or associated person must believe in good faith that the exploitation of a specified adult has occurred, is occurring, or has been attempted.

After placing the temporary hold, the dealer, investment advisor, or associated person must immediately notify the Department of Children and Families of the suspected exploitation, through the agency's central abuse hotline. Within 3 business days after placing the temporary hold, the dealer, investment advisor, or associated person must also notify all parties authorized to transact business on the account, unless a party is believed to be engaged in the suspected exploitation.

The bill provides that a temporary hold expires after 15 business days, but the hold may be extended for up to 10 additional business days if the facts and circumstances continue to support a good faith belief of exploitation. The bill also authorizes a court or agency of competent jurisdiction to extend or shorten the length of the temporary hold at any time.

In response to the increasing financial exploitation of seniors, the Financial Industry Regulatory Authority (FINRA) recently implemented rules to provide its members with the ability to place a hold on a disbursement of funds or securities from a customer's account. Under the rules, a hold may be applied if there is a reasonable basis to believe that financial exploitation of a specified adult has occurred, is occurring, has been attempted, or will be attempted. These rules took effect on February 5, 2018; however, they do not apply to broker-dealers and investment advisers who are not FINRA members.

II. Present Situation:

Financial Exploitation of Seniors

With the aging of the U.S. population, financial exploitation of seniors is a serious and growing problem. Senior financial abuse schemes are a \$2.9 billion industry.¹ Financial exploitation is a fast-growing form of abuse of seniors and adults with disabilities. Situations of financial exploitation commonly involve trusted persons in the life of the vulnerable adult. Recent research has found that elder financial exploitation is widespread and expensive, as noted:

- One in nine seniors reported being abused, neglected or exploited in the past 12 months; the rate of financial exploitation is extremely high, with 1 in 20 older adults indicating some form of perceived financial mistreatment occurring in the recent past.
- Elder abuse is vastly under-reported; only one in 44 cases of financial abuse is reported.
- Abused seniors are three times more likely to die and elder abuse victims are four times more likely to go into a nursing home.
- Ninety percent of abusers are family members or trusted others.
- Almost one in ten financial abuse victims will turn to Medicaid as a direct result of their own monies being stolen from them.
- Cognitive impairment and the need for help with activities of daily living make seniors more vulnerable to financial abuse.²

Adult Protective Services/Department of Children and Families

The Adult Protective Services (APS) program, under the Department of Children and Families (DCF), is responsible for investigating allegations of abuse, neglect or exploitation, as provided in the Adult Protective Services Act.³ Section 415.101, F.S., provides that the legislative intent of this act is to provide for the detection and correction of abuse, neglect, and exploitation through social services and criminal investigations and to establish a program of protective services for all vulnerable adults in need of them. Further, it is intended that the mandatory reporting of such cases will cause the protective services of the state to be brought to bear in an effort to prevent further abuse, neglect, and exploitation of vulnerable adults. In taking this action, the Legislature intends to place the fewest possible restrictions on personal liberty and the exercise of constitutional rights, consistent with due process and protection from abuse, neglect, and exploitation.

Handling of Allegations of Abuse, Neglect, or Exploitation

The Florida Abuse Hotline, within the DCF, screens allegations of adult abuse, neglect, and exploitation to determine whether the information meets the criteria of an abuse report. The DCF is required, upon receipt of a report alleging abuse, neglect, or exploitation of a vulnerable adult, to initiate a protective investigation within 24 hours.⁴ Section 415.102, F.S., defines a

¹ National Conference of State Legislatures, *Financial Crimes against the Elderly*, available at <http://www.ncsl.org/research/financial-services-and-commerce/financial-crimes-against-the-elderly-2016-legislation.aspx> (last visited Feb. 19, 2018).

² National Association of Adult Protective Services Association, *Elder Financial Exploitation*, available at <http://www.napsa-now.org/policy-advocacy/exploitation/> (last visited Feb. 19, 2018).

³ Sections 415.101-415.113, F.S.

⁴ Section 415.104(1), F.S.

“vulnerable adult” as “a person 18 years of age or older whose ability to perform the normal activities of daily living or to provide for his or her own care or protection is impaired due to a mental, emotional, sensory, long-term physical, or developmental disability or dysfunction, or brain damage, or the infirmities of aging.”

