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# Taking the Next Step: Simple Changes Regulators Can Make to More Effectively Combat Financial Exploitation

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ABSTRACT

Since 2016, three regulatory measures that put financial institutions at the forefront of combatting financial exploitation of elderly adults have been adopted. These three regulatory measures—"An Act to Protect Vulnerable Adults from Financial Exploitation," FINRA RULE 2165, and the "Senior $afe Act"—permit, and sometimes require, financial institutions to take certain precautionary measures when they reasonably suspect financial exploitation of vulnerable adults. These measures laid a strong foundation for combating financial exploitation but can easily be improved to protect even more elderly investors. This article provides a background and description of each of these regulatory measures in order to highlight their strengths and weaknesses. It then addresses the next steps regulators must take to build upon these strengths and fix inherent weaknesses. All the proposals provide realistic, practical solutions that can easily be implemented to strengthen financial institutions' ability to combat financial exploitation of elderly adults.

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## I. INTRODUCTION

Imagine you are in your twilight years. You planned and saved for retirement your entire life, but like anybody, you could use some extra money. One day your pastor, whom you trust very much, approaches you with a lucrative investment offer. You do not fully understand everything that he is talking about, but he assures you that you will make a lot of money and you have known this man for years—what could possibly go wrong? You give your pastor the amount necessary for the investment, with his word that he will double your money. You are unaware that your pastor is running a scam, that you will never see that money again, and that the retirement you planned for so diligently just became a lot more difficult.

Sadly, this scenario happens far too often to seniors[1] in the United States.[2] Aware of the issue, regulators began to act. In 2014, Delaware passed a statute that allows an employee of a financial institution to place a hold on a proposed transaction for up to ten days.[3] Currently, 49 states have specifically made financial exploitation a reportable type of elderly abuse.[4] Financial exploitation of an elderly person is defined as an individual who "knowingly obtains control over the property of [an] elderly person . . . with the intent to permanently deprive the person of the use, benefit[,] or possession of his or her property. . . ."[5]

Despite regulators' early attempts to combat financial exploitation of the elderly, it is still an enormous problem. According to a 2016 American Association of Retired Persons ("AARP") survey, financial exploitation victimizes one out of every five U.S. citizens aged 65 or older.[6] It is estimated that in 2017 alone, seniors lost over $36.5 *billion* to financial exploitation.[7] These fraudulent schemes are conducted by a large spectrum of individuals ranging from complete strangers to those much closer to the victim, including caretakers and family members.[8] In addition to demolishing victims' financial security and quality of life in their retirement, senior citizens who are victims of financial abuse die three times faster than seniors who are not abused.[9]

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1. Unless otherwise stated, elderly, senior citizens, retired persons, and "twilight years" refers to a person who is 65 years of age or older.
2. Stanford Fin. Firm, No. AP-17-04, 2017 WL 2991662 (Mo. Div. Sec. May 15, 2017); Sarah Fenske, *St. Louis Pastor Mark Q. Stafford Busted for $1 Million Scam*, RIVERFRONT TIMES (Mar. 15, 2017, 1:29 PM), https://www.riverfronttimes.com/newsblog/2017/03/15/st-louis-pastor-mark-stafford-busted-for-1-million-scam; City Capital Corp., Litigation Release No. 22330, 2012 WL 12367761 (Apr. 13, 2012).
3. DEL. CODE ANN. tit. 31, § 3910(c) (2018).
4. Christine A. Gilsinan & Mary McCormick, *§ 5:2. Financial Exploitation*, *in* 41 MO. PRAC., MISSOURI ELDER LAW (Sept. 2018).
5. MO. REV. STAT. § 570.145.1 (2017).
6. Victoria Sackett, *New Law Targets Elder Financial Abuse*, AARP (May 24, 2018), https://www.aarp.org/politics-society/government-elections/info-2018/congress-passes-safe-act.html.
7. Nick Leiber, *How Criminals Steal $37 Billion a Year from America's Elderly*, BLOOMBERG (May 3, 2018, 3:00 AM), https://www.bloomberg.com/news/features/2018-05-03/america-s-elderly-are-losing-37-billion-a-year-to-fraud.
8. NORTH AM. SEC. ADMIN. ASS'N, NASAA MODEL LEGISLATION TO PROTECT VULNERABLE ADULTS FROM FINANCIAL EXPLOITATION 1 (2018), http://www.nasaa.org/wp-content/uploads/2011/07/NASAA-Model-Act-and-Updated-Commentary-for-2018-Session.pdf [hereinafter NASAA MODEL ACT].
9. Leiber, *supra* note 7.

In an attempt to combat this "public health crisis," legislatures, government agencies, and regulatory institutions are taking action.[10] In 2014, Delaware became the first state to pass a statute allowing financial institutions to place a temporary hold on transactions if they had reason to believe that the transaction was attempted financial exploitation of a senior citizen.[11] Other states followed, passing similar legislation.[12] In 2016, The North American Securities Administrators Association ("NASAA")—a group of securities regulators in the United States, Canada, and Mexico—was formed "to advocate and act for the protection of investors, especially those who lack the expertise, experience[,] and resources to protect their own interests."[13] In accordance with this goal, NASAA adopted model legislation titled "An Act to Protect Vulnerable Adults from Financial Exploitation" ("the Model Act").[14] The Model Act is in place for the purpose of aiding "securities regulators, investment advisers[,] and broker-dealers, as well as Adult Protective Services agencies . . . to protect [the] most vulnerable investors."[15] While the Model Act does not have any force of law on its own, it serves as a valuable tool for state legislatures trying to create similar laws.[16] As of October 2018, 19 states had adopted the Model Act into state law or regulation.[17]

