

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 143 Protection of Vulnerable Investors

SPONSOR(S): Commerce Committee, Insurance & Banking Subcommittee; Donalds; Brown and others

TIED BILLS: IDEN./SIM. **BILLS:** SB 1466

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Insurance & Banking Subcommittee	13 Y, 0 N, As CS	Pirrello	Luczynski
2) Government Operations & Technology Appropriations Subcommittee	9 Y, 0 N	Helping	Topp
3) Commerce Committee	20 Y, 0 N, As CS	Pirrello	Hamon

SUMMARY ANALYSIS

Although investment fraud is not a new occurrence in the financial marketplace, recent economic forces such as the rise of technology and the information age have created an environment conducive to swindlers practicing their craft. In an effort to address financial exploitation of seniors, the Financial Industry Regulatory Authority (FINRA), of which most securities broker-dealers are members, 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 if they have a reasonable basis to believe that financial exploitation of a "specified adult" has occurred, is occurring, has been attempted, or will be attempted. The term "specified adult" refers to a natural person age 65 and older; or a natural person age 18 and older who the FINRA member reasonably believes has a mental or physical impairment that renders the individual unable to protect his or her own interests. These rules took effect February 5, 2018. However, they do not apply to broker-dealers and investment advisers who are not FINRA members.

Similar to the FINRA rules, the bill allows a dealer or investment adviser to delay a transaction on, or disbursement of funds or securities from, the account of a specified adult or an account for which a specified adult is a beneficiary or beneficial owner if the dealer or investment adviser, reasonably believes that financial exploitation of the specified adult has occurred, is occurring, has been attempted, or will be attempted in connection with the transaction or disbursement. A specified adult is an individual who is age 65 or older, or who meets the definition of "vulnerable adult" under the Adult Protective Services Act. The suspected exploitation must be immediately reported to the Florida Abuse Hotline if so required by the Adult Protective Services Act. All parties authorized to transact business on the account as well as any designated trusted contact must be contacted, unless such person is believed to be engaged in the suspected exploitation.

A delay expires in 15 business days but may be terminated sooner. The dealer or investment adviser may extend the delay an additional 10 business days. The length of the hold may be shortened or extended by a court of competent jurisdiction. The bill requires training to educate employees on issues pertaining to exploitation of specified adults. A dealer, investment adviser, or associated person is presumed to be acting based upon a reasonable belief and is immune from civil or administrative liability, unless lack of such reasonable belief is shown by a preponderance of the evidence.

Within three days of placing a delay, the bill requires dealers and investment advisers to notify the Office of Financial Regulation (OFR) of the delay and the reason for it. If the dealer or investment adviser extends the delay for an additional 10 days, they must notify OFR within three business days of the extension.

The bill has no fiscal impact on state or local government and an indeterminate fiscal impact on the private sector.

The bill provides an effective date of July 1, 2019.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Federal Securities Regulation

The federal Securities Exchange Act of 1934 ('34 Act) requires registration of securities market participants like broker-dealers and exchanges.¹ Generally, any person acting as “broker” or “dealer” as defined in the '34 Act must be registered with the United States Securities and Exchange Commission (SEC) and join a self-regulatory organization (SRO), like the Financial Industry Regulatory Authority (FINRA) or a national securities exchange. The '34 Act broadly defines “broker” as “any person engaged in the business of effecting transactions in securities for the account of others,” which the SEC has interpreted to include involvement in any of the key aspects of a securities transaction, including solicitation, negotiation, and execution.² A “dealer” is “any person engaged in the business of buying and selling securities . . . for such person’s own account through a broker or otherwise.”³ Certain entities in the securities industry are often 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.

State Securities Regulation

In addition to federal securities laws, “Blue Sky Laws” are state laws designed to protect investors against fraudulent sales practices and activities by requiring companies making offerings of securities to register their offerings before they can be sold in that state and by requiring licensure for brokerage firms, their brokers, and investment adviser representatives.⁴

In Florida, the Office of Financial Regulation’s (OFR’s) Division of Securities oversees the Securities and Investor Protection Act, ch. 517, F.S. (“the Act”), which regulates the offer and sale of securities in, to, or from Florida by firms, branch offices, and individuals affiliated with these firms.