For each report it receives, the APS must determine whether the person meets the definition of a vulnerable adult and, if so, whether:

- The person is in need of services;
- There is an indication of abuse, neglect, or exploitation; and
- Protective, treatment, or ameliorative services are necessary to safeguard and ensure the vulnerable adult’s wellbeing.⁵

If exploitation is determined to have occurred, the APS notifies the appropriate law enforcement agency and the state attorney’s office for a possible criminal investigation. The primary function of the APS is to safeguard the vulnerable adult⁶ and law enforcement is responsible for criminal investigations. The APS may obtain a court order when a vulnerable adult lacks the capacity to consent or to refuse services in order to safeguard the vulnerable adult and their assets.

Currently, the APS cannot place a temporary hold on any financial transaction without a court order.⁷

Mandatory Reporting and Immunity

Section 415.1034, F.S., provides a mandatory requirement for any person to report to the central abuse hotline if they know, have suspicion, or have reasonable cause to suspect, that a vulnerable adult has been or is being abused, neglected, or exploited. Section 415.106, F.S., provides that any person reporting or that participates in a judicial proceeding is presumed to be acting in good faith and, unless lack of good faith is shown by clear and convincing evidence, is immune from any civil or criminal liability that otherwise might be incurred or imposed.

Access to Records

Section 415.1045, F.S., provides a protective investigator with access to all relevant medical, social, or financial records or documents in the possession of any person, caregiver, guardian, or facility, unless specifically prohibited by the vulnerable adult who has capacity to consent. The confidentiality of such documents does not constitute grounds for failure to:

- Report as required by s. 415.1034, F.S.;
- Cooperate with the department in its activities under ss. 415.101-415.113, F.S.;
- Give access to such records or documents; or
- Give evidence in any judicial or administrative proceeding relating to abuse, neglect, or exploitation of a vulnerable adult.

⁵ Section 415.104(2), F.S.

⁶ Department of Children and Families; Protecting Vulnerable Adults, available at <http://www.myflfamilies.com/service-programs/adult-protective-services/protecting-vulnerable-adults> (last visited Feb. 19, 2018).

⁷ Department of Children and Families, *Analysis of SB 662* (Dec. 6, 2017) (on file with the Senate Banking and Insurance Committee).

If any person refuses to allow a law enforcement officer or the protective investigator to have access to relevant information, the DCF may petition the court for an order requiring the person to allow access to the record or document. The petition must allege specific facts sufficient to show that the record or document is relevant to the allegations under investigation and that the person refuses to allow access to such record or document. If the court finds by a preponderance of the evidence that the record or document is relevant to the allegations under investigation, the court may order the person to allow access to and permit the inspection or copying of the medical, social, or financial record or document.⁸

Release of Confidential Information

In order to protect the rights of the individual or other persons responsible for the welfare of a vulnerable adult, all records concerning reports of abuse, neglect, or exploitation are confidential and exempt from public record provisions under s. 119.07(1), F.S. The records may not be disclosed, except as specifically authorized by ss. 415.101-415.113, F.S.,⁹ which provides a few exceptions. Currently, the DCF may not share information concerning open cases or disposition of cases with any third parties other than law enforcement.¹⁰

Any person or organization, including the DCF, may petition the court to make public the records of the DCF pertaining to an investigation of alleged abuse, neglect, or exploitation of a vulnerable adult. The court determines whether good cause exists for public access by balancing the best interests of the vulnerable adult together with the privacy right of other persons identified in the reports against the public interest.¹¹

Criminal Penalties

Section 415.111, F.S., provides that a person who knowingly and willfully makes public or discloses any confidential information contained in the central abuse hotline, or in other computer systems, or in the records of any case of abuse, neglect, or exploitation of a vulnerable adult, except as provided in ss. 415.101-415.113, F.S., commits a misdemeanor of the second degree, punishable as provided in s. 775.082, F.S., or s. 775.083, F.S.

Federal Regulation of Securities

The Securities and Exchange Commission (SEC), created by the federal Securities Act of 1934 ('34 Act), has broad authority over all aspects of the securities industry, including the power to register, regulate, and oversee broker-dealers, brokerage firms, transfer agents, and clearing agencies as well as the nation's securities self-regulatory organizations (SROs).¹² The New York Stock Exchange, the NASDAQ Stock Market, the Chicago Board of Options, and the Financial Industry Regulatory Authority (FINRA) are forms of SROs.

⁸ Section 415.1045(5), F.S.

