

**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.)

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Prepared By: The Professional Staff of the Committee on Banking and Insurance

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BILL: CS/SB 1466

INTRODUCER: Banking and Insurance Committee and Senators Gibson and Broxson

SUBJECT: Protection for Vulnerable Investors

DATE: April 2, 2019

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Hendon</u>	<u>Hendon</u>	<u>CF</u>	<b>Favorable</b>
2.	<u>Billmeier</u>	<u>Knudson</u>	<u>BI</u>	<b>Fav/CS</b>
3.	_____	_____	<u>RC</u>	_____

**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

CS/SB 1466 addresses financial exploitation of vulnerable adults and the elderly. The bill adds financial securities dealers and investment advisers to the list of specified persons to report abuse or exploitation to the central abuse hotline.

The bill creates a new section of statute in ch. 517, F.S., relating to securities transactions, to allow securities dealers and investment advisers to place a temporary hold on financial transactions when exploitation of a vulnerable adult or person 65 years of age or older is reasonably suspected. The dealer or adviser must notify the persons who have access to the account and the Office of Financial Regulation of the hold. The bill provides civil and administrative immunity to dealers or advisers for placing a delay or hold on a transaction if they comply with the provisions of the bill.

The bill is not expected to have a fiscal impact to the state and has an effective date of July 1, 2019.

**II. Present Situation:**

**Adult and Elder Abuse**

The Adult Protective Services Act (ch. 415, F.S.) defines abuse as any willful act or threatened act by a relative, caregiver, or household member which causes or is likely to harm a vulnerable

adult's physical, mental, or emotional health. Abuse includes acts as well as omissions.<sup>1</sup> A vulnerable adult is defined 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.<sup>2</sup>

Section 415.1034, F.S., requires anyone who knows, or has reasonable cause to suspect, that a vulnerable adult has been or is being abused, neglected, or exploited to immediately report suspected abuse to the central abuse hotline. The central abuse hotline is maintained by the Department of Children and Families (department). Once reported, the department must begin a protective investigation within 24 hours.<sup>3</sup> If a caregiver refuses to allow the department to begin a protective investigation or interferes with the investigation, the department can contact the appropriate law enforcement agency for assistance. If, during the course of the investigation, the department has reason to believe that the abuse, neglect, or exploitation is perpetrated by a second party, the appropriate law enforcement agency and state attorney must be notified. The department shall make a preliminary written report to the law enforcement agencies within 5 working days after the oral report and complete the investigation within 60 days.<sup>4</sup>

Financial exploitation occurs when a person misuses or takes the assets of a vulnerable adult for his or her own personal benefit. This frequently occurs without the knowledge or consent of a senior or disabled adult, depriving him or her of financial resources for personal needs. Assets are commonly taken by deception, false pretenses, coercion, harassment, duress and threats. These are commonly reported forms of financial exploitation reported to Adult Protective Services:<sup>5</sup>

- Theft - involves taking assets without knowledge, consent or authorization and may include taking of cash, valuables, medications other personal property.
- Fraud - involves acts of dishonesty by persons entrusted to manage assets and may include falsification of records, forgeries, unauthorized check-writing, and Ponzi-type financial schemes.
- Real Estate - involves unauthorized sales, transfers or changes to property, and may include unauthorized or invalid changes to estate documents.
- Contractor - includes building contractors or handymen who receive payment for building repairs, but fail to initiate or complete the project and may include invalid liens by contractors.
- Lottery scams - involves payments to collect unclaimed property or "prizes" from lotteries or sweepstakes.
- Electronic - includes "phishing" e-mail messages to trick persons into unwittingly surrendering bank passwords and may include faxes, wire transfers, telephonic communications.

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<sup>1</sup> Section 415.102, F.S.

<sup>2</sup> Section 415.102, F.S.

<sup>3</sup> Section 415.104, F.S.

<sup>4</sup> *Id.*

<sup>5</sup> National Adult Protective Services Association website, see <http://www.napsa-now.org/get-informed/what-is-financial-exploitation/> last visited March 28, 2019.

- Mortgage - includes financial products which are unaffordable or out-of-compliance with regulatory requirements and may include loans issued against property by unauthorized parties.
- Investment - includes investments made without knowledge or consent and may include high-fee funds (front or back-loaded) or excessive trading activity to generate commissions for financial advisors.
- Insurance - involves sales of inappropriate products, such as a thirty-year annuity for an elderly person and may include unauthorized trading of life insurance policies.

### **Regulation of Securities and Investments**

The Division of Securities within the Office of Financial Regulation (OFR) protects the investing public from unlawful securities activities through regulating the sale of securities and investment advice from Florida securities dealers, issuer dealers, and investment advisers, branch offices, and individuals affiliated with these firms.<sup>6</sup> As of January 31, 2019, there were:

- 2,501 securities dealers,
- 6,342 investment advisers,
- 10,676 branches, and
- 328,217 associated persons.<sup>7</sup>

The North American Securities Administrators Association (NASAA) is an international organization devoted to investor protection. Its membership consists of securities administrators. On January 22, 2016, the NASAA approved model “Legislation to Protect Vulnerable Adults from Financial Exploitation” (the Model Act).<sup>8</sup> The Model Act focuses on the reporting and prevention of senior financial exploitation. The Model Act has the following features:

- A mandatory reporting requirement applicable to qualified individuals of broker-dealers and investment advisers;
- Notification to third-parties of potential financial exploitation with advance consent of the investor;
- Authority to temporarily delay disbursement of funds;
- Immunity from civil and administrative liability for reporting, notifications, delays; and
- Mandatory sharing of records related to exploitation with law enforcement and state adult protective services agencies.

As of January 1, 2019, twenty-one states have adopted legislation and in the case of one state, a regulation comparable to the Model Act.<sup>9</sup>

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<sup>6</sup> Florida Office of Financial Regulation bill analysis, dated March 7, 2019.

<sup>7</sup> “Associated person” means, 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 this section. *See* s.517.021, F.S.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

In addition, the Financial Industry Regulatory Authority, a private self-regulatory organization that regulates certain aspects of the securities industry, adopted Rule 2165 on February 5, 2018. This rule is aimed at preventing financial exploitation of the elderly. The rule permits a member that reasonably believes that financial exploitation has occurred, is occurring, has been attempted, or will be attempted to place a temporary hold on the disbursement of funds or securities from the account of a customer.

### **III. Effect of Proposed Changes:**

#### **Reporting Exploitation to the Department of Children and Families**

**Section 1** amends s. 415.1034, F.S., relating to reporting of abuse, neglect, or exploitation of a vulnerable adult. The bill adds a dealer of securities, investment advisor, or person regulated by ch. 517, F.S., to the list of specified reporters of abuse. The bill also retains current law that all persons who suspect abuse, neglect, or exploitation must report to the central abuse hotline.

#### **Allowing the Delay of Financial Transactions or Disbursements Based Upon the Reasonable Belief a Senior Adult is Being Exploited**

**Section 2** creates s. 517.34, F.S., which allows a securities dealer (dealer) or investment adviser to delay a transaction or disbursement of funds or securities from the account of a specified adult if the dealer or investment adviser reasonably believes that exploitation<sup>10</sup> of the specified adult has occurred, is occurring, has been attempted, or will be attempted. A specified adult is defined as a person 65 years or older or a vulnerable adult.<sup>11</sup> The reasonable belief of exploitation may be based on the facts and circumstances observed in the business relationship with the specified adult.

The bill requires the dealer or investment adviser to provide written or electronic notice of the temporary hold and the reason for the hold to all parties authorized to transact business on the account and any trusted contact<sup>12</sup> within 3 business days after the date on which the delay was first placed. The dealer or investment adviser must also notify the OFR of the temporary hold and the reason for the temporary hold.

The bill requires a dealer or investment adviser subject to the jurisdiction of the OFR to make all records relating to a delay or report available to the OFR upon request.

#### ***Length of the Delay***

A delay on a transaction or disbursement expires 15 business days after the date on which the delay was first placed. The delay may be terminated after communication with the parties authorized to transact business on the account or any trusted contact on the account. The bill allows the dealer or investment adviser to extend the delay for up to 10 additional business days

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<sup>10</sup> The bill's definition of "exploitation" is similar to the definition in the Model Act. See <http://www.nasaa.org/wp-content/uploads/2011/07/NASAA-Model-Act-and-Updated-Commentary-for-2018-Session.pdf> (last visited April 2, 2019).

<sup>11</sup> "Vulnerable adult" is defined in s. 415.102, F.S.

<sup>12</sup> The bill defines "trusted contact" as a natural person 18 years of age or older, whom the account owner has expressly identified as a person who may be contacted about the account.

if the review of the available facts and circumstances continues to support its good faith belief regarding exploitation of the specified adult. The dealer or investment adviser extending the delay must notify the OFR within 3 business days after the start of the extension. The length of the delay may be shortened or extended at any time by a court. A dealer, investment adviser, or associated person may terminate a delay after communication with the parties authorized to transact business on the account and any trusted contact on the account.

### ***Requirement to Develop Policies and Procedures Regarding Exploitation***

The bill requires the dealer or investment adviser, before placing a delay on a transaction or disbursement, to develop training policies or programs reasonably designed to educate associated persons on issues pertaining to exploitation, to develop and maintain written procedures regarding the manner in which suspected exploitation must be reported to supervisory personnel, and to conduct training for all associated persons. The dealer or investment adviser must maintain a written record of compliance with the training provisions of the bill.

### ***Immunity Provision***

The bill provides that a dealer, investment adviser, or associated person who:

- delays a transaction or disbursement pursuant to this section;
- provides records to an agency of competent jurisdiction pursuant to this section; or
- participates in a judicial or arbitration proceeding resulting in the delay or provision of records

is presumed to be acting based upon a reasonable belief<sup>13</sup> of exploitation and is immune from any civil or administrative liability that otherwise might be incurred or imposed. The immunity does not apply if the lack of such reasonable belief is shown by a preponderance of the evidence. The bill does not supersede or diminish any immunity under ch. 415.

### ***Other Provisions***

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., which provides a few exceptions. The bill provides that the Department of Children and Families may share the status and result of any investigation with the reporting dealer or investment adviser.

The bill provides that it does not create new rights or obligations of a dealer, investment adviser, or associated person under other applicable laws or rules and does not limit the right to refuse to

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<sup>13</sup> The bill does not define “reasonable belief.” The term generally creates an objective standard where the court determines how a reasonable person would have acted under the circumstances. *See e.g., Mobley v. State*, 132 So.3d 1160 (Fla. 3d DCA 2014)(applying the objective reasonable person standard to a self-defense statute allowing the use of deadly force when a person reasonably believes it is necessary to prevent great bodily harm); *Lopez v. Regalado*, 257 So.3d 550 (Fla. 3d DCA 2018)(holding a domestic violence injunction under s. 741.30, F.S., was appropriate when the victim had an “objectively reasonable cause to believe” she was in imminent danger); *Habie v. Krischer*, 642 So.2d 138 (Fla. 4<sup>th</sup> DCA 1994)(holding the phrase “reasonably believes” in a criminal statute was not void for vagueness and noting that a court had held “reasonable belief” is an objective standard); *Kaplan v. DaimlerChrysler*, 331 F.3d 1251 (11<sup>th</sup> Cir. 2003)(applying an objective reasonable person standard in interpreting a federal rule asking whether an attorney has reasonable factual basis for a claim).

place a delay on a transaction or disbursement under other applicable laws or rules or under an applicable customer agreement.

The bill provides that absent a reasonable belief of exploitation, it 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.

**Section 3** provides an effective date of July 1, 2019.

**IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None.

**V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Fewer vulnerable adults and elders would experience financial exploitation under the bill.

C. Government Sector Impact:

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

The Office of Financial Regulation may need rule making authority to implement the provisions of the bill.

**VIII. Statutes Affected:**

This bill substantially amends section 415.1034 of the Florida Statutes.

This bill creates section 517.34 of the Florida Statutes.

**IX. Additional Information:**

- A. **Committee Substitute – Statement of Substantial Changes:**  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS by Banking and Insurance on April 1, 2019:**

The CS:

- Changes the definition of “exploitation” to make it more like the definition used in the Model Act;
- Removes incorrect references to “law enforcement agency;”
- Removes provisions allowing associated persons to delay transactions; and
- Requires dealers and investment advisors to notify OFR of any extension of a delay.

- B. **Amendments:**

None.