

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 681 Protection for Vulnerable Investors
SPONSOR(S): Health & Human Services Committee; Insurance and Banking Subcommittee; Donalds
TIED BILLS: IDEN./SIM. **BILLS:** SB 662

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR or BUDGET/POLICY CHIEF |
|--------------------------------------|---------------------|-------------|--|
| 1) Insurance & Banking Subcommittee | 12 Y, 0 N, As CS | Hinshelwood | Luczynski |
| 2) Health & Human Services Committee | 18 Y, 0 N, As CS | Langston | Calamas |
| 3) Commerce Committee | | | |

SUMMARY ANALYSIS

Although investment fraud is not a new occurrence in the financial marketplace, recent economic forces such as the rise of technology and the information age have created an environment conducive to swindlers. In recent years, financial research has focused on understanding the vulnerability of seniors to investment fraud. Studies show that older individuals are more likely to be solicited for fraud, more likely to engage with potentially fraudulent financial opportunities, and more likely to have lost money.

Federal law requires, any person acting as broker or dealer to be registered with the United States Securities and Exchange Commission and join a self-regulatory organization, such as the Financial Industry Regulatory Authority (FINRA). In an effort to address financial exploitation of seniors, FINRA recently implemented rules to provide its members with the ability to place a hold on a disbursement of funds or securities from a customer's account if they have a reasonable basis to believe that the customer is a specified adult who is being financially exploited. The term "specified adult" refers to someone 65 or older, or someone 18 or older who is reasonably believed to have a mental or physical impairment that renders him or her unable to protect his or her own interests. These rules only apply to broker-dealers and investment advisers who are FINRA members.

Similar to the FINRA rules, CS/CS/HB 681 allows a dealer, investment adviser, or associated person to place a hold on disbursement of funds or securities from a specified adult's account if there is a good faith belief that the specified adult is being financially exploited. However, the bill also allows the entire transaction to be delayed, not only the disbursement held. A delay on a transaction or disbursement expires in 15 business days, but may be extended up to 10 additional business days if the facts and circumstances continue to support the good faith belief of suspected exploitation. A court or the Office of Financial Regulation (OFR) may shorten or extend the length of the hold at any time. When a delay is placed, all parties authorized to transact business on the account as well as any designated trusted contact must be contacted, unless such person is believed to be engaged in the suspected exploitation.

The bill defines a "specified adult" as someone who is 65 or older or meets the definition of "vulnerable adult" under the Florida Adult Protective Services Act. If the specified adult is a vulnerable adult, the suspected exploitation must be immediately reported to the Florida Abuse Hotline for investigation by the Department of Children and Families (DCF). The bill also permits records to be provided to DCF or a law enforcement agency at their request and permits the DCF to inform the reporting party on the status of an investigation and any final disposition.

Additionally, the bill requires dealers, investment advisers, and associated persons to notify the OFR on a quarterly basis of every delay they place and provide certain information about the delay and the facts giving rise to it. The OFR must annually report on the delays placed in the prior fiscal year. The bill requires dealers, investment advisers, and associated persons to have at least one hour of training on issues pertaining to financial exploitation of specified adults. A dealer, investment adviser, or associated person is presumed to be acting in good faith and, unless lack of good faith is shown by clear and convincing evidence, is immune from civil or administrative liability.

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

The bill provides an effective date of July 1, 2018.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h0681c.HHS

DATE: 2/16/2018

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Securities Regulation

Federal Securities Regulation

The federal Securities Exchange Act of 1934 (“federal Act”) requires registration of securities market participants like broker-dealers and exchanges.¹ Generally, any person acting as “broker” or “dealer” as defined in the federal Act must be registered with the United States Securities and Exchange Commission (SEC) and join a self-regulatory organization (SRO), like the Financial Industry Regulatory Authority (FINRA) or a national securities exchange.

The federal Act broadly defines a “broker” as any person engaged in the business of effecting transactions in securities for the account of others, which the SEC has interpreted to include involvement in any of the key aspects of a securities transaction, including solicitation, negotiation, and execution.² The federal Act defines a “dealer” as any person engaged in the business of buying and selling securities for such person’s own account through a broker or otherwise.³ Certain entities in the securities industry are often referred to as “broker-dealers” because the institution is a “broker” when executing trades on behalf of a customer, but is a “dealer” when executing trades for its own account.