In 2015, Congress proposed legislation that allows financial institutions to report transactions that they believe are attempted financial exploitation.[18] This legislation was finally enacted on May 24, 2018 as part of the Economic Growth, Regulatory Relief, and Consumer Protection Act ("the Federal Act").[19] Finally, the Financial Industry Regulatory Authority ("FINRA") recently passed a rule that, among other things, allows a broker-dealer to place a temporary hold on a disbursement of funds or securities if they reasonably believe financial exploitation of a specified adult is occurring.[20] Unlike NASAA, FINRA is a self-regulatory organization; therefore, its rules are enforceable against the broker-dealers that it regulates.[21]

All these regulatory measures have one thing in common: they put financial institutions in a position to help prevent financial exploitation of elderly adults. The Model Act, FINRA Rule 2165, and the Federal Act provide a strong foundation to combat financial exploitation; however, elderly investors still need more protection, and these regulatory measures must be strengthened in order to do so. Part II of this article goes into greater detail about the previously mentioned statutes, rules, and

10. *Id.*
11. DEL. CODE ANN. tit. 31, § 3910 (2018).
12. *See* MO. REV. STAT. §§ 409.600–.630 (2015); WASH. REV. CODE § 74.34.215 (2010).
13. *See A Century of Investor Protection and Service NASAA: 1919 | 2019*, NORTH AM. SEC. ADMIN. ASS'N (2019), http://www.nasaa.org/about-us/nasaa-history/.
14. NASAA MODEL ACT, *supra* note 8, at 1–2.
15. Bob Webster, *NASAA Members Adopt Model Act to Protect Seniors and Vulnerable Adults*, NORTH AM. SEC. ADMIN. ASS'N (Feb. 1, 2016), http://www.nasaa.org/38777/nasaa-members-adopt-model-act-to-protect-seniors-and-vulnerable-adults/.
16. *Id.*
17. *See NASAA Model Act to Protect Vulnerable Adults from Financial Exploitation Update Center*, SERVEOURSENIORS.ORG, http://serveourseniors.org/about/policy-makers/nasaa-model-act/update/ (last visited Feb. 17, 2019) [hereinafter *NASAA Model Act Update Center*].
18. Senior$afe Act of 2015, S. 2216, 114th Cong. (2015).
19. Economic Growth, Regulatory Relief, and Consumer Protection Act, Pub. L. No. 115-174, § 303, 132 Stat. 1296, 1335 (2018).
20. *See* Financial Exploitation of Specified Adults, FINRA Rule 2165(b) (2018).
21. *See* 15 U.S.C. § 78o (2015) (authorizing the establishment of national securities associations to be registered with the S.E.C.).

models to provide a stronger understanding for Part III, which compares and elaborates on the underlying weaknesses of each statute, rule, or model. Finally, Part IV discusses potential improvements and what a stronger piece of legislation entails.

## II. Statutes, Models, and Acts: A Deeper Look at Recent Action to Combat Financial Exploitation of the Elderly

In order to better understand the shortcomings of the Federal Act, and the additions that should be made to the Model Act, a background of the two is necessary. This section summarizes the scope of the Federal Act and the Model Act, which take vastly different approaches. In sum, the Federal Act exculpates persons from liability for good faith disclosures made to certain state agencies.[22] The immunity from suit is contingent upon the completion of specified training.[23] The Model Act is much broader. Among other things, the Model Act imposes mandatory disclosure obligations and allows a covered institution to place a temporary hold on disbursements of funds when the covered institution reasonably suspects covered misconduct.[24]

### *A. The Economic Growth, Regulatory Relief, and Consumer Protection Act*

The Federal Act is the most recent attempt at combatting financial exploitation of the elderly, and is comprised of four primary components.[25] The first provision provides that a covered individual is not liable in a civil or administrative proceeding for reporting the suspected financial exploitation of a senior citizen to the appropriate government agency.[26] There are six types of government agencies that are covered under the Federal Act: (1) "a State financial regulatory agency," (2) all federal agencies represented under the Financial Institutions Examination Council,[27] (3) FINRA, (4) the Securities and Exchange Commission ("S.E.C."), (5) a law enforcement agency, or (6) a state or local adult protective services agency.[28] This provision is a crucial step towards federal protection for seniors because it helps encourage institutions to disclose financial exploitation by eliminating their concerns of violating the financial privacy rules of the Gramm-Leach-Bliley Act, which would otherwise make it illegal for financial institutions to disclose certain financial information of their clients.[29] The provision requires the reporting individual to meet certain requirements, including (1) the individual making the disclosure must serve in a legal, compliance, or supervisor role for the institution,[30] (2) the

22. 12 U.S.C. § 3423(a)(2) (2018).
23. *Id.* § 3423(b).
24. NASAA Model Act, *supra* note 8, at 8, 10–11.
25. 12 U.S.C. § 3423.
26. *Id.* § 3423(a)(1)(C).
27. *See* 12 U.S.C. § 3303(a) (2011).
28. 12 U.S.C. § 3423(a)(1)(C).
29. *See* 15 U.S.C. §§ 6801-6809 (2011).
30. *See* 12 U.S.C. § 3423(a)(2)(A) (in the case that the individual reporting is an investment adviser representative, registered representative, or insurance producer, the individual must be affiliated associated with the covered institution, rather than serving in legal, compliance, or supervisor role.).

individual making the disclosure does so in good faith, and (3) the individual making the disclosure does so with reasonable care.[31]

The second provision of the Federal Act is similar to the first, providing the same type of civil and administrative immunity to financial institutions for a disclosure of suspected financial exploitation to a covered government agency, made by a qualified individual who is provided immunity under the first provision of the act.[32] In other words, the financial institution also receives immunity for a disclosure made by an employee as long the disclosure was made in accordance with the first section of the Federal Act. The financial institutions that are covered by the Federal Act include credit unions, depository institutions, investments advisers, broker-dealers, insurance companies, insurance agencies, and transfer agents.[33] Similar to the first provision, the second provision is essential to the Federal Act's purpose because it is unlawful for financial institutions to disclose information about their clients' financial records.[34]

It is important to point out that the Federal Act only grants immunity from liability for disclosing suspected financial exploitation to a covered agency.[35] The Federal Act specifically states that it is not to be "construed to limit the liability of an individual or a covered financial institution in a civil action for any act, omission, or fraud" that is not a good faith disclosure made in accordance with the Federal Act.[36] This provision significantly limits the Federal Act's potential for abuse by clearly stating that an individual or financial institution may not receive immunity from liability by claiming they suspected financial exploitation if the disclosure was made in bad faith.[37] For example, a qualified individual who reports suspected financial exploitation in order to have a transaction put on hold for their own benefit, or knowing that there was not financial exploitation, would not be provided immunity under the Federal Act.

The third provision of the Federal Act outlines the necessary training for financial institutions to provide their employees in order to qualify for immunity from liability.[38] The training is designed to instruct employees on how to properly identify and report suspected financial exploitation of elderly adults, while still emphasizing the importance of client privacy.[39] Before either the financial institution or the individual can receive immunity for disclosure of suspected financial exploitation, the individual must receive the required training.[40] In other words, a financial institution will not receive immunity if an employee reports suspected financial exploitation without the required training.[41]

Finally, the Federal Act specifies that it does not preempt or limit any state laws that provide greater protection to an individual or financial institution making an approved disclosure.[42] Essentially, this provision makes it clear that states which

31. *Id.*
32. *Id.* § 3423(a)(2)(B).
33. *Id.* § 3423(a)(1)(D).
34. 15 U.S.C. § 6801.
35. 12 U.S.C. § 3423(a)(2)(C).
36. *Id.*
37. *Id.*
38. *Id.* § 3423(b).
39. *Id.* § 3423(b)(2)(A)(ii)-(iii).
40. *Id.* § 3423(b).
41. *Id.*
42. *Id.* § 3423(c).

have enacted stronger measures, such as the Model Act, can continue to enforce their laws.[43]

### *B. An Act to Protect Vulnerable Adults from Financial Exploitation*

In 2016, NASAA adopted the Model Act.[44] As previously mentioned,[45] the Model Act is simply a guideline for state legislatures to use when proposing legislation to protect elderly adults from financial exploitation.[46] The Model Act has five primary features that, according to NASAA, "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."[47] There are five primary features of the Model Act: (1) a mandatory reporting requirement for broker-dealers and investment advisers; (2) a provision requiring broker-dealers and investment advisers to share records related to exploitation with law enforcement and state adult protective services agencies; (3) the option to notify third parties of suspected financial exploitation if they receive prior consent from the investor; (4) the ability to place a temporary hold of 15 business days on disbursements of funds if the individual suspects financial exploitation; and (5) immunity from civil and administrative liability for reporting to government agencies, notifying third parties, and delaying disbursements of funds.[48]

The first two components of the Model Act require all broker-dealers and investment advisers that reasonably suspect an elderly client is the target of financial exploitation to disclose their suspicion to the state "agencies."[49] State "agencies," or "the agencies," refers to the adult protective services ("APS") unit and/or the state commissioner of securities.[50] Additionally, they require the individual that makes a disclosure to share records related to the suspected financial exploitation.[51] These records include, but are not limited to, bank records, email conversations, and information regarding the fraudulent investment.[52] NASAA is clear to point out that this provision is meant to allow disclosure of financial information confidentially because "[APS] agencies often have difficulty obtaining records from financial firms in a timely fashion."[53] However, this provision does not diminish state securities regulators' authority to obtain records from broker-dealers or investment advisers.[54]

The third component provides broker-dealers and investment advisors the option to notify third parties of suspected financial exploitation if they receive prior

43. *Id.*
44. *See* NASAA MODEL ACT, *supra* note 8, at 2.
45. *See* Webster, *supra* note 15 and accompanying text.
46. STEPHEN DEANE, SEC, ELDER FINANCIAL EXPLOITATION: WHY IT IS A CONCERN, WHAT REGULATORS ARE DOING ABOUT IT, AND LOOKING AHEAD at i–ii (June 2018), https://www.sec.gov/files/elder-financial-exploitation.pdf.
47. *See* NASAA MODEL ACT, *supra* note 8, at 2.
48. *Id.* at 2–3.
49. *Id.* at 8.
50. *Id.*
51. *Id.* at 13–14.
52. *Id.* at 11–12.
53. *Id.* at 19 n.39.
54. *Id.* at 13–14.

consent from the investor.[55] Simply put, in situations where reporting is required under the first two Model Act provisions, the broker-dealer or investment adviser can also notify someone such as a family member or caretaker as long as the elderly adult previously authorized them to do so.[56] The exception to this provision is that broker-dealers or investment advisers cannot notify the third party if they are the party suspected of financial exploitation, or if they are suspected of other forms of elderly abuse.[57]

The fourth provision of the Model Act allows a broker-dealer or investment advisor to delay a disbursement from an account of an elderly adult or an account of which the elderly adult is a beneficiary.[58] If a qualified individual decides to make a temporary delay on a disbursement, the funds are held in a temporary escrow account.[59] The delay of disbursements expires after 15 business days, unless the agency notified requests for the broker-dealer or investment advisor to extend the delay.[60] If a government agency requests an extension of the delay, disbursements may be delayed for up to 25 business days from the first delayed disbursement of funds.[61] This is arguably the most important provision of the Model Act because it actually prevents disbursement of a senior's funds that would otherwise be authorized.[62] If the requested disbursement is determined to be attempted financial exploitation, the disbursement delay directly prevents the investor from losing their money.[63]

The final provision of the Model Act provides broker-dealers and investment advisers with immunity from civil and administrative liability for delaying disbursements.[64] The provision is subject to the requirement that the delay is in good faith and in the exercise of reasonable care.[65]

To summarize, the Model Act is an example of legislation that helps protect elderly investors from financial exploitation.[66] The Model Act does this by requiring broker-dealers and investment advisers to report and share records relating to suspected elderly financial exploitation to state agencies.[67] It also allows the broker-dealer or investment advisor to notify an approved third party of the suspected financial exploitation and temporarily delay a disbursement if there is reason to believe that it is attempted financial exploitation.[68]

55. *Id.* at 10.
56. *Id.*
57. *Id.*
58. *Id.* at 11–12.
59. *Id.* at 13.
60. *Id.*
61. *Id.* at 12.
62. *See* DEANE, *supra* note 46, at 16.
63. *Id.*
64. NASAA MODEL ACT, *supra* note 8, at 13.
65. *Id.*
66. DEANE, *supra* note 46, at 16.
67. *See* NASAA MODEL ACT, *supra* note 8, at 2–3.
68. *Id.*

### C. *FINRA Rule 2165: Financial Exploitation of Specified Adults*

FINRA Rule 2165 was passed in February 2018.[69] It shares many similarities to the Model Act but also has a multitude of material differences.[70] As NASAA made clear, FINRA's rule is an important regulatory step, but is not a substitute for state legislation.[71] FINRA Rule 2165 has three primary provisions: (1) allowing a broker-dealer to place a temporary hold of funds or securities from the account of an elderly adult; (2) requiring a broker-dealer that intends to place a temporary hold of funds or securities to notify all authorized parties on the account and all trusted third party contact persons on the account; and (3) requiring a broker-dealer to maintain records related to compliance with FINRA Rule 2165.[72] The reasoning and application of these provisions are similar to the Model Act and therefore are not discussed in more greater depth in this article. However, it is necessary to point out that a broker-dealer may not notify an authorized party or trusted third party if they are the party suspected of engaging in financial exploitation of the elderly adult.[73]

## III. COMPARISONS, INTERACTIONS, AND INHERENT WEAKNESSES

Of the three regulatory measures created to combat financial exploitation of elderly adults discussed above, it is clear the Model Act and FINRA Rule 2165 have a lot more in common than the Federal Act.[74] The Federal Act simply allows a financial institution to report suspected financial exploitation to a government agency by providing immunity for a good faith disclosure.[75] While providing notice of suspected financial exploitation of elderly adults to the appropriate government agency is an important step for protecting vulnerable investors, it does not do enough on its own to prevent financial exploitation of elderly adults. Therefore, additional regulatory measures are needed.

The Federal Act's narrow scope of protection for elderly investors is especially evident in states that have not enacted legislation that mirrors the Model Act. In a state that has not adopted a version of the Model Act, an investment advisor or other financial institution[76] that suspects financial exploitation is occurring will have to make the requested disbursement or transaction—even if they are certain that the

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69. *See Frequently Asked Questions Regarding FINRA Rules Relating to Financial Exploitation of Senior Investors*, FINRA, http://www.finra.org/industry/frequently-asked-questions-regarding-finra-rules-relating-financial-exploitation-seniors (last visited Feb. 26, 2019); FINRA, REGULATORY NOTICE 17-11 at 1 (Mar. 2017), https://www.finra.org/sites/default/files/Regulatory-Notice-17-11.pdf.

70. *See* DEANE, *supra* note 46; Financial Exploitation of Specified Adults, FINRA Rule 2165(b) (2018).

71. NASAA MODEL ACT, *supra* note 8, at 4.

72. FINRA Rule 2165.

73. Notice of Filing of Partial Amendment and Order Granting Accelerated Approval of the Proposed Rule Change to Amend Rule 4512 and Adopt FINRA Rule 2165, 82 Fed. Reg. 10,059 (Feb. 9, 2017).

74. *See* NASAA MODEL ACT, *supra* note 8; FINRA Rule 2165; 12 U.S.C. § 3423 (2018).

75. 12 U.S.C. § 3423(a)(2)(A).

76. A broker-dealer is purposely not included because they are permitted to make such a delay under FINRA Rule 2165.

disbursement will result in financial exploitation.[77] In a state that has enacted a version of the Model Act, the investment advisor can both disclose their suspicion to state government agencies and place a temporary hold on the disbursement.[78] The temporary hold means that the disbursement will likely not occur if the disbursement is determined to be related to financial exploitation.

