

Having a Senior Moment: Recent Legislation and Rules to Protect Seniors from Financial Exploitation

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Overview

In recent years there has been a spate of legislation and rules passed to protect senior investors. Similarly, observers of FINRA's and the SEC's annual priorities will, of course, have noticed both bodies' inclusion of elder protection. The trend appears unmistakable: firms and registered individuals should continue to expect regulatory bodies and lawmakers to beef up senior protection.

In this paper we provide an overview into the recent phenomena of federal and state legislation, as well as FINRA Rules designed to protect senior investors. We specifically cover: (a) the Senior Safe Act; (b) FINRA Rules 4512, 2165 (including an analogous SEC No-Action Letter), 3241; and (c) Good Samaritan/Report and Hold Statutes.

The Senior Safe Act

On May 24, 2018, President Trump signed into law the [Senior Safe Act](#), which is aimed at curbing elder financial abuse.

To help prevent elder financial abuse, the Senior Safe Act provides **immunity** to certain defined financial advisors¹ and financial institutions who disclose "potential examples of financial exploitation of senior citizens." Exploitation includes fraudulent or other improper acts that: (1) "uses the senior citizen's resources for monetary or personal benefit or profit" or; (2) "results in depriving a senior citizen of rightful access to or use of benefits, resources, belongings or assets." Senior citizens are defined as individuals 65 years and older.

Among others, broker-dealers, investment advisors and insurance providers **will not** be liable for any good faith disclosures of senior exploitation made in any civil or

administrative hearing or to any financial regulators, so long as they receive certain training from their associated financial institution. Similarly, "covered financial institutions,"² including broker-dealers, insurance agencies, and insurance companies, **will not** be liable for any disclosures made by its employees, so long as the financial institutions provide their employees with training.

Specifically, the financial institution **must** "instruct any individual . . . on how to identify and report the suspected exploitation of a senior citizen internally, and as appropriate to government official or law enforcement authorities, including common signs that indicate the financial exploitation of a senior citizen." The training **must** also "discuss the need to protect the privacy and respect of each individual customer of the covered financial institution." The financial institution must provide its employees with the training "as soon as reasonably practicable."

There are a few additional aspects of the Senior Safe Act to highlight. The Senior Safe Act does not mandate **any** action. Rather, it simply provides firms/employees with immunity in the event they do disclose information. The Senior Safe Act only protects disclosures to "covered agenc[ies]"³ **not** disclosures to unrelated third parties.

FINRA Rule 2165- Financial Exploitation of Specified Adults

[Rule 2165](#) allows 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. These temporary

1 Individuals protected are: (1) An employee who serves as a supervisor or in a compliance or legal function, for a covered financial institution; (2) A registered representative, investment adviser representative, or insurance producer affiliated or associated with a covered financial institution.

2 "Covered financial institutions" specifically include: credit unions, depository institutions, investment advisers, broker-dealers, insurance companies, insurance agencies, and transfer agents.

3 "Covered agency" includes: state financial regulatory authority; a state or local adult protective services agency; the SEC; an SEC-registered national securities association; a federal law enforcement agency; or any Federal agency represented in the membership of the Financial Institutions Examination Council.



holds can be placed on accounts involving “specified adults”⁴

In addition to the member’s “reasonable belief” that financial exploitation has occurred, Rule 2165 also **requires** the member to: (a) within **2** business days after placing the hold, provides notice of the temporary hold to all parties to the account and the Trusted Contact Person (more on this below and (b) “**immediately**” initiates an internal review of the “facts and circumstances” surrounding their belief that financial exploitation has occurred.

It is important to note that Rule 2165 (intentionally so) has a broad definition of financial exploitation.⁵ A few other important points: (1) Like with the Senior Safe Act, Rule 2165 does **not** mandate firms/registered individuals to place a temporary hold. Rather it provides “a safe harbor from FINRA Rules 2010, 2150 and 11870,” when correctly applied; (2) Rule 2165 does not prevent a member from terminating a temporary hold **after** communicating with either the customer or trusted contact person. FINRA encourages members to consider what, if any, objections the customer may have to the hold; (3) Firms **must** maintain records of the temporary hold and be prepared to provide these records to FINRA and; (4) The holds expire in 15 business days, but can be extended for another 15.