⁹ Section 415.107, F.S.

¹⁰ Department of Children and Families correspondence (Dec. 20, 2017) (on file with Senate Banking and Insurance Committee).

¹¹ Section 415.1071, F.S.

¹² 15 U.S.C. ss. 78c(4) and 78o; U.S. SECURITIES AND EXCHANGE COMMISSION, *Guide to Broker-Dealer Registration*, <http://www.sec.gov/divisions/marketreg/bdguide.htm#II> (last visited Feb. 19, 2018).

Generally, any person acting as “broker” or “dealer,” as defined in the ’34 Act, must be registered with the SEC and must join an SRO, like the Financial Industry Regulatory Authority (FINRA) or a national securities exchange. The ’34 Act broadly defined “broker” as “any person engaged in the business of effecting transactions in securities for the account of others,” which the SEC has interpreted to persons involved in any of the key aspects of a securities transaction, such as solicitation, negotiation, and execution.¹³ A “dealer” is defined as “any person engaged in the business of buying and selling securities... for such person’s own account through a broker or otherwise.”¹⁴ Certain entities in the securities industry are referred to as “broker-dealers” because the institution is a “broker” when executing trades on behalf of a customer, but is a “dealer” when executing trades for its own account. In addition to being registered with the SEC, broker-dealers must comply with state registration requirements.

FINRA Rules

In April 2015, the FINRA launched its Securities Helpline for Seniors, which has highlighted some of the issues firms are facing relating to senior investors, including how firms respond when they suspect a senior customer is being exploited. Two years later, the helpline had fielded more than 8,600 calls and recovered over \$4.3 million in voluntary reimbursements from firms to customers.¹⁵ In response to this issue, the FINRA proposed rules addressing financial exploitation of specified adults.

In February 2017, the SEC approved the adoption of a new FINRA Rule 2165¹⁶ (Financial Exploitation of Specified Adults) to allow members to place temporary holds on disbursements of funds or securities from the accounts of specified customers where there is a reasonable belief of financial exploitation of these customers. The SEC also adopted amendments to FINRA Rule 4512 (Customer Account Information) to require members to make reasonable efforts to obtain the name of and contact information for a trusted contact person (trusted contact) for a customer’s account.¹⁷ Rule 2165 and the amendments to Rule 4512 became effective February 5, 2018. Most broker-dealers in the United States are members of FINRA, and therefore subject to FINRA rules and examinations.

Key Provisions of the Rules¹⁸

The rules provide protections for a specified adult, who is defined as a natural person age 65 or older, or a natural person age 18 or older who the member reasonably believes has a mental or physical impairment that renders the individual unable to protect his or her own interests. Rule 2165 provides a safe harbor for a member to place a temporary hold on a disbursement of funds

¹³ *Id.*

¹⁴ 15 U.S.C. s. 78c(5).

¹⁵ FINRA, *FINRA Receives SEC Approval on Rule Proposal Addressing Financial Exploitation of Seniors*, available at <http://www.finra.org/newsroom/2017/finra-receives-sec-approval-rule-proposal-addressing-financial-exploitation-seniors> (last visited Feb. 19, 2018).

¹⁶ FINRA, http://finra.complanet.com/en/display/display_main.html?rbid=2403&element_id=12784 (last visited Feb. 19, 2018).

¹⁷ See Securities Exchange Act Release No. 79964 (Feb. 3, 2017), 82 FR 10059 (Feb. 9, 2017) (Notice of Filing of Partial Amendment No. 1 and Order Granting Accelerated Approval of File No. SR-FINRA-2016-039).

¹⁸ FINRA, *Frequently Asked Questions Regarding FINRA Rules Relating to Financial Exploitation of Seniors*, available at <http://www.finra.org/industry/frequently-asked-questions-regarding-finra-rules-relating-financial-exploitation-seniors> (last visited Feb. 19, 2018).

or securities from the account of a specified adult if the member reasonably believes that financial exploitation of the specified adult has occurred, is occurring, has been attempted or will be attempted. Rule 2165 does not apply to transactions in securities. For example, Rule 2165 would not apply to a customer's order to sell his shares of a stock. However, if a customer requested that the proceeds of a sale of shares of a stock be disbursed out of an account held at a member's business, then Rule 2165 could apply to the disbursement of the proceeds where the customer is a specified adult and there is reasonable belief of financial exploitation.

The FINRA has stated that, where a questionable disbursement involves less than all assets in an account, a member should not place a blanket hold on the entire account. Each disbursement should be analyzed separately. In addition, the FINRA noted that where a disbursement at issue involves all of the assets of the account (*e.g.*, a transfer request), the member must permit disbursements from the account where there is not a reasonable belief of financial exploitation regarding such disbursements (*e.g.*, regular bill payments). The FINRA notes that some members intend, for operational reasons, to place a temporary hold or restrictions on an entire account when they have a reasonable belief of financial exploitation regarding a disbursement or disbursements from the account, but also intend to permit legitimate disbursements from the account in these circumstances. The FINRA believes that placing a temporary hold or restrictions on an entire account but allowing legitimate disbursements from the account is consistent with Rule 2165 and members may proceed in such a manner as long as they have procedures reasonably designed to permit legitimate disbursements. The FINRA emphasizes that a member may not avail itself of the Rule 2165 safe harbor if it blocks disbursements where there is not a reasonable belief of financial exploitation regarding such disbursements.

Florida Regulation of Securities

In addition to federal securities laws, "Blue Sky Laws" are state laws that protect the investing public through registration requirements for both broker-dealers and securities offerings, merit review of offerings, and various investor remedies for fraudulent sales practices and activities.¹⁹

In Florida, the Securities and Investor Protection Act, ch. 517, F.S. (act), regulates securities issued, offered, and sold in the state of Florida. The Florida Office of Financial Regulation (OFR) regulates and registers the offer and sale of securities in, to, or from Florida by firms, branch offices, and individuals affiliated with these firms in accordance with the act. There are 2,607 dealers, 5,984 investment advisers, 10,539 branches, and 319,941 stockbrokers registered in Florida.²⁰

¹⁹ U.S. Securities and Exchange Commission, *Blue Sky Laws*, <http://www.sec.gov/answers/bluesky.htm> (last visited Feb. 19, 2018).

²⁰ Office of Financial Regulation, *Fast Facts*, available at <https://www.flofr.com/StaticPages/documents/FastFacts.pdf> (Dec. 2017) (last visited Feb. 19, 2018).

The act requires the following individuals or businesses to be registered with the OFR under s. 517.12, F.S., in order to sell or offer to sell any securities in or from offices in this state, or to sell securities to persons in this state from offices outside this state:²¹

- “Dealers,” which include:
 - Any person, other than an associated person registered under ch. 517, F.S., who engages, either for all or part of her or his time, directly or indirectly, as broker or principal in the business of offering, buying, selling, or otherwise dealing or trading in securities issued by another person.
 - Any issuer who through persons directly compensated or controlled by the issuer engages, either for all or part of her or his time, directly or indirectly, in the business of offering or selling securities, which are issued or are proposed to be issued by the issuer.²²
- “Investment advisers,” which:
 - Include any person who receives compensation, directly or indirectly, and engages for all or part of her or his time, directly or indirectly, or through publications or writings, in the business of advising others as to the value of securities or as to the advisability of investments in, purchasing of, or selling of securities, except a dealer whose performance of these services is solely incidental to the conduct of her or his business as a dealer and who receives no special compensation for such services.²³
 - Do not include a “federal covered adviser.”²⁴
- “Associated persons,” which, with respect to a federal covered adviser, includes any person who is an investment adviser representative and who has a place of business in this state, and with respect to a dealer or investment adviser, includes any of the following:
 - Any partner, officer, director, or branch manager of a dealer or investment adviser or any person occupying a similar status or performing similar functions;
 - Any natural person directly or indirectly controlling or controlled by such dealer or investment adviser, other than an employee whose function is only clerical or ministerial; or
 - Any natural person, other than a dealer, employed, appointed, or authorized by a dealer, investment adviser, or issuer to sell securities in any manner or act as an investment adviser as defined in s. 517.021, F.S.²⁵

III. Effect of Proposed Changes:

Section 1 creates s. 517.34, F.S., relating to the protection of specified adults.

²¹ Section 517.12(1), F.S.

²² Section 517.021(6)(a), F.S. The term “dealer”, as defined under Florida law, encompasses the definitions of “broker” and “dealer” under federal law.

²³ Section 517.021(14)(a), F.S.

²⁴ Section 517.021(9) and (14)(b)9., F.S. A federal covered adviser must be registered under federal law and must provide a notice filing to the OFR. ss. 517.021 and 517.1201, F.S.