In a state that has not enacted a version of the Model Act, and therefore only has the tools provided under the Federal Act, the temporary delay of the disbursement is not allowed.[79] The investment advisor is required to make the disbursement or transaction.[80] After the investment advisor has completed the disbursement, they must report the suspected financial exploitation to the appropriate government agency in accordance with the Federal Act.[81] Meanwhile, the disbursed money is now out of the control of the financial institution and in the hands of the person that is believed to be financially exploiting the elderly investor. [82] If financial exploitation did occur as a result of the disbursement or transaction, the investor is left without their money and with a difficult path to recover it because money stolen through financial exploitation is often "quickly expended[] with nothing left to recover."[83] The fact that a government agency is aware of the situation is likely of little condolence.

If all states, or at least a large percentage of them, enacted legislation similar to the Model Act, the narrow scope of protection provided by the Federal Act would be less prevalent. However, as of October 13, 2018, only 19 states enacted the Model Act.[84] While three states enacted similar legislation prior to the Model Act's adoption by NASAA,[85] an additional three states enacted legislation in 2018.[86] However, half the states (and less than half if you count the District of Columbia) still have no state legislation or regulation that allows for a hold on disbursements

77. *See* 12 U.S.C. § 3423(a) (containing no provision relating to a financial institution placing a temporary hold on a disbursement of funds or securities).

78. NASAA MODEL ACT, *supra* note 8, at 8, 11.

79. *See* NASAA MODEL ACT, *supra* note 8; FINRA Rule 2165; 12 U.S.C. § 3423.

80. *See* Standards of Commercial Honor and Principles of Trade, FINRA Rule 2010 (2008) (requiring a broker-dealer to "observe high standards of commercial honor and just equitable principles of trade"); *See* Standards of Commercial Honor and Principles of Trade, FINRA Rule 2010 (2008) (requiring a broker-dealer to "observe high standards of commercial honor and just equitable principles of trade"); Customer Account Transfer Contracts, FINRA Rule 11870 (2010) (requiring broker-dealers to expedite authorized account asset transfers).

81. 12 U.S.C. § 3423(a)(2)(B).

82. While the Federal Act uses the term financial institution to cover multiple types of institutions, the Model Act and FINRA Rule 2165 only apply to broker-dealers and investment advisers. Other institutions, such as credit unions and banks, would not be able to place a hold on a disbursement under any of the regulatory measures.

83. Michael O. Schroeder, *Recovering from Trauma of Financial Elder Abuse—What to Do*, NEW AM. MEDIA (Mar. 20, 2017), http://newamericamedia.org/2017/03/recovering-from-trauma-of-financial-elder-abusewhat-to-do.php.

84. *NASAA Model Act Update Center*, *supra* note 17.

85. *See* Senior Savings Protection Act, MO. REV. STAT. §§ 409.600-.630 (2015); WASH. REV CODE § 74.34.215 (2010); DEL. CODE ANN. tit 31, §§ 3902, 3910 (2014).

86. *See* Protection from Financial Exploitation Act, KY. REV. STAT. ANN. § 365.245 (West 2018); Financial Exploitation Protection for Older or Vulnerable Adults, MINN. STAT. §§ 45A.01-.07 (2018); Protection of Vulnerable Adults from Financial Exploitation Act, UTAH CODE ANN. §§ 61-1-201 to 61-1-206 (West 2018).

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or transactions.[87] This poses a serious hurdle in the effort to combat financial exploitation.[88]

In contrast to the Federal Act, both the Model Act and FINRA Rule 2165 provide a broader array of measures for combatting financial exploitation.[89] While they seem very similar, or even identical at first glance, there are a couple of key differences worth noting. The most important difference, as stated previously, is that the Model Act serves as a set of guidelines and is not enforceable, while FINRA Rule 2165 is an enforceable regulation.[90]

Another key difference between the Model Act and FINRA Rule 2165 is FINRA Rule 2165 applies only to broker-dealers and agents, while the Model Act applies to broker-dealers, agents, investment advisers, and investment adviser representatives.[91] This is not a provision that can be changed, as FINRA only has regulatory authority over broker-dealers, but it is still a material difference that makes the Model Act broader in regards to protecting elderly investors.[92] It also reaffirms NASAA's position that FINRA Rule 2165 is not a substitute for states adopting the Model Act.[93]

In addition to the two primary differences in enforceability and applicability of the protective regulation, the Model Act and FINRA Rule 2165 have multiple material distinctions that are less noticeable but impact the strength of protection provided.[94] These differences include (1) the mandatory third-party notification requirement, (2) mandatory reporting to state securities regulators and APSs, (3) mandatory retention of records, (4) mandatory training, and (5) immunity from civil and administrative proceedings.[95]

Neither FINRA Rule 2165 or the Model Act require the elderly investor to provide a trusted third-party contact in the event that the investor is subject to financial exploitation in the future.[96] However, if the elderly investor does provide a trusted third-party contact, FINRA Rule 2165 requires the broker-dealer to notify the suspected financial exploitation to the third party.[97] However, the Model Act allows, but does not require, a third party to be notified.[98]

Both FINRA Rule 2165 and the Model Act allow the investment firm to place a hold on a disbursement, but FINRA Rule 2165 does not require the broker-dealer to notify state securities regulators or APS about the suspected financial exploitation, even if they place a hold on disbursements.[99] On the other hand, the Model Act

87. *See* NASAA MODEL ACT, *supra* note 8, at 3–4; *NASAA Model Act Update Center*, *supra* note 17.

