SENATE BILL

58TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2027

INTRODUCED BY

DISCUSSION DRAFT

AN ACT

RELATING TO PROTECTING ELDERLY AND INCAPACITATED ADULTS FROM FINANCIAL EXPLOITATION; RENAMING THE PROTECTING VULNERABLE ADULTS FROM FINANCIAL EXPLOITATION ACT; ADDING AND AMENDING DEFINITIONS; CLARIFYING REPORTING REQUIREMENTS OF QUALIFIED INDIVIDUALS; ESTABLISHING PENALTIES FOR FAILURE TO REPORT SUSPECTED FINANCIAL EXPLOITATION; CREATING CIVIL LIABILITY WHEN FINANCIAL EXPLOITATION IS NOT PREVENTED.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. Section 58-13D-1 NMSA 1978 (being Laws 2017, Chapter 106, Section 1) is amended to read:

"58-13D-1. SHORT TITLE.--[~~This act~~] Chapter 58, Article 13D NMSA 1978 may be cited as the "Protecting [~~Vulnerable~~] Elderly and Incapacitated Adults from Financial Exploitation Act"."

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SECTION 2. Section 58-13D-2 NMSA 1978 (being Laws 2017, Chapter 106, Section 2) is amended to read:

"58-13D-2. DEFINITIONS.--As used in the Protecting [~~Vulnerable~~] Elderly and Incapacitated Adults from Financial Exploitation Act:

A. "agencies" means the securities division of the regulation and licensing department, the financial institutions division of the regulation and licensing department and the adult protective services division of the aging and long-term services department;

B. "agent" means an individual, other than a broker-dealer, who represents a broker-dealer in effecting or attempting to effect purchases or sales of securities, or represents an issuer in effecting or attempting to effect purchases or sales of the issuer's securities, but a partner, officer or director of a broker-dealer or issuer, or an individual having a similar status or performing similar functions, is an agent only if the individual otherwise comes within the term. "Agent" does not include an individual excluded by rule adopted pursuant to the New Mexico Uniform Securities Act;

C. "broker-dealer" means a person engaged in the business of effecting transactions in securities for the account of others or for the person's own account. "Broker-dealer" does not include:

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(1) an agent;

(2) an issuer;

(3) a bank or savings institution if:

(a) its activities as a broker-dealer are limited to those specified in: 1) Subsections 3(a)(4)(B)(i) through (vi) and (viii) through (ix) of the federal Securities Exchange Act of 1934, and they are unsolicited transactions; 2) Subsection 3(a)(5)(B) of that act; or 3) Subsection 3(a)(5)(C) of that act; or

(b) the bank satisfies the conditions described in Subsection 3(a)(4)(E) of the federal Securities Exchange Act of 1934;

(4) an international banking institution; or

(5) a person excluded by rule adopted pursuant to the New Mexico Uniform Securities Act;

D. "brokerage firm" means a financial services entity that acts as an intermediary between buyers and sellers of financial securities;

[~~D.~~] E. "eligible adult" means:

(1) a person [~~sixty-five~~] sixty years of age or older; or

(2) an incapacitated [~~person~~] adult who is eighteen years of age or older;

[~~E.~~] F. "financial exploitation" means:

(1) the wrongful or unauthorized taking,

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withholding, appropriation or use of money, assets or property of an eligible adult; or

(2) any act or omission taken by a person, including through the use of a power of attorney, guardianship or conservatorship of an eligible adult, to:

(a) obtain control, through deception, intimidation or undue influence, over the eligible adult's money, assets or property to deprive the eligible adult of the ownership, use, benefit or possession of the eligible adult's money, assets or property; or

(b) convert money, assets or property of the eligible adult to deprive such eligible adult of the ownership, use, benefit or possession of the eligible adult's money, assets or property;

G. "financial institution" means a:

(1) state bank, as defined in 12 U.S.C. Sec. 1813(a)(2);

(2) federal or state savings association, as defined in 12. U.S.C. Sec. 1813(b);

(3) depository institution, as defined in 12 U.S.C. Sec. 1813(c);

(4) federal credit union or state credit union, as defined in 12 U.S.C. Sec. 1752; or

(5) wealth management firm or brokerage firm;

[~~F.~~] H. "incapacitated [~~person~~] adult" means a

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person with a mental, physical or developmental condition that substantially impairs the person's ability to provide adequately for the person's own care or protection;

[~~G.~~] I. "investment adviser" means a person that, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or the advisability of investing in, purchasing or selling securities or that, for compensation and as a part of a regular business, issues or promulgates analyses or reports concerning securities. "Investment adviser" includes a financial planner or other person that, as an integral component of other financially related services, provides investment advice to others for compensation as part of a business or that holds itself out as providing investment advice to others for compensation. "Investment adviser" does not include:

(1) an investment adviser representative;

(2) a lawyer, an accountant, an engineer or a teacher whose performance of investment advice is solely incidental to the practice of the person's profession;

(3) a broker-dealer or its agents whose performance of investment advice is solely incidental to the conduct of business as a broker-dealer and that does not receive special compensation for the investment advice;

(4) a publisher, an employee or a columnist of

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a bona fide newspaper, news magazine or business or financial publication of general and regular circulation or an owner operator, a producer or an employee of a cable, radio or television network, station or production facility, if, in either case:

(a) the financial or business news or advice is contained in a publication or broadcast disseminated to the general public; and

(b) the content does not consist of rendering advice on the basis of the specific investment situation of each client;

(5) a federal covered investment adviser;

(6) a bank or a savings institution; or

(7) any other person excluded by rule adopted pursuant to the New Mexico Uniform Securities Act;