SEC No-Action Letter Relating to Rule 2165

While this is a bit more discrete, the SEC published a [no-action](#) letter that relates to Rule 2165. The no-action letter specifically explained that the SEC would not recommend enforcement action against a mutual fund or its SEC-registered transfer agent under Section 22(e) of the Investment Company Act of 1940, if:

“the transfer agent, acting on behalf of the mutual fund, **temporarily delays** for more than seven days the disbursement of redemption proceeds from the mutual fund account of a Specified Adult (which includes a natural person age **65+** or a natural person age 18+ who the transfer agent **reasonably believes** has a mental or physical impairment that renders the individual unable to protect his or her own interests) based on a reasonable belief of financial exploitation.”

The no-action letter specifically references FINRA Rule 2165 and mimics its language in deciding against action. While the no-action letter, of course, does not contain legal conclusions, it demonstrates the trend of greater emphasis of senior protection across regulatory bodies.

FINRA Rule 4512- Trusted Contact Person

Each member firm shall maintain the “name of and contact information for a trusted contact person age 18 or older who may be contacted about the customer’s account.” The supplement to the rule provides greater detail. FINRA specifically recently amended this rule to require members to “make **reasonable** efforts” to obtain this information either upon the opening of an account or when updating account information.

A few important points:

- [Rule 4512](#) does not *only* apply to senior investors, even though FINRA made amendments to it in express contemplation of Rule 2165;

4 A “Specified Adult” is either (a) someone 65 years or over; (b) someone 18 or over “that the member reasonably believes has a mental or physical impairment that renders the individual unable to protect his or her own interests”

5 This includes: “(A) the wrongful or unauthorized taking, withholding, appropriation, or use of a Specified Adult’s funds or securities”; or (B) any act or omission taken by a person, including through the use of a power of attorney, guardianship, or any other authority, regarding a Specified Adult, to: (i) obtain control, through deception, intimidation or undue influence, over the Specified Adult’s money, assets or property; or (ii) convert the Specified Adult’s money, assets or property.



- The “shall” in the Rule is a “soft” shall, in that members are not prevented from opening an account if they cannot obtain this information—again, they just must make reasonable efforts;
- FINRA explained in [Notice 17-11](#) that “reasonable efforts” can be as simple as asking the customer for this information;
- Members need to obtain this information in writing;
- This Rule does not apply to institutional accounts.

Again, the theme that flows through both the legislation and the FINRA Rules is that members and firms are being incentivized to increase protection for senior investors.

FINRA Rule 3241

In essence, [Rule 3241](#) attempts to mitigate conflicts that can result from a registered person “[exploiting or taking advantage](#)” of being named a beneficiary, receiving a bequest, or being named executor of a customer’s estate.

To accomplish this, FINRA now requires a registered person to decline receiving a bequest or being named a beneficiary of a customer’s estate **unless**: (a) the registered person provides written notice to his or her member firm **and**; (b) receives written approval from that member firm **prior** to being named a beneficiary of a customer’s estate or receiving a bequest from a customer’s estate.

Rule 3241 places the same limitations on a registered person’s ability to be named executor of a customer’s estate.

In addition, the registered person **must also** demonstrate:

- (a) They **do not** derive financial gain from acting in such capacity other than from fees or other charges that are reasonable and customary for acting in such capacity **and**;
- (b) if the member disapproves the position or places conditions or limitations on it, the registered person shall not act in such capacity or shall comply with such conditions or limitations.

Importantly, neither of these limitations apply if the registered person is a member of the immediate family⁶.

The firms receiving notice of the registered person’s designation also have obligations. They must: (1) perform a **reasonable** assessment of the risks created by this designation—including whether this will **interfere/compromise** the person’s ability to perform their responsibilities; and (2) make a **reasonable** determination of whether to approve and/or place restrictions on the registered person’s ability to serve the customer. Firms must (obviously) let the registered person know of its determination.