The Act requires the following individuals or businesses to be registered with the OFR under s. 517.12, F.S., in order for such persons 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:⁵

- “Dealers,” which include:⁶
 - 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.

¹ 15 U.S.C. §§ 78c(4) and 78o (2019).; U.S Securities and Exchange Commission, *Guide to Broker-Dealer Registration*, <http://www.sec.gov/divisions/marketreg/bdguide.htm#II> (last visited Jan. 14, 2019).

² *Id.*

³ 15 U.S.C. §§ 78c(5) (2019).

⁴ U.S Securities and Exchange Commission, *Blue Sky Laws*, <http://www.sec.gov/answers/bluesky.htm> (last visited Jan. 14, 2019).

⁵ S. 517.12(1), F.S.

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

- “Investment advisers,” which:⁷
 - 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.
 - Does not include a “federal covered adviser.”⁸
- “Associated persons,” which include:⁹
 - With respect to a dealer or investment adviser, 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.
 - With respect to a federal covered adviser, any person who is an investment adviser representative and who has a place of business in this state.

Vulnerability of Seniors to Investment Fraud

Although investment fraud is not a new occurrence in the financial marketplace, recent economic forces have created an environment conducive to swindlers practicing their craft.¹⁰ Such economic forces include:¹¹

- The decline of traditional pensions, which has resulted in fewer Americans relying on expert money managers to invest their retirement funds in a fast-moving and complex investment market.
- The rise of technology, which has made it significantly easier for scammers to reach a broad set of investors with sophisticated robotic and predictive telephone dialing, email, television, and social media.
- The rise of the information age, which has given scammers unlimited access to personal information about investors, making it easier for them to customize their messages and harder for investors to discern who is truly on their side.

In recent years, financial research has focused on understanding the vulnerability of seniors to investment fraud. In a 2012 study prepared for the FINRA Investor Education Foundation, adults 65 and older were found to be more likely to receive solicitations in the mail.¹² Survey respondents age 65 and older were more likely to be solicited for fraud, more likely to engage with potentially fraudulent financial opportunities, and more likely to have lost money.¹³

⁷ S. 517.021(14)(a), F.S.

⁸ S. 517.021(9), (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.

⁹ S. 517.021(2), F.S.

¹⁰ Doug Shadel and Karla Pak, *AARP Investment Fraud Vulnerability Study*, AARP (2017), https://www.aarp.org/content/dam/aarp/research/surveys_statistics/econ/2017/investment-fraud-vulnerability.doi.10.26419%252Fres.00150.001.pdf (last visited Jan. 14, 2019).

¹¹ *Id.*

¹² FINRA Investor Education Foundation, *Financial Fraud and Fraud Susceptibility in the United States: Research Report from a 2012 National Survey*, (Sept. 2013), <https://www.saveandinvest.org/sites/default/files/Financial-Fraud-And-Fraud-Susceptibility-In-The-United-States.pdf> (last visited Jan. 14, 2019).

¹³ *Id.* at 17-18.

A more recent study sponsored by AARP sought to identify psychological, behavioral, and demographic risk factors that might make investors more vulnerable to investment fraud.¹⁴ The study identified the following psychological risk factors:¹⁵

- Belief that accumulation of wealth is an important measure of success in life.
- Openness to new opportunities presented by salespersons.
- Belief that the most profitable investments are those not regulated by the government.
- Belief in taking chances with one's money if those chances are likely to pay off.

Many behavioral factors that put victims at risk flow directly from the psychological risk factors above.¹⁶ The mindset of openness to sales pitches may result in signaling a desire to be pitched with investment opportunities.¹⁷ Compared to the general investor population, more fraud victims engaged in active trading of five or more trades in a year, and the victims were more likely to make remote investments.¹⁸ As for demographic risk factors, the study found that many more of the victims were older (age 70+), male, married, and veterans.¹⁹

FINRA Rules Relating to Financial Exploitation of Seniors

FINRA is an SRO regulated by the United States Security Exchange Commission. Most broker-dealers in the United States are members of FINRA. As members, such broker-dealers are subject to FINRA rules and examination by FINRA. In an effort to address financial exploitation of seniors, FINRA implemented rules to provide its members with a way to respond to situations in which they have a reasonable basis to believe that financial exploitation of a "specified adult" has occurred, is occurring, has been attempted, or will be attempted.²⁰