In addition to being registered with the SEC, broker-dealers must comply with state registration requirements.

State Securities Regulation

In addition to federal securities laws, “Blue Sky Laws” are state laws designed to protect investors against fraudulent sales practices and activities by requiring companies making offerings of securities to register their offerings before they can be sold in that state and by requiring licensure for brokerage firms, their brokers, and investment adviser representatives.⁴ In Florida, the Office of Financial Regulation (OFR) Division of Securities oversees the Securities and Investor Protection Act, ch. 517, F.S. (“Florida Act”), which regulates the offer and sale of securities in, to, or from Florida by firms, branch offices, and individuals affiliated with these firms.

The Florida Act requires the following individuals or businesses to be registered with the OFR in order for such persons to sell or offer to sell any securities in or from offices in this state, or to sell securities to persons in this state from offices outside this state:⁵

- **“Dealers”** which include:⁶
 - Any person, other than an associated person registered under the Florida Act, who engages, either for all or part of her or his time, directly or indirectly, as broker or

¹ 15 U.S.C. §§ 78c(4) and 78o; U.S. SECURITIES AND EXCHANGE COMMISSION, *Guide to Broker-Dealer Registration*, <http://www.sec.gov/divisions/marketreg/bdguide.htm#I> (last visited Jan. 27, 2018).

² *Id.*

³ 15 U.S.C. §§ 78c(5).

⁴ U.S. SECURITIES AND EXCHANGE COMMISSION, *Blue Sky Laws*, <http://www.sec.gov/answers/bluesky.htm> (last visited Jan. 27, 2018).

⁵ s. 517.12(1), F.S.

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

principal in the business of offering, buying, selling, or otherwise dealing or trading in securities issued by another person.

- Any issuer who through persons directly compensated or controlled by the issuer engages, either for all or part of her or his time, directly or indirectly, in the business of offering or selling securities which are issued or are proposed to be issued by the issuer.
- **“Investment advisers”** which:⁷
 - Include any person who receives compensation, directly or indirectly, and engages for all or part of her or his time, directly or indirectly, or through publications or writings, in the business of advising others as to the value of securities or as to the advisability of investments in, purchasing of, or selling of securities, except a dealer whose performance of these services is solely incidental to the conduct of her or his business as a dealer and who receives no special compensation for such services.
 - Does not include a “federal covered adviser.”⁸
- **“Associated persons”** which include:⁹
 - With respect to a dealer or investment adviser, any of the following:
 - Any partner, officer, director, or branch manager of a dealer or investment adviser or any person occupying a similar status or performing similar functions;
 - Any natural person directly or indirectly controlling or controlled by such dealer or investment adviser, other than an employee whose function is only clerical or ministerial; or
 - Any natural person, other than a dealer, employed, appointed, or authorized by a dealer, investment adviser, or issuer to sell securities in any manner or act as an investment adviser.
 - With respect to a federal covered adviser, any person who is an investment adviser representative and who has a place of business in this state.

Vulnerability of Seniors to Investment Fraud

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

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

In recent years, financial research has focused on understanding the vulnerability of seniors to investment fraud. In a 2012 study prepared for the FINRA Investor Education Foundation, adults 65

⁷ s. 517.021(14)(a), F.S.

⁸ s. 517.021(9) and (14)(b)9., F.S. A federal covered adviser must be registered under federal law and must provide a notice-filing to the OFR. ss. 517.021 and 517.1201, F.S.

⁹ s. 517.021(2), F.S.

¹⁰ Doug Shadel and Karla Pak, *AARP Investment Fraud Vulnerability Study*, at 3 (2017), available at https://www.aarp.org/content/dam/aarp/research/surveys_statistics/econ/2017/investment-fraud-vulnerability.doi.10.26419%252Fres.00150.001.pdf (last visited Jan. 27, 2018).

¹¹ *Id.*

and older were found to be more likely to receive solicitations in the mail.¹² Survey respondents age 65 and older were more likely to be solicited for fraud, more likely to engage with potentially fraudulent financial opportunities, and more likely to have lost money.¹³

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

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

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

Mandatory Reporting for Abuse or Exploitation of Vulnerable Adults

The Florida Department of Children and Families (DCF) houses the Adult Protective Services Program (APS). APS is responsible for preventing further harm to vulnerable adults who are victims of abuse, neglect, exploitation, or self-neglect.²⁰ Florida law currently contains a mandatory reporting requirement in ch. 415, F.S., which states that any person “who knows, or has reasonable cause to suspect, that a vulnerable adult has been or is being abused, neglected, or exploited shall immediately report such knowledge or suspicion to the central abuse hotline.”²¹

A “vulnerable adult” is “a person 18 years of age or older whose ability to perform the normal activities of daily living or to provide for his or her own care or protection is impaired due to a mental, emotional, sensory, long-term physical, or developmental disability or dysfunction, or brain damage, or the infirmities of aging.”²²

“Exploitation” means a person who:²³

- Stands in a position of trust and confidence with a vulnerable adult and knowingly, by deception or intimidation, obtains or uses, or endeavors to obtain or use, a vulnerable adult's funds, assets, or property with the intent to temporarily or permanently deprive a vulnerable adult of the use, benefit, or possession of the funds, assets, or property for the benefit of someone other than the vulnerable adult; or

¹² FINRA Investor Education Foundation, *Financial Fraud and Fraud Susceptibility in the United States: Research Report from a 2012 National Survey*, at 11 (Sept. 2013), available at <https://www.saveandinvest.org/sites/default/files/Financial-Fraud-And-Fraud-Susceptibility-In-The-United-States.pdf> (last visited Jan. 27, 2018).

¹³ *Id.* at 17-18.

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

¹⁵ *Id.*

¹⁶ *Id.* at 15.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 6 and 15.

²⁰ FLORIDA DEPARTMENT OF CHILDREN AND FAMILIES, *Protecting Vulnerable Adults*, <http://www.myflfamilies.com/service-programs/adult-protective-services/protecting-vulnerable-adults> (last visited Jan. 27, 2018).

²¹ s. 415.1034(1)(a), F.S.

²² s. 415.102(28), F.S.

²³ s. 415.102(8), F.S.

- Knows or should know that the vulnerable adult lacks the capacity to consent, and obtains or uses, or endeavors to obtain or use, the vulnerable adult's funds, assets, or property with the intent to temporarily or permanently deprive the vulnerable adult of the use, benefit, or possession of the funds, assets, or property for the benefit of someone other than the vulnerable adult.

“Exploitation” may include, but is not limited to:²⁴

- Breaches of fiduciary relationships, such as the misuse of a power of attorney or the abuse of guardianship duties, resulting in the unauthorized appropriation, sale, or transfer of property;
- Unauthorized taking of personal assets;
- Misappropriation, misuse, or transfer of moneys belonging to a vulnerable adult from a personal or joint account; or
- Intentional or negligent failure to effectively use a vulnerable adult's income and assets for the necessities required for that person's support and maintenance.

The Florida Abuse Hotline screens allegations of child and adult abuse and neglect to determine whether the information meets the criteria of an abuse report.²⁵ If the criteria is met, a protective investigation is initiated to confirm whether or not there is evidence that abuse, neglect, or exploitation occurred; whether there is an immediate or long-term risk to the victim; and whether the victim needs additional services to safeguard his or her well-being.²⁶ APS services include:²⁷

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

A person who participates in making a report to the Florida Abuse Hotline or who participates in a judicial proceeding resulting therefrom “is presumed to be acting in good faith and, unless lack of good faith is shown by clear and convincing evidence, is immune from any liability, civil or criminal, that otherwise might be incurred or imposed.”²⁸

FINRA Rules Relating to Financial Exploitation of Seniors

FINRA is an SRO regulated by the United States Security Exchange Commission. Most broker-dealers in the United States are members of FINRA. As members, such broker-dealers are subject to FINRA rules and examination by FINRA. In an effort to address financial exploitation of seniors, FINRA implemented rules to provide its members with a way to respond to situations in which they have a reasonable basis to believe that financial exploitation of a “specified adult” has occurred, is occurring, has been attempted, or will be attempted.²⁹ Under the new rules, FINRA members have the ability to contact a customer's designated trusted contact person and, when appropriate, place a temporary hold on a disbursement of funds or securities from a specified adult's account.³⁰ The term “specified adult” refers to a natural person age 65 and older; or a natural person age 18 and older who the FINRA member reasonably believes has a mental or physical impairment that renders the individual unable to protect his or her own interests.³¹

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ S. 415.1036(1), F.S.