88. *See* NASAA MODEL ACT, *supra* note 8, at 3–4; *NASAA Model Act Update Center*, *supra* note 17.

89. *See* NASAA MODEL ACT, *supra* note 8; Financial Exploitation of Specified Adults, FINRA Rule 2165 (2018).

90. *See supra* notes 15, 21 and accompanying text.

91. FINRA MANUAL: BY-LAWS OF THE CORPORATION art. III, § 1(a) (2007), http://finra.complinet.com/en/display/display_viewall.html?rbid=2403&element_id=4603&record_id=6003&filtered_tag= (stating that a FINRA member is "[a]ny registered broker, dealer, municipal securities broker or dealer, or government securities broker or dealer . . ."); *See* NASAA MODEL ACT, *supra* note 8, at 6–7.

92. NASAA MODEL ACT, *supra* note 8, at 4.

93. *Id.*

94. *See id.* at 4–5; FINRA Rule 2165.

95. *See* DEANE, *supra* note 46, at 16; *see also* NASAA MODEL ACT, *supra* note 8; FINRA Rule 2165.

96. DEANE, *supra* note 46, at 16.

97. *Id.* at 17 (stating "the broker-dealer is not required to report the suspected financial exploitation to the trusted third party if they reasonably believe that the third party is engaged in financial exploitation").

98. NASAA MODEL ACT, *supra* note 8, at 10.

99. *See* FINRA Rule 2165(b).

requires the individual[100] who believes financial exploitation is occurring to notify state securities regulators and APS.[101] This is a very important difference and a prime example of why FINRA Rule 2165 is not a substitute to adopting the Model Act.[102]

If an individual believes that financial exploitation of an elderly investor is taking place, it is important that they report it to the appropriate agencies.[103] Reporting the suspected financial exploitation to the appropriate agencies is imperative to protecting vulnerable investors because it allows them to investigate the matter to confirm that financial exploitation occurred and to provide resources to limit the harm caused by the financial exploitation.[104] This includes preventing the fraudster from financially exploiting other elderly investors in the future.[105]

Another distinction between the Model Act and FINRA Rule 2165 is that, much like the Federal Act, FINRA Rule 2165 requires the individual or firm that places the temporary disbursement hold to have received training before they are able to do so.[106] In contrast, the Model Act does not require any training before making a disclosure or placing a temporary hold on disbursements.[107] While FINRA Rule 2165 applies to broker-dealers, this still leaves a clear hole that allows investment advisers and investment adviser representatives to make disclosures and place temporary disbursement holds without receiving any training.[108]

A final difference between the Model Act and FINRA Rule 2165 regards immunity from liability. The Model Act provides an individual that makes a disclosure or temporary disbursement hold with immunity from civil and administrative liability, so long as their action was done in compliance with the Model Act.[109] The commentary on this provision clearly states that immunity from liability does not apply to potential criminal liability.[110] The immunity also does not apply to prior misconduct, meaning that the individual cannot "engage in misconduct," report the misconduct as financial exploitation, and then receive immunity for the misconduct.[111] In contrast, FINRA Rule 2165 does not provide immunity from civil or administrative liability that may arise from disclosures or temporary disbursement holds, although it does provide a defense from action taken against them by FINRA.[112]

To recap, the Federal Act is the most narrow regulatory mechanism in regard to the protection it provides elderly investors from financial exploitation.[113] Its two main components are providing firms and certain individuals with immunity from

100. *See* NASAA MODEL ACT, *supra* note 8, at 7 (the individual can be a broker-dealer, agent, investment adviser, or investment adviser representative.).
101. *Id.* at 8 (stating that, in the case of suspected financial exploitation, "the qualified individual shall promptly notify Adult Protective Services and the commissioner of securities.").
102. *Id.* at 4.
103. Appropriate agencies refer to state security regulators and APS.
104. NASAA MODEL ACT, *supra* note 8, at 9.
105. *Id.*
106. Financial Exploitation of Specified Adults, FINRA Rule 2165.02 (2018).
107. *See* NASAA MODEL ACT, *supra* note 8.
108. DEANE, *supra* note 46, at 17.
109. NASAA MODEL ACT, *supra* note 8, at 9, 13.
110. *Id.* at 10.
111. *Id.*
112. DEANE, *supra* note 46, at 17.
113. *See* 12 U.S.C. § 3423 (2018).

liability for good faith disclosures and requiring a training program to do so.[114] FINRA Rule 2165 and the Model Act provide broader protection than the Federal Act because they both allow a temporary hold on disbursements from an elderly investor's account if the broker-dealer or investment advisor suspects the investor is the target of financial exploitation.[115] Although FINRA Rule 2165 and the Model Act are well planted first steps, securities regulators must do more to combat financial exploitation of elderly investors.

## IV. Proposal to Strengthen Financial Exploitation Regulation

It is now apparent that all of the discussed regulatory measures taken to combat financial exploitation of elderly persons have multiple flaws. To be clear, they have all been instrumental in preventing financial exploitation, but they still need improvement. There are three different categories of improvements that regulators can make: (1) changes to both the Model Act and FINRA Rule 2165, (2) changes to the Model Act, and (3) changes to FINRA Rule 2165.