FINRA defines "specified adult" and "exploitation" as follows:

- "Specified adult" is a natural person age 65 and older; or . . . a natural person age 18 and older who the [FINRA] member reasonably believes has a mental or physical impairment that renders the individual unable to protect his or her own interests.²¹
- Financial Exploitation:
 - The wrongful or unauthorized taking, withholding, appropriation, or use of a specified adult's funds or securities; or
 - Any act or omission by a person, including through the use of a power of attorney, guardianship, or any other authority regarding a specified adult, to:
 - Obtain control, through deception, intimidation or undue influence, over the specified adult's money, assets or property; or
 - Convert the specified adult's money, assets or property.²²

Under the new rules, FINRA members have the ability to contact a customer's designated trusted contact person and, when appropriate, place a temporary hold on a disbursement of funds or securities from a customer's account.²³ These rules took effect February 5, 2018.²⁴ However, they do not apply to broker-dealers and investment advisers who are not FINRA members.

¹⁴ Doug Shadel and Karla Pak, *supra* note 10, at 14.

¹⁵ *Id.*

¹⁶ *Id.* at 15.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 6 and 15.

²⁰ FINRA, *Regulatory Notice 17-11 (Financial Exploitation of Seniors)*, (March 2017)

<https://www.finra.org/sites/default/files/Regulatory-Notice-17-11.pdf> (last visited Jan. 14, 2019).

²¹ *Id.*

²² FINRA, *Rule 2165. Financial Exploitation of Specified Adults*,

http://finra.complinet.com/en/display/display.html?rbid=2403&record_id=17538&element_id=12784 (last visited Apr. 5, 2019).

²³ *Id.*

²⁴ *Id.*

Mandatory Reporting for Abuse or Exploitation of Vulnerable Adults

The Florida Department of Children and Families (DCF) houses the Adult Protective Services Program (APS). APS is responsible for preventing further harm to vulnerable adults who are victims of abuse, neglect, exploitation, or self-neglect.²⁵ Florida law currently contains a mandatory reporting requirement in ch. 415, F.S., the Adult Protective Services Act (Act) which states that any person “who knows, or has reasonable cause to suspect, that a vulnerable adult has been or is being abused, neglected, or exploited shall immediately report such knowledge or suspicion to the central abuse hotline.”²⁶

The Act defines “vulnerable adult” and “exploitation” as follows:

- “Vulnerable adult” is 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.²⁷
- “Exploitation” means a person who:²⁸
 - Stands in a position of trust and confidence with a vulnerable adult and knowingly, by deception or intimidation, obtains or uses, or endeavors to obtain or use, a vulnerable adult’s funds, assets, or property with the intent to temporarily or permanently deprive a vulnerable adult of the use, benefit, or possession of the funds, assets, or property for the benefit of someone other than the vulnerable adult; or
 - Knows or should know that the vulnerable adult lacks the capacity to consent, and obtains or uses, or endeavors to obtain or use, the vulnerable adult’s funds, assets, or property with the intent to temporarily or permanently deprive the vulnerable adult of the use, benefit, or possession of the funds, assets, or property for the benefit of someone other than the vulnerable adult.
- “Exploitation” may include, but is not limited to:²⁹
 - Breaches of fiduciary relationships, such as the misuse of a power of attorney or the abuse of guardianship duties, resulting in the unauthorized appropriation, sale, or transfer of property;
 - Unauthorized taking of personal assets;
 - Misappropriation, misuse, or transfer of moneys belonging to a vulnerable adult from a personal or joint account; or
 - Intentional or negligent failure to effectively use a vulnerable adult’s income and assets for the necessities required for that person’s support and maintenance.

The Florida Abuse Hotline screens allegations of child and adult abuse and neglect to determine whether the information meets the criteria of an abuse report.³⁰ If the criteria is met, a protective investigation is initiated to confirm whether or not there is evidence that abuse, neglect, or exploitation occurred; whether there is an immediate or long-term risk to the victim; and whether the victim needs additional services to safeguard his or her well-being.³¹ APS services include:³²

- On-site investigation of reports of alleged abuse, neglect, exploitation or self-neglect;
- Determination of immediate risk to the victim and provision of necessary emergency services;
- Evaluation of the need for and provision of protective supervision; and,
- Provision of on-going protective services.