²⁵ Section 517.021(2), F.S.

Definitions

The bill defines the term “specified adult” as “a natural person who is 65 years of age or older or a vulnerable adult as defined in s. 415.102, F.S.”²⁶ The bill also creates a definition for the term “law enforcement agency” and clarifies that the definitions for the term “exploitation” and the term “records” have the same meanings as provided in s. 415.102, F.S.

Temporary Holds on Transactions

A dealer, investment adviser, or an associated person may place a temporary hold on a transaction in an account of a specified adult or beneficial owner if the dealer, investment adviser, or associated person believes in good faith that the specified adult is being or has been financially exploited. The dealer, investment adviser or associated person (reporting party) is required to notify the DCF of the suspected exploitation through the agency’s abuse hotline.

Within 3 days of placing a temporary hold on the transaction, the reporting party must orally or in writing attempt to notify all parties authorized to transact business on the account, unless the parties are believed to be involved in the suspected exploitation. A temporary hold expires 15 business days after the date the temporary hold is placed. However, the dealer, investment adviser or associated person may extend the temporary hold up to an additional 10 business days if a review of the available facts and circumstances continue to support its good faith belief that exploitation of the specified adult has occurred. The length of the hold may be shortened or extended by a court or agency of competent jurisdiction.

Access to Records and Confidential Information

A dealer, investment adviser, or associated person may provide access to, or copies of, any records that are relevant to the suspected exploitation to the DCF or a law enforcement agency. Notwithstanding any law to the contrary, the DCF may inform the reporting party on the status of its investigation or any final disposition.

Immunity

Notwithstanding any law to the contrary, the bill grants immunity to a dealer, investment adviser, or associated person from any civil, criminal, or administrative liability for actions taken in accordance with the provisions of the bill. The bill does not create new rights or obligations of a dealer, investment adviser, or associated person under other applicable laws or rules. The bill does not limit the right of a dealer, investment adviser, or associated person to refuse or place a hold on a transaction under other laws or rules or under a customer agreement.

Section 2 provides the bill takes effect on July 1, 2018.

²⁶ Section 415.102, F.S., defines a “vulnerable adult” as “a person 18 years of age or older whose ability to perform the normal activities of daily living or to provide for his or her own care or protection is impaired due to a mental, emotional, sensory, long-term physical, or developmental disability or dysfunction, or brain damage, or the infirmities of aging.”

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Indeterminate. However, the bill will provide additional tools for dealers, investment advisors, and associated persons to protect their senior and other specified adult clients from alleged financial exploitation in a more effective and expedient manner.

C. Government Sector Impact:

Department of Children and Families. Although s. 415.1034, F.S., currently mandates reporting by any person of suspected exploitation of a vulnerable person, the bill may increase awareness and reporting by the securities industry to the Florida Abuse Hotline and the APS. Implementation of the bill would result in expansion of the jurisdiction of the hotline and the APS in order to handle additional calls and investigations relating to alleged financial exploitation of persons age 65 and older who are not considered vulnerable adults. The additional annual costs to the hotline are estimated to be \$1,888,758.43 to fund 27 hotline intake FTEs and two supervisors to handle the increased workload. The additional annual costs to the APS are estimated to be \$10,584,798 to fund an additional 145 investigative positions and 29 supervisor positions to handle the increased workload.²⁷

VI. Technical Deficiencies:

None.

²⁷ Department of Children and Families, *Analysis of SB 662* (Dec. 6, 2017) (on file with the Senate Committee on Banking and Insurance).

VII. Related Issues:

Lines 91-97 of the bill provide “Notwithstanding any law to the contrary, a dealer, an investment adviser, or an associated person is immune from any civil, criminal, or administrative liability for actions taken in accordance with this section. This section may not be construed to form a basis for any civil, criminal, or administrative liability against a dealer, an investment adviser, or an associated person.” According to the OFR, this would prevent the OFR from taking administrative action against persons violating the requirements in any way, such as acting in bad faith. It would also prohibit criminal penalties or civil action for their doing so.²⁸

VIII. Statutes Affected:

This bill creates section 517.34 of the Florida Statutes.

IX. Additional Information:**A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill’s introducer or the Florida Senate.

²⁸ Office of Financial Regulation, *Analysis of SB 662* (Nov. 14, 2017) (on file with Senate Committee on Banking and Insurance).