²⁹ FINRA, *Regulatory Notice 17-11 (Financial Exploitation of Seniors)*, available at <https://www.finra.org/sites/default/files/Regulatory-Notice-17-11.pdf> (last visited Jan. 27, 2018).

³⁰ *Id.*

³¹ *Id.*

The FINRA rules took effect February 5, 2018.³² However, they only apply to broker-dealers who are FINRA members and do not apply to broker-dealers and investment advisers who are not FINRA members.

Effect of the Bill

CS/CS/HB 681 implements protections for specified adults who may be subject to exploitation similar to those in the FINRA rule. A specified adult is an individual who is age 65 or older, or who meets the definition of “vulnerable adult” under ch. 415, F.S., which is consistent with the definition of a specified adult in the FINRA rule. However, the bill allows for broader holds than the FINRA rule. In addition to implementing provisions for placing holds on specified adults’ accounts, similar to the FINRA rule for dealers, investment advisors, and associated persons regulated by OFR, the bill imposes requirements for access to records, training and continuing education, immunity from civil and administrative liability related to such holds.

Delays on Transactions or Disbursements for Financial Exploitation of Specified Adults

The FINRA rule allows FINRA member broker-dealers to place a hold only on a *disbursement* of funds or securities from a customer’s account if they have a reasonable basis to believe that the customer is a specified adult who is being financially exploited. The bill applies to dealers, investment advisers, and associated persons, and allows them to place a hold on disbursement of funds or securities from, and also place a hold on an *entire transaction* on an account of a specified adult or an account for which a specified adult is a beneficiary or beneficial owner. To place the hold, the dealer, investment advisor, or associated person must have a good faith belief that financial exploitation of the specified adult has occurred, is occurring, has been attempted, or will be attempted in connection with the transaction or disbursement. The good faith belief may be based on the facts and circumstances observed in his or her business relationship with the specified adult.

Notice Requirements

The FINRA rule requires notice of the hold to be given, either orally or in writing, no later than two business days after the hold is placed on the disbursement; however, it is silent as to what must be included with such notice. The bill requires the dealer, investment adviser, or associated person to notify in writing all parties authorized to transact business on the account as well as any designated trusted contact³³ within three business days after placing a delay, using the contact information provided for the account. The bill requires the written notice to include, at a minimum:

- A description of the transaction or disbursement;
- A statement that a delay was placed on the transaction or disbursement pursuant to s. 517.34, F.S.;
- The basis for the good faith belief regarding financial exploitation of the specified adult; and
- An explanation of the delay process.

The dealer, investment adviser, or associated person is not required to provide such notice if he or she believes in good faith that any party to the transaction or trusted contact is engaged or is engaging in the suspected exploitation of the specified adult. This is consistent with the FINRA rule.

If the specified adult is a vulnerable adult, the dealer, investment adviser, or associated person must also immediately notify the DCF, via its central abuse hotline, of the suspected exploitation.

³² *Id.*

³³ The bill defines “trusted contact” to mean “a natural person 18 years of age or older whom the account owner has expressly identified in writing as a person who may be contacted about the account.”

Length of Delay

A delay expires 15 business days after the date on which the delay was placed. However, the dealer, investment adviser, or associated person may extend the delay for up to 10 additional business days if its review of the available facts and circumstances continues to support its good faith belief that exploitation of the specified adult has occurred, is occurring, has been attempted, or will be attempted. The bill allows a court or the OFR may shorten or extend the length of the hold at any time. This is consistent with the FINRA rule. The bill states that nothing prevents the dealer, investment adviser, or associated person from terminating or shortening the length of the delay after contacting the specified adult or trusted contact.

Access to Records

The bill permits a dealer, investment adviser, or associated person to provide access to or copies of any records³⁴ that are relevant to the suspected exploitation of a specified adult to the DCF or a law enforcement agency³⁵ at their request. These records may include records of prior transactions in addition to the transactions comprising the suspected exploitation. The bill authorizes the DCF to inform the reporting party on the status of an investigation of reported financial exploitation of a specified adult and any final disposition.

The bill requires a dealer, investment adviser, or associated person subject to the jurisdiction of the OFR to make available to the OFR, upon request, all records relating to a delay or report made by the dealer, investment adviser, or associated person regarding the financial exploitation of a specified adult.

Reporting Requirements

The bill requires dealers, investment advisors, and associated persons to notify the OFR, on a quarterly basis, of every delay they place and its outcome. The notice cannot not directly or indirectly identify the specified adult or the parties to the transaction, and it must include:

- The name of the firm and dealer, investment advisor, or associated person placing the delay on the transaction or disbursement.
- A general description of the reason giving rise to the dealer, investment advisor, or associated person placing a delay on the transaction or disbursement.
- The length of the delay on transaction or disbursement, and whether or not the transaction or disbursement ultimately took place.

Additionally, or before October 1 of each year, the OFR must report to the Governor, the President of the Senate, and the Speaker of the House of Representatives, summarizing the information it received from dealers, investment advisors, and associated persons during the prior fiscal year.

Education and Training Requirements

The bill requires a dealer, investment adviser, or associated person to develop and comply with training policies or programs reasonably designed to educate employees on issues pertaining to financial exploitation of specified adults. The training policies and programs must provide for the dealer,

³⁴ The bill defines "records" to mean, as provided in s. 415.102, F.S., "all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, videotapes, or other material, regardless of physical form or characteristics, made or received pursuant to a protective investigation."

³⁵ The bill defines "law enforcement agency" to mean "an agency or a political subdivision of this state or of the United States whose primary responsibility is the prevention and detection of crime or the enforcement of the penal laws of this state or the United States, and whose agents and officers are empowered by law to conduct criminal investigations or to make arrests."

investment adviser, or associated person to receive a minimum of one hour of such training every three calendar years after the year in which the initial training requirement is met. The dealer, investment adviser, or associated person must complete such training before delaying a transaction or disbursement. The dealer, investment adviser, or associated person must maintain a written record of compliance with these training requirements.

Immunity from Liability

Any dealer, investment adviser, or associated person who delays a transaction or disbursement, who provides records to an agency of competent jurisdiction, or who participates in a judicial or arbitration proceeding resulting therefrom is presumed to be acting in good faith and, unless lack of good faith is shown by clear and convincing evidence, is immune from any civil or administrative liability that otherwise might be incurred or imposed.

The bill does not create new rights or obligations of a dealer, investment adviser, or associated person under other applicable laws or rules. In addition, the bill does not limit the right of a dealer, investment adviser, or associated person to otherwise refuse or place a delay on a transaction or disbursement under other applicable laws or rules or under an applicable customer agreement.

B. SECTION DIRECTORY:

Section 1. Creates s. 517.34, F.S., relating to protection of specified adults.

Section 2. Provides an effective date of July 1, 2018.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

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

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On January 30, 2018, the Insurance and Banking Subcommittee considered one strike-all amendment, which was adopted, and reported the bill favorably as a committee substitute. The committee substitute:

- Permits a delay to be placed on a disbursement of funds or securities from an account.
- Permits a delay to be placed if the dealer, investment adviser, or associated person believes in good faith that financial exploitation of the specified adult will be attempted.
- Adds “trusted contact” to the set of individuals who must be notified when a delay is placed on a transaction or disbursement.
- Requires that such notice must be in writing and specifies minimum content for the notice.
- Clarifies that reporting to the DCF is only required to the extent currently required by the Adult Protective Services Act (ch. 415, F.S.).
- Specifies that the dealer’s, investment adviser’s, or associated person’s good faith belief may be based on the facts and circumstances observed in such dealer’s, investment adviser’s, or associated person’s business relationship with the specified adult.
- Requires that a dealer, investment adviser, or associated person subject to the jurisdiction of the OFR must make available to the OFR, upon request, all records relating to a delay or report made by the dealer, investment adviser, or associated person.
- Amends the scope of immunity granted by the statute.
- Provides minimum training requirements pertaining to financial exploitation of specified adults.
- Makes other technical and clarifying changes.

On February 15, 2018, the Health and Human Services Committee adopted two amendments that:

- Required dealers, investment advisors, and associated persons to notify the OFR quarterly of every delay they place and provide specified information.
- Requires an annual report by the OFR to the Governor, Senate President, and House Speaker on the delays placed by dealers, investment advisors, and associated persons in the prior fiscal year.
- Stated that nothing in the bill prevents a dealer, investment advisor, or associated person from shortening or terminated a delay after contacting the specified adult or trusted contact.

The bill was reported favorably as a committee substitute. This analysis is drafted to the bill as amended by the Health and Human Services Committee.