²⁵ Florida Department of Children and Families, *Protecting Vulnerable Adults*, <http://www.myflfamilies.com/service-programs/adult-protective-services/protecting-vulnerable-adults> (last visited Jan. 14, 2019).

²⁶ S. 415.1034(1)(a), F.S.

²⁷ S. 415.102(28), F.S.

²⁸ S. 415.102(8), F.S.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

A person who participates in making a report to the Florida Abuse Hotline or who participates in a judicial proceeding resulting therefrom “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 liability, civil or criminal, that otherwise might be incurred or imposed.”³³

Effect of the Bill

The bill allows a dealer or investment adviser to delay a transaction on, or a disbursement of funds or securities from, an account of a specified adult or an account for which a specified adult is a beneficiary or beneficial owner, if the dealer or investment adviser reasonably believes that financial exploitation of the specified adult has occurred, is occurring, has been attempted, or will be attempted in connection with the transaction or disbursement. The dealer’s or investment adviser’s reasonable belief may be based on the facts and circumstances observed in such dealer’s, investment adviser’s, or associated person’s business relationship with the specified adult.

A specified adult is an individual who is age 65 or older, or who meets the definition of “vulnerable adult” under the Adult Protective Services Act (ch. 415, F.S.).

The bill defines “exploitation,” substantially as defined under FINRA to mean:

- The wrongful or unauthorized taking, withholding, appropriation, or use of money, assets, or property of a specified adult, or any act or omission by a person, including through the use of a power of attorney, guardianship, or conservatorship of a specified adult, to:
 - Obtain control over the specified adult’s money, assets, or property through deception, intimidation, or undue influence to deprive him or her of the ownership, use, benefit, or possession of the money, assets, or property; or
 - Convert the specified adult’s money, assets, or property to deprive him or her of the ownership, use, benefit, or possession of the money, assets, or property.

The bill adds dealers, investment advisers, and associated persons to the list of specified mandatory reporters under ch. 415, F.S. If the exploitation involves a specified adult who meets the definition of a “vulnerable adult” under ch. 415, F.S., the dealer, investment adviser, or associated person must immediately notify the DCF, via its central abuse hotline.³⁴

Additionally, within three business days after placing a delay, the dealer or investment adviser must notify in writing, which may be provided electronically, all parties authorized to transact business on the account as well as any designated trusted contact³⁵ using the contact information provided for the account, of the delay and the reason for the delay, unless the dealer or investment adviser reasonably believes that any such party engaged or is engaging in the suspected exploitation of the specified adult. Within three business days after the delay was placed, the dealer or investment adviser must notify OFR either by telephone using a number designated by the office for such purpose, or in writing, which may be provided electronically of the delay and the reason for the delay.

The bill allows the DCF to share the status and result of an investigation conducted pursuant to s. 415.1034, F.S., with the reporting dealer or investment adviser.

A delay expires 15 business days after the date on which the delay was placed. The dealer or investment adviser may extend the delay for up to 10 business days if its review of available facts and

³³ S. 415.1036(1), F.S.

³⁴ Chapter 415, F.S., does not require a person to report suspected exploitation of an adult age 65 or older who does not meet the definition of vulnerable adult.

³⁵ The bill defines “trusted contact” to mean “a natural person 18 years of age or older whom the account owner has expressly identified and is recorded in the dealer’s or investment adviser’s books and records as a person who may be contacted about the account.”

circumstances continues to support its reasonable belief that exploitation of the specified adult has occurred, is occurring, has been attempted or will be attempted. Within three business days after an extension a dealer or investment adviser who extends a delay must notify OFR of the extension using the same method as for the initial delay. The length of the delay may be shortened or extended at any time by a court of competent jurisdiction. Nothing in the bill prevents a dealer or investment adviser from terminating a delay after communication with the parties authorized to transact business on the account and any trusted contact on the account.