Good Samaritan or “Report and Hold Statutes”

On January 22, 2016, North American Securities Administrators Association’s (“NASAA”) members passed the “[Senior Model Act](#).” Its goal is to serve as a model statute for states to adopt to target financial exploitation of seniors. The Senior Model Act comports with a multitude of other [legislation](#) and [regulatory](#) protection for seniors. Broadly stated, the Senior Model Act proposes language for

⁶ The term “immediate family” means parents, grandparents, mother-in-law or father-in-law, spouse or domestic partner, brother or sister, brother-in-law or sister-in-law, son-in-law or daughter-in-law, children, grandchildren, cousin, aunt or uncle, or niece or nephew, and any other person who resides in the same household as the registered person and the registered person financially supports, directly or indirectly, to a material extent. The term includes step and adoptive relationships.



legislation that would require “qualified individuals” such as broker-dealers, investment advisors, and those who work in a supervisory or legal capacity for them, to report any suspicions of elderly financial abuse. The Senior Model Act proposes the protection of “eligible adults,” meaning those over the age of 65.

The Senior Model Act has several **key** provisions:

- (1) **Mandatory Reporting:** Qualified Individuals⁷ who reasonably believe a senior has been, or is attempting to be financially exploited, must promptly report this to their state’s security regulator and state’s adult protective services;
- (2) **Notification to Third Parties:** A Qualified Individuals may only report this to a third party, if the senior has previously designated one. A Qualified Individuals cannot report it to this person if they are the one suspected of committing the financial abuse;
- (3) **Delayed Disbursements:** Broker-dealers and investment advisors can delay disbursements from the senior’s account for up to 15 days. If they decide to do so, they must: (a) notify people authorized to transact business on the senior’s account; (b) notify the state securities regulator and adult protective services; and (c) undertake an internal review of the suspected exploitation. The disbursements may be extended by 10 business days, or by court order.

- (4) **Immunity:** Qualified Individuals will have immunity from civil or administrative liability for actions taken pursuant to the Senior Model Act; and,
- (5) **Providing Records:** Broker-dealers and investment advisors would be required to comply with record requests from adult protective services or law enforcement when financial exploitation is suspected.

Conclusion

As is evident, regulatory bodies and legislators—through a variety of mandatory and non-mandatory means—are nudging firms to take a greater hand in protection. The regulatory landscape is change quickly and, therefore, Firms should continue to stay abreast of (and expect) changes.

⁷ “Qualified Individuals” under the Senior Model Act means any agent, investment adviser representative or person who serves in a supervisory, compliance, or legal capacity for a broker-dealer or investment adviser.



Best Interest Compliance Team

States with Good Samaritan Broker Laws

As of March 11, 2022, the below states have passed Good Samaritan Broker Laws that are substantially similar or identical to the **Senior Model Act**. Our chart below tracks: the effective date of the law, which key provisions the state has adopted, and any notable deviations or notes of interest. Hyperlinks to the bill are included in the state's name.

State	Date Effective	Mandatory Reporting	Notification	Delayed Disbursements	Immunity	Providing Records	Notes
Alabama	July 1, 2016	X	X	X	X	X	Reporting must be made to Alabama Securities Commission and Alabama Department of Human Resources. Ala. Code § 8-6-170 to 179
Alaska	November 7, 2018	X	X	X	X	X	Notification shall be made no later than 5 days. Alaska Stat. Ann. § 45.56.430
Arizona	August 27, 2019		X	X	X	X	Qualified individuals “may” but are not required to report. Ariz. Rev. Stat. Ann. § 46-471 to 474
Arkansas	August 1, 2017		X	X	X	X	Qualified individuals “should” but are not required to report. Ark. Code Ann. § 23-42-309
California	January 1, 2020	X	X	X	X	X	Failing to report the financial abuse could subject the qualified individual to a fine of not greater than \$1,000, or not greater than \$5,000 for willful violations. The qualified individual's employer must pay the fine. Cal. Welf. & Inst. Code § 15630.2



State	Date Effective	Mandatory Reporting	Notification	Delayed Disbursements	Immunity	Providing Records	Notes
Colorado	July 1, 2017	X	X	X	X	X	The senior must be at least seventy. Colo. Rev. Stat. Ann. § 11-51-1001 to 1007
Delaware	November 30, 2018	X	X	X	X	X	Notification shall be made no later than 5 days. Del. Code Ann. tit. 6, § 73-103; § 73- 307
Florida	July 1, 2020	X	X	X	X	X	Upon placing a hold on a distribution, the qualified individual must file a form with certain enumerated questions. Fla. Stat. Ann. § 415.1034
Hawaii	July 1, 2021	X	X	X	X	X	Haw. Rev. Stat. Ann. § 485A-A
Indiana	April 24, 2017	X	X	X	X	X	Ind. Code Ann. § 23-19-41-1 to -11
Iowa	May 2, 2021		X	X	X	X	Qualified individuals “may” but are not required to report. Iowa Code Ann. § 502.801
Kentucky	April 10, 2018	X	X	X	X	X	Ky. Rev. Stat. Ann. § 365.245
Louisiana	January 1, 2017		X	X	X	X	Qualified individuals “may” but are not required to report. La. Stat. Ann. § 51:731 to 738
Maine	April 2, 2019	X	X	X	X	X	Reporting must be made to Department of Professional and Financial Regulation, Office of Securities and the Department of Health and Human Services. Me. Rev. Stat. tit. 32, § 16801 to 16808



State	Date Effective	Mandatory Reporting	Notification	Delayed Disbursements	Immunity	Providing Records	Notes
Minnesota	August 1, 2018		X	X	X	X	Qualified individuals “may” but are not required to report. Minn. Stat. Ann. § 45A.01 to A.07
Mississippi	July 1, 2017	X	X	X	X	X	Miss. Code Ann. § 75-71-413
Missouri	August 28, 2015 (passed prior to Senior Model Act)		X	X	X	X	Does not apply to investment advisors. Qualified individuals “may” but are not required to report. Applies to individuals over sixty. Mo. Ann. Stat. § 409.600 to 630
Montana	March 22, 2017		X	X	X	X	Qualified individuals “may” but are not required to report. Mont. Code Ann. § 30-10-103; § 30-10-1003
New Hampshire	September 8, 2019		X	X	X	X	Qualified individuals “may” but are not required to report. Reporting must be made to the secretary of state. N.H. Rev. Stat. Ann. § 421-B:5-507-A
New Jersey	April 13, 2020	X	X	X	X	X	N.J. Stat. Ann. § 49:3-84 to -89
New Mexico	July 1, 2017	X	X	X	X	X	N.M. Stat. Ann. § 58-13D-1 to D-8
North Dakota	April 7, 2017	X	X	X	X	X	N.D. Cent. Code Ann. § 10-04-08.5



State	Date Effective	Mandatory Reporting	Notification	Delayed Disbursements	Immunity	Providing Records	Notes
Oklahoma	Admin Code Amended in 2020		X	X	X	X	Protected individuals are those sixty-two years and older. Qualified individuals “may” but are not required to report. Okla. Admin. Code § 660:11-15-2
Oregon	June 19, 2017	X	X	X	X	X	Each failure to report shall subject the qualified individual to a \$1,000 fine. Notification must be made to the Department of Consumer and Business Services. Or. Rev. Stat. Ann. § 59.480 to 59.505
Rhode Island	July 15, 2019	X	X	X	X	X	Applies to individuals over sixty. R.I. Gen. Laws Ann. § 7-11.2-1-6
South Carolina	May 18, 2021		X	X	X	X	Applies to individuals fifty-five years and older. Qualified individuals “may” but are not required to report. S.C. Code Ann. § 43-35-87
Tennessee	May 23, 2017		X	X	X	X	Qualified individuals “may” but are not required to report. Tenn. Code Ann. § 48-1-127
Texas	September 1, 2019	X	X	X	X	X	This applies to employees of financial institutions, and requires them to first report the suspected abuse to the financial institution. After a further review, it is the financial institution’s responsibility to determine whether to further report it. Tex. Fin. Code Ann. § 281.001 to § 281.006
Utah	May 8, 2018	X	X	X	X	X	Utah Code Ann. § 61-1-201 to 206



State	Date Effective	Mandatory Reporting	Notification	Delayed Disbursements	Immunity	Providing Records	Notes
Vermont	May 12, 2017	X	X	X	X	X	Immunity only extends to actions taken by the Department of Financial Regulation. 4-4 Vt. Code R. § 8
Virginia	July 1, 2019	X	X	X	X	X	There is a \$500 penalty for a first time failure to report and up to \$1,000 fine for a second failure. Va. Code Ann. § 63.2-1606
West Virginia	June 7, 2020	X	X	X	X	X	W. Va. Code Ann. § 32-2-601 to 610



Best Interest Compliance Team

Our national Best Interest Compliance Team assists clients with the evolving and overlapping federal and state regulations related to the standard of care for broker-dealers, investment advisers, and insurance companies, agents and brokers.

The interdisciplinary group of more than 20 lawyers consists of attorneys from the firm's Investment Management, ERISA, SEC and Regulatory Enforcement Defense, Litigation/FINRA Arbitration, and Insurance Regulatory and Transactional practice areas. The team includes attorneys who were former financial services in-house counsel, legislative professionals, compliance supervisors and/or regulators.

We actively assist investment managers, broker-dealers, registered investment advisers, retirement plan/IRA service providers and insurance companies with the challenges resulting from the ever-changing regulations of the SEC, FINRA, the Department of Labor and state agencies related to fiduciary requirements and best interest duties.

Our experience with fiduciary and best interest compliance and reporting obligations includes strengthening supervisory procedures and internal controls. In addition, our lawyers draft agreements, disclosure documents and Written Supervisory Procedures to assist with the implementation of new standards of care, and supervision of those standards. We also advise clients on the development of products and services that are consistent with ERISA's fiduciary standards and prohibited transaction restrictions, including retirement income investments and guaranties.

We represent clients involved in investigations and enforcement matters before agencies such as the SEC, the Department of Labor, the IRS, FINRA and other self-regulatory or state agencies. Our lawyers also provide independent assessments of risk management and supervisory frameworks, and overall compliance policies and procedures related to conflicts of interest, breaches of fiduciary duty and securities law violations. In addition, our lawyers represent broker-dealers, investment advisers, insurance companies and other financial services entities in litigation and arbitration matters on standards of care and conflicts of interest.

Through articles, webinars, audio casts and white papers, our Best Interest Compliance Team also provides investment advisers, brokers, insurance representatives and others with counsel and information to stay ahead of directives from the SEC, FINRA, the Department of Labor and other regulatory agencies.

Team Members

Jeffrey R. Blumberg
Partner – Chicago

Bradford P. Campbell
Partner – Washington D.C.

Joshua B. Deringer
Partner – New York

Page D. Fleeger
Partner – Minneapolis

Sandra Dawn Grannum
Partner – Florham Park

Douglas J. Heffernan
Partner – Minneapolis

Jamie L. Helman
Partner – Florham Park

Megan E. Hladilek
Partner – Minneapolis

Kimberly A. Jones
Partner – Chicago

Stephen J. Jordan
Partner – Hartford

James G. Lundy
Partner – Chicago

Jason S. Luter
Partner – Dallas

Michael R. MacPhail
Partner – Denver

Robert J. Mancuso
Partner – New York

James G. Martignon
Counsel - Chicago

Glenn Merten
Partner – Washington D.C.

Matthew M. Morrissey
Partner – Chicago

Joan M. Neri
Counsel – Florham Park

K. Elise Norcini
Associate - Chicago

Timothy J. O'Driscoll
Partner – Philadelphia

Gregory J. Ossi
Partner – Washington D.C.

Rick Pearl
Partner – Chicago

David W. Porteous
Partner – Chicago

Andrew C. Raby
Partner – Chicago

Fred Reish
Partner – Los Angeles

Diego J. Rosado
Associate – Florham Park

Tracey Salmon-Smith
Partner – Florham Park

Edward J. Scarillo Jr.
Associate – Florham Park

Joshua J. Waldbeser
Partner – Chicago

David L. Williams
Partner – Chicago