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Via Email to cs@nasaa.org

October 29, 2015

Mr. Christopher Staley, Counsel
NASAA Legal Department
750 First Street, NE, Suite 1140
Washington, DC 20002

Re: Request For Comments Regarding NASAA's Proposed Model Legislation Or Regulation To Protect Vulnerable Adults From Financial Exploitation

Dear Mr. Staley:

I write on behalf of the Public Investors Arbitration Bar Association ("PIABA"), an international bar association comprised of attorneys who represent investors in securities arbitrations. Since its formation in 1990, PIABA has promoted the interests of the public investor in all securities and commodities arbitration forums, while also advocating for public education regarding investment fraud and industry misconduct. Our members and their clients have a strong interest in rules promulgated by regulatory and self-regulatory securities authorities to govern the conduct of securities firms and their representatives. In particular, our members and their clients have a strong interest in rules relating to the protection of elderly and retired investors and the supervision of associated persons who serve these investors.

PIABA supports, but proposes certain important changes to, NASAA's current proposed Model Legislation or Regulation to Protect Vulnerable Adults from Financial Exploitation ("Model Act"), which seeks to promote a uniform standard that may be adopted by state regulators and other industry participants. The Model Act would define key terms, as well as provide for disclosure, permit delay of disbursements and provide immunity for such disclosure and delay of disbursements under certain circumstances.

The purpose of the Model Act is to protect senior-aged investors from financial exploitation, ideally with uniform parameters that all states will adopt for the sake of clarity. PIABA is generally supportive of the Model Act, because it properly establishes a bright-line definition of the population sought to be protected. However, PIABA believes that the proposed Model Act does not go far enough to reach this aim of protection of senior-aged investors, because it does not obligate action by the firm that should be reporting and does not create a penalty for willfully ignoring evidence of abuse.

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There is a need for strong protection of the elderly investing population. With roughly one out of every five Americans 65 years and older being the victim of financial abuse,[1] the elderly are estimated to lose up to $2.9 billion per year from scams.[2] These figures are likely lower than the true figures since they only account for frauds that are reported, and seniors are "less likely" to report being scammed.[3]

Broker-Dealers, Investment Advisors and registered persons are in the perfect position to recognize signs and symptoms of diminished capacity and dementia with respect to their clients' ability to handle their finances and prevent elder financial abuse.[4] Financial advisors may actually become aware of suspicious activity before family and friends.[5]

A. The Model Act Permits, But Does Not Obligate, Disclosure and Action

The Model Act contains three key provisions where there should be an obligation, not merely permission, for a "qualified employee" to act when they have a reasonable belief that financial exploitation of an Eligible adult may have occurred or will occur. Section 3 of the Model Act properly requires that if a qualified employee has such a reasonable belief, that "the qualified employee shall promptly notify" the requisite governmental authorities.

On the other hand, Sections 5 and 7 of the Model Act merely permit action by the qualified employee or firm. *See* Section 5 (Third-Party Disclosure… a qualified employee may notify any third party [previously] designated…); Section 7(1) (Delaying Disbursements… [a] broker-dealer or, investment adviser may delay disbursement…). Since the proposed language already contemplates limiting the disclosure to third-parties previously designated by the eligible adult, and who are not themselves the suspected abuser, there is no reason why the disclosure should not also be mandatory.

NASAA would find support from forward-looking statutes that have already been enacted that seek to protect the elderly.

California

Since January 1, 2007, officers and employees of financial institutions have been mandatory reporters of suspected financial abuse of an elder or dependent adult, with "elder" defined simply as a California resident age 65 or older. Cal. Welf. & Inst. Code §§ 15610.27, 15630.1. If an incident known or observed by the mandatory reporter reasonably appears to be financial abuse, or triggers reasonable suspicion of abuse, he or she must report

[1] *See* E.S. Browning, *Financial Scammers Increasingly Target Elderly Americans*, WALL ST. J. (Dec. 23, 2013), http://www.wsj.com/articles/SB10001424052702303330204579248292834035108. This is the equivalent of more than seven million Americans. *See* INVESTOR PROTECTION TRUST*, Preventing Elder Investment Fraud*, http://www.investorprotection.org/protect-yourself/?fa=protect-seniors (last visited July 29, 2015).
[2] Mason Braswell, *Unraveling Minds*, INVESTMENTNEWS, (Nov. 3, 2014).
[3] FEDERAL BUREAU OF INVESTIGATION, *Fraud Target: Senior Citizens*, https://www.fbi.gov/scams-safety/fraud/seniors (last visited July 29, 2015).
[4] *See* Naomi Karp & Ryan Wilson, Protecting Older Investors: The Challenge of Diminished Capacity, AARP PUBLIC POLICY INSTITUTE 17 (Nov. 2011), http://www.aarp.org/content/dam/aarp/research/public_policy_institute/cons_prot/2011/rr2011-04.pdf.
[5] *Id.*

"the known or suspected instance of financial abuse by telephone or through a confidential Internet reporting tool, as authorized pursuant to Section 15658, immediately, or as soon as practicably possible. If reported by telephone, a written report shall be sent, or an Internet report shall be made through the confidential Internet reporting tool established in Section 15658, within two working days to the local adult protective services agency or the local law enforcement agency." *Id.* at § 15630.1(d)(1). Reports of suspected financial abuse of the elder or dependent adult qualify as a "privileged publication or broadcast" under Cal. Civ. Code § 47(b). The mandated reporter is protected from civil and criminal liability with respect to the report. Cal. Welf. & Inst. Code § 15634. Interestingly, *nonmandated* reporters who report the abuse in the same manner as the mandated are also protected from liability, unless it can be proven that the report was knowingly false. Cal. Welf. & Inst. Code §§ 15631, 15634.

The California law is limited in some important respects. "Financial institutions" are specifically defined to include national banks, savings and loans, state banks and trust companies whose deposits are not limited solely to funds held in a fiduciary capacity, and federal or state credit unions. *Id*. at § 15630.1(b). Thus, while the California provisions appear to give parallel required reporting requirements as the Model Act, they exclude broker-dealers and investment advisors not otherwise falling under the definition of "financial institutions". Another gap in the California law is that the obligation to report may apply only if the employee or officer's knowledge or observation arises in connection with providing financial services with respect to the elder, and within the scope of the reporter's employment or professional practice, with a direct relation between the potential abuse and the transaction or matter within that scope. *Id.* at § 15630.1(d). PIABA applauds the Model Act for specifically applying to broker-dealers and investment advisors, and for not limiting the reporting requirement to such narrow circumstances.

Washington State

Other states specifically include broker-dealers in the statutory scheme but are limited by being permissive rather than mandatory for reporting. Effective since June, 2010, Washington has a permissive statutory scheme that allows (but does not require) financial institutions to refuse a transaction requiring disbursal of funds in the account of a "vulnerable adult" if it reasonably believes financial exploitation occurred, was attempted, or is being attempted. Wash. Rev. Code Ann. § 74.34.215. For purposes of Chapter 74.34 only, "financial institution" is defined to also include broker-dealers and investment advisers. §74.34.020(8). *If* the financial institution chooses to halt the disbursal of funds under the statute, then it "shall" make a reasonable effort to notify all parties authorized to transact on the account and "shall" report the incident to adult protective services and local law enforcement. *Id.* at § 74.34.215(4). Absent a court order extending the time period, the ability for the institution to refuse to disburse funds expires after either 5 days or 10 days (if involving the sale or offer to sell a security). *Id.* at § 74.34.215(5), (6). So long as the refusal was made in good faith, the financial institution or its employee following the statutory scheme is immune from criminal, civil, or administrative liability. *Id.* at § 74.34.215(7). Thus, while Washington's law is permissive, once a firm elects to halt a disbursement it must notify all persons on the account in addition to APS and law enforcement.

Missouri Senate Bill 244

In June, 2015, Missouri enacted a law providing immunity from civil liability and authorizing broker-dealers to refuse a disbursement request from the account of an adult age 60 or older (or of a disabled adult), when the broker-dealer reasonably suspects financial exploitation. Missouri Senate Bill 244. The new Missouri law is

permissive: the firm "may" refuse a disbursement request and it "may" notify the department of health and senior services and the commissioner of securities where there is a reasonable belief financial exploitation has occurred, was attempted, or is being attempted.. It also permits (but does not require) the firm to notify "an immediate family member, legal guardian, conservator, co-trustee, successor trustee, or agent under a power of attorney" of the elder or disabled adult. Like the Washington statute, *if* the firm refuses a disbursement, it must make a reasonable effort within two business days to notify all parties on the account and must notify the agencies within three days.

B. The Model Act Does Not Institute a Penalty for Willfully Ignoring Evidence of Abuse

In order to enforce the obligations that should be created by the Model Act, there should be inclusion of a penalty. Already built it would be a waiver of indemnity; if the broker-dealer or investment advisor fails to comply with their affirmative obligations, they could not claim the protections of immunity.

The Model Act would also establish a duty to act, so it should be made clear that a private right of action would exist, within the respective statutes of limitation set by each implementing jurisdiction.

California does not require the officer or employee of the financial institution to investigate accusations of abuse. Cal. Welf. & Inst. Code § 15630.1(e). However, failure to report what reasonably appears to be abuse or when reasonable suspicion is triggered and thus reporting mandated "shall be subject to" civil penalties of $1,000 (or $5,000 if the failure to report is "willful"). *Id*. at § 15630.1(f). With this civil penalty California gives some enforcement mechanism to its reporting requirements, and PIABA encourages the Model Act to include a similar penalty for failure to report.

C. In Many States, Other Professionals are Mandatory Reporters of Elder Financial Abuse, and Brokers and Investment Advisors Should Be Included

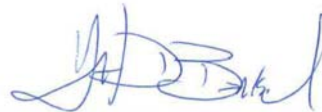
Recognizing that professionals in frequent contact with elders are in positions to spot financial abuse, in many states various medical, mental health, religious, social service, law enforcement, and nursing home providers are already mandatory reporter of suspected financial abuse of elders (and even more mandate reporting of suspected abuse of "vulnerable" or incapacitated persons). For example, beginning January 1, 2015, attorneys licensed in Oregon became mandatory reporters of elder (age 65 and above) financial exploitation as defined in Or. Rev. Statutes 124.050(4). With certain exceptions for attorney-client privileged information, the law requires a lawyer to report elder abuse when he or she has "reasonable cause" to believe the abuse has occurred, and the lawyer has had contact with the elder or the alleged abuser. See Or. Rev. Statutes 124.060. This mandatory reporting applies to lawyers at all times, and is not limited to the scope of providing professional services.

Likewise, doctors, lawyers and accountants in Arizona are required to report exploitation of a vulnerable adult immediately in person or by telephone, with a written report to follow within forty-eight hours. Ariz. Rev. Stat. § 46-454. A "vulnerable adult" is defined as "an individual who is eighteen years of age or older and who is unable to protect himself from abuse, neglect or exploitation by others because of a physical or mental impairment, while "exploitation" is defined as "the illegal or improper use of a vulnerable adult or his resources for another's profit or advantage." *Id*. at § 46-451.

Brokers and investment advisors are in an especially close position to spot potential financial exploitation of an elder, and should have no less than the same mandatory reporting requirements as other professionals.

In summary, PIABA applauds and supports NASAA's efforts to promote a model rule to protect seniors from financial abuse. We are concerned, however, that the permissive nature of the model rule and the lack of a penalty for compliance with the rule, will undercut the rule's value and leave vulnerable seniors subject to ongoing financial abuse. Accordingly, we ask that NASAA amend the proposed Model Act to address these issues. PIABA thanks you for the opportunity to comment on this important topic.

Very truly yours,



PIABA, President

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