### *A. Necessary Changes to the Model Act and FINRA Rule 2165*

Strengthening current regulation requires an important improvement to the Model Act and FINRA Rule 2165. Specifically, both the Model Act and FINRA Rule 2165 must be amended to allow a qualified individual to place a temporary hold on transactions in addition to the temporary hold on disbursements that is currently permitted.[116]

A transaction is defined as "[t]he act or instance of conducting business or other dealings; especially the formation, performance, or discharge of a contract."[117] The key distinction between a disbursement and a transaction is that a transaction involves the sale, purchase, or trade of securities or other assets, but the acquired funds, securities, or assets stay in the account, which is managed by the account holders' broker-dealer or investment adviser.[118] On the other hand, a disbursement involves the liquidation and withdrawal of securities or assets.[119] Disbursed funds are thus no longer managed by the broker-dealer or investment adviser.[120]

Adding the ability to place a temporary hold under both measures means that this important change will apply to the widest range of firms. The reasoning behind this is that FINRA adopting the change to Rule 2165 would permit broker-dealers in every state to place a temporary hold on transactions, given they meet all the requirements.[121] NASAA amending the Model Act to apply this change would likely result in states that have adopted the Model Act amending their state statutes

114. *Id.* § 3423(a)(2)(A), (B).
115. NASAA Model Act, *supra* note 8, at 11; Financial Exploitation of Specified Adults, FINRA Rule 2165(b)(1) (2018).
116. NASAA Model Act, *supra* note 8, at 11–13; FINRA Rule 2165(b).
117. *Transaction*, Black's Law Dictionary (10th ed. 2014).
118. Deane, *supra* note 46, at 17.
119. *Id.*
120. *Id.*
121. FINRA Rule 2165(b).

to match the Model Act. This is important because only the Model Act includes investment advisers.[122] If states update their statutes to match this proposed change, investment advisers in around half the states would be able to place a temporary hold on transactions. Therefore, if both the Model Act and FINRA Rule 2165 make this change, all broker-dealers and investment advisers in approximately half the states would be able to place a hold on transactions if they reasonably suspected financial exploitation. This is a huge improvement from the current amount, in which only Kentucky, Utah, and Minnesota allow such a hold.[123]

To better demonstrate the distinction between a disbursement and a transfer in the exploitation of an elderly investor, consider the following example. A disbursement would involve the elderly person requesting their broker-dealer to liquidate all the stock in their account. The cash value of the stock is then transferred—or "dispersed"—to the elderly investor. The investor then gives the funds to the individual that is attempting to exploit the investor. The exploitation could be in the form of a fraudulent investment scheme, or it could be as easy as simply asking for the money. In either event, the fraudster successfully exploits the elderly investors naivety and obtains their retirement funds.

Because disbursements can result in an investor's entire account being demolished, preventing financial exploitation that results in a disbursement has been a higher priority for regulators.[124] While there is no denying the devastating effect of financial exploitation that results in a disbursement, it is important to recognize the substantial effect that transactions can also have. A prime example of the harmful effect of transactions is if a fraudster convinces an elderly investor to sell their annuities.[125] While both the Model Act and FINRA rule 2165 permit a hold to be placed if the elderly investor requests a disbursement in that case,[126] the investor will still incur significant penalties from the transaction of cashing out the annuity, regardless of whether there is a disbursement.[127]

Because of the significant financial harm that can occur from financial exploitation that results in a transaction, both FINRA Rule 2165 and the Model Act must allow a qualified individual to place a temporary hold on transactions.[128] In amending each respective regulatory measure to include a temporary hold on transactions, the process, time restraints, and the requirements of a qualified individual should be identical to those that are currently laid out in the Model Act and FINRA Rule 2165.[129] Making this change to both measures is as simple as adding the words "and transactions" to each provision that a hold on disbursements is mentioned. Recently, Kentucky adopted a version of the Model Act that also allows for a temporary hold on transactions.[130] Similar to the above suggestion, Kentucky has identical requirements for placing a temporary hold on a disbursement and any other transaction.[131]

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122. NASAA MODEL ACT, *supra* note 8, at 11.
123. *See* KY. REV. STAT. ANN. § 365.245 (West 2018); MINN. STAT. § 45A.06 (2018); UTAH CODE ANN. § 61-1-204 (West 2018).
124. DEANE, *supra* note 46, at 17.
125. *Id.* at 11.
126. NASAA MODEL ACT, *supra* note 8, at 11; FINRA Rule 2165(b).
127. DEANE, *supra* note 46, at 17.
128. *Id.*
129. *See* NASAA MODEL ACT, *supra* note 8; FINRA Rule 2165(b).
130. *See* KY. REV. STAT. ANN. § 365.245(3)(a) (West 2018).
131. *Id.*

Applying this change to both the Model Act and FINRA Rule 2165 will significantly expand the number of firms and individuals that are permitted to place a hold on transactions when they reasonably suspect financial exploitation of their client. Doing so will increase the regulatory protection provided to elderly investors, which can help reduce the rate of successful financial exploitation.[132]

### *B. Necessary Changes to FINRA Rule 2165*

There are two additional improvements to FINRA Rule 2165 needed to help firms and government agencies combat financial exploitation of the elderly. The first change that must be made is to require a broker-dealer that reasonably suspects financial exploitation to disclose that suspicion to their state security regulator. This change is necessary because state securities regulators are equipped to investigate claims of suspected financial exploitation and their early intervention can mitigate, and even prevent, the harmful effects of financial exploitation.[133] While the broker-dealer who suspects financial exploitation will likely be able to prevent their client from being exploited, they are not capable of shielding non-clients from financial exploitation. By reporting the suspected financial exploitation to a state securities regulator, the broker-dealer is not prevented from helping their client, and the government can further investigate the financial exploitation.[134]

In 2018, states that had enacted the Model Act received over 500 reports of suspected elderly financial exploitation.[135] In Texas alone, approximately 100 instances of suspected financial exploitation were reported to the Texas State Securities Board, resulting in 24 opened investigations—a rate of almost 25%.[136] If Texas had to rely solely on FINRA Rule 2165 rather than state-enacted legislation, these disclosures of suspected financial exploitation would likely not have been made, the fraudster would not be under investigation, and would be free to financially exploit others.[137] Simply put, a mandatory disclosure of suspected financial exploitation will lead to a higher awareness of individual occurrences of financial exploitation.[138]

The other necessary change to FINRA Rule 2165 is a provision that provides a broker-dealer with immunity from civil and administrative liability for placing a temporary hold on a disbursement. While the Federal Act provides a broker-dealer with immunity from liability for making a disclosure to a government agency,[139] and FINRA Rule 2165 provides a defense from action against FINRA,[140] neither provide immunity from liability for making a disclosure to a trusted third party, or placing a temporary hold on the disbursement.[141]

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132. *See* NASAA, ENFORCEMENT REPORT 6 (2018), http://www.nasaa.org/wp-content/uploads/2018/10/2018-Enforcement-Report-Based-on-2017-Data-FINAL.pdf [hereinafter ENFORCEMENT REPORT].
133. NASAA MODEL ACT, *supra* note 8, at 9.
134. *Id.*
135. *See* ENFORCEMENT REPORT, *supra* note 132, at 6.
136. *Id.*
137. NASAA MODEL ACT, *supra* note 8, at 8–9.
138. *See* ENFORCEMENT REPORT, *supra* note 132, at 6.
139. *See* 12 U.S.C. § 3423(a)(2) (2018).
140. DEANE, *supra* note 46, at 17.
141. *See* 12 U.S.C. § 3423; Financial Exploitation of Specified Adults, FINRA Rule 2165 (2018).

Without a provision that provides immunity from liability for good faith disclosures or temporary holds on disbursements, broker-dealers may not be as inclined to take the measures permitted by FINRA Rule 2165 due to fear of liability for violating financial privacy rules. While a broker-dealer would likely point to "the safe harbor provisions in FINRA Rule 2165" as a defense, this provision is no guarantee against a civil or administrative action against them.[142] Adding an immunity from civil and administrative liability provision will remove this uncertainty, which would make broker-dealers more likely to use the measures permitted in FINRA Rule 2165.

### *C. Necessary Changes to the Model Act*

Finally, there is one necessary change to the Model Act to make it more effective in combatting financial exploitation. The Model Act must require the individuals that it permits to make disclosures and place holds on transactions to receive training before they are able to do so. The training should be similar, or even the same, as the training required under the Federal Act and FINRA Rule 2165.[143] It is important to note that the training required under the FINRA Rule 2165 would apply to broker-dealers in states that have adopted the Model Act.[144] However, certain investment advisers would not be required to receive training about financial exploitation, leaving a gap.[145] Required training will assist the investment advisers in recognizing the signs of financial exploitation as well as ensure that investment advisers are complying with the requirements of the Model Act.[146] By recognizing the signs of financial exploitation, individuals will be able to spot and act on financial exploitation of elderly persons that an untrained individual would likely have missed. Adding this provision will increase the number of elderly adults who are able to benefit from the measures permitted within the Model Act.

## V. CONCLUSION

Financial exploitation of elderly adults is an enormous concern. While both federal and state regulators have taken measures to combat this epidemic, more must be done. Currently, less than half the states have adopted legislation that mirrors the Model Act.[147] That statistic is simply unacceptable, especially considering that adoption of the Model Act is currently the strongest regulatory tool available against financial exploitation.

However, because a majority of states have yet to adopt a version of the Model Act, there are other measures needed to combat financial exploitation of elderly adults. Adding a provision to both the Model Act and FINRA Rule 2165 that allows qualified individuals to place a temporary hold on transactions, in addition to disbursements, will provide certain professionals with an additional mechanism to combat financial exploitation.

142. DEANE, *supra* note 46, at 17.
143. *See, e.g.*, Economic Growth, Regulatory Relief, and Consumer Protection Act, Pub. L. No. 115-174, § 303(c), 115 Stat. 40, 41 (2018); FINRA Rule 2165.02 (2018).
144. *See supra* notes 15, 21 and accompanying text.
145. *See supra* notes 15, 21 and accompanying text.
146. FINRA Rule 2165.02 (2018).
147. NASAA MODEL ACT, *supra* note 8, at 3.

Additionally, there are changes that need to be made to the Model Act and FINRA Rule 2165 to make the tools they provide financial professionals more effective. FINRA Rule 2165 needs to add a provision that requires broker-dealers to disclose suspected financial exploitation to state securities regulators. FINRA also needs to add a provision that provides immunity from liability for the measures that the Rule currently permits; that way broker-dealers will be more inclined to use them. Finally, the Model Act should add a mandatory training requirement similar to the ones required by the Federal Act and FINRA Rule 2165. This training will assist qualified individuals in recognizing financial exploitation, potentially allowing them to identify and prevent additional occurrences of such exploitation.

While these changes to regulation do not provide a flawless solution to financial exploitation, they would be another enormous step in combating the issue. Additionally, all these proposals are realistic, practical changes that regulators can actually implement. Every proposed change discussed is in use by at least one state, or by federal statute or regulation. These changes are not suggesting radical untested changes to current regulation, rather they are expanding current regulation so that it can be used in a greater number of suspected finical exploitation cases.