A dealer or investment adviser subject to the jurisdiction of the OFR must make available to the OFR, upon request, all records relating to a delay or notification made by the dealer or investment adviser regarding the financial exploitation of a specified adult.

Before placing a delay on a transaction or disbursement pursuant to this section, a dealer or investment adviser must have training policies or programs reasonably designed to educate associated persons on issues pertaining to exploitation, must develop and maintain written procedures regarding the manner in which suspected exploitation is required to be reported to the supervisory personnel and must conduct periodic training of all associated persons. The dealer or investment adviser must maintain a written record of compliance with these training requirements.

Any dealer, investment adviser, or associated person who delays or participates in the delay of a transaction or disbursement, who provides records to an agency of competent jurisdiction, or who participates in a judicial or arbitration proceeding resulting therefrom is presumed to be acting based upon a reasonable belief and is immune from any civil or administrative liability that otherwise might be incurred or imposed, unless lack of such reasonable belief is shown by a preponderance of the evidence. The bill does not create new rights or obligations of a dealer, investment adviser, or associated person under other applicable laws or rules. In addition, the bill does not limit the right of a dealer, investment adviser, or associated person to otherwise refuse or place a delay on a transaction or disbursement under other applicable laws or rules or under an applicable customer agreement. Absent a reasonable belief of exploitation, the bill does not alter a dealer's, investment adviser's, or associated person's obligation to comply with instructions from a client to close an account or transfer an account to another dealer, investment adviser, or associated person.

B. SECTION DIRECTORY:

Section 1. Amends s. 415.1034, F.S., relating to mandatory reporting of abuse, neglect, or exploitation of vulnerable adults; mandatory reports of death.

Section 2. Creates s. 517.34, F.S., relating to protection of specified adults.

Section 3. Provides an effective date of July 1, 2019.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

There is no fiscal impact to DCF since reporting of suspected abuse, neglect or exploitation of vulnerable adults to the Florida Abuse Hotline is already a mandated function for the department.³⁶

³⁶ Florida Department of Children and Families, Agency Analysis of 2019 House Bill 143, p. 4 (Jan 15, 2019).

In addition, OFR has sufficient resources, including current vacancies, to implement the provisions of the bill.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

As permitted by the bill, the placement of a delay on a transaction or disbursement, may decrease losses to investors who are financially preyed upon because such a delay may prevent the money from ever getting into the hands of the bad actor. Once the bad actor receives the money, it is difficult, or in some cases impossible, to ever recover the money. Given the inability to quantify avoidance of future losses to investors, the impact on the private sector is indeterminate.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 13, 2019, the Insurance & Banking Subcommittee considered a proposed committee substitute and reported the bill favorably as a committee substitute. The committee substitute made the following changes to the bill:

- Amended the definition of “Trusted Contact” by removing the requirement that the contact be designated in writing and adding that the individual must be recorded in the books and records of the dealer or investment advisor as a person who may be contacted about the account.
- Removes associated persons from the list of persons who may place a delay on a transaction.
- Removes quarterly reporting to OFR.
- Removes the yearly report to the legislature.
- Removes associated persons from the list of parties who should contact the parties authorized to transact business on the account and the trusted contact.

- Removes specifications regarding what the notice to the parties authorized to transact business on the account and the trusted contact must include.
- Requires dealers and investment advisors to notify OFR of a delay within three days of placing it.
- Allows DCF to share the status of any investigation with the reporting party.
- Allows the dealer or investment advisor to extend the delay another 10 business days, under specified circumstances.
- Removes training specifications and requires periodic training. Requires dealers and investment advisers to keep a record of compliance with training requirements.
- Changes the standard of evidence for overcoming the presumption that a dealer or investment adviser acted on a reasonable belief from clear and convincing to a preponderance of the evidence.

On April 4, 2019, the Commerce Committee considered the bill, adopted three amendments and reported the bill favorably as a committee substitute. The following changes were made to the bill:

- Conforms the definition of exploitation to CS/SB 1466 to more closely follow the definition in the Financial Industry Regulatory Authority rule.
- Removes a definition of a term that is no longer used in this version of the bill.
- Adds a requirement that a dealer or investment adviser who extends a delay for an additional 10 days must notify OFR of the extension within three business days.

The staff analysis has been updated to reflect the committee substitute.