[~~H.~~] J. "investment adviser representative" means an individual employed by or associated with a New Mexico investment adviser or federal covered investment adviser and who makes recommendations or otherwise gives investment advice regarding securities, manages accounts or portfolios of clients, determines which recommendation or advice regarding securities should be given, provides investment advice or holds [~~herself or himself~~] that individual's self out as providing investment advice, receives compensation to solicit, offer or negotiate for the sale of or for selling investment advice or

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supervises employees who perform any of the foregoing. "Investment adviser representative" does not include an individual who:

(1) performs only clerical or ministerial acts;

(2) is an agent whose performance of investment advice is solely incidental to the individual acting as an agent and who does not receive special compensation for investment advisory services;

(3) is employed by or associated with a federal covered investment adviser, unless the individual has a place of business in New Mexico, as "place of business" is defined by rule adopted pursuant to Section 203A of the federal Investment Advisers Act of 1940 and is:

(a) an investment adviser representative, as "investment adviser representative" is defined by rule adopted pursuant to Section 203A of the federal Investment Advisers Act of 1940; or

(b) not a supervised person as "supervised person" is defined in Section 202(a)(25) of the federal Investment Advisers Act of 1940; or

(4) is excluded by rule adopted pursuant to the New Mexico Uniform Securities Act;

[~~I.~~] K. "issuer" means a person that issues or proposes to issue a security, subject to the following:

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(1) the issuer of a voting trust certificate, collateral trust certificate, certificate of deposit for a security or share in an investment company without a board of directors or individuals performing similar functions is the person performing the acts and assuming the duties of depositor or manager pursuant to the trust or other agreement or instrument under which the security is issued;

(2) the issuer of an equipment trust certificate or similar security serving the same purpose is the person by which the property is or will be used or to which the property or equipment is or will be leased or conditionally sold or that is otherwise contractually responsible for assuring payment of the certificate; and

(3) the issuer of a fractional undivided interest in an oil, gas or other mineral lease or in payments out of production pursuant to a lease, right or royalty is the owner of an interest in the lease or in payments out of production pursuant to a lease, right or royalty, whether whole or fractional, that creates fractional interests for the purpose of sale;

[~~J.~~] L. "qualified individual" means an agent, a broker-dealer, an investment adviser, an investment adviser representative, [~~or~~] a person who serves in a supervisory, compliance or legal capacity for a broker-dealer or investment adviser or a director, an officer or an employee of a financial

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institution; [~~and~~

~~K.~~] M. "savings institution" means an institution organized or chartered pursuant to the laws of a state or of the United States, authorized to receive deposits and supervised and examined by an official or agency of a state or the United States if its deposits or share accounts are insured to the maximum amount authorized by statute by the federal deposit insurance corporation, the national credit union share insurance fund or a successor authorized by federal law, or a receiver, conservator or other liquidating agent of such institutions or entities. "Savings institution" does not include:

(1) an insurance company or other organization primarily engaged in the business of insurance;

(2) a Morris plan bank; or

(3) an industrial loan company that is not an "insured depository institution" as defined in Section 3(c)(2) of the Federal Deposit Insurance Act or any successor federal statute; and

N. "wealth management firm" means a financial services entity that offers portfolio allocation, investment advice and comprehensive financial planning to maximize wealth growth and protection."

SECTION 3. Section 58-13D-3 NMSA 1978 (being Laws 2017, Chapter 106, Section 3) is amended to read:

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"58-13D-3. [~~THIRD-PARTY AND AGENCY DISCLOSURE~~] REPORTING OF SUSPECTED FINANCIAL EXPLOITATION.--

A. [~~If a broker-dealer, investment adviser or qualified individual reasonably believes that financial exploitation of an eligible adult may have occurred, may have been attempted or is being attempted, a broker-dealer, investment adviser or qualified individual~~] A financial institution or qualified individual who has direct contact with an eligible adult or who reviews or approves the financial documents, records or transactions of an eligible adult and who, in the course of employment, has actual knowledge that or reasonably believes that financial exploitation of the eligible adult has occurred, has been attempted or is being attempted:

(1) shall promptly [~~notify~~] report the suspected financial exploitation to the appropriate agencies;

(2) may report the suspected financial exploitation to law enforcement;

[~~(2)~~] (3) shall promptly attempt to [~~notify a third-party previously designated by the eligible adult~~] report the suspected financial exploitation to:

(a) the eligible adult, if the qualified individual reasonably believes that the eligible adult possesses sufficient capacity to take reasonable and appropriate action in the eligible adult's own best interests; and

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(b) any third party previously designated by the eligible adult if the qualified individual reasonably believes that the eligible adult lacks the capacity to take reasonable and appropriate action in the eligible adult's own best interests; and

[~~(3)~~] (4) may attempt to notify a [~~third-party~~] third party that is not designated but is reasonably associated with the eligible adult.

B. [~~Disclosure~~] Reports shall not be made to a designated [~~third-party~~] third party that, [~~is~~] at the time of [~~disclosure~~] the report, is suspected of financial exploitation or other abuse of the eligible adult."

SECTION 4. A new section of the Protecting Elderly and Incapacitated Adults from Financial Exploitation Act, Section 58-13D-3.1 NMSA 1978, is enacted to read:

"58-13D-3.1. [NEW MATERIAL] PENALTIES FOR FAILURE TO REPORT SUSPECTED FINANCIAL EXPLOITATION.--

A. Failure of a qualified individual to report suspected financial exploitation as required pursuant to Section 58-13D-3 NMSA 1978 shall be subject to a civil penalty not exceeding five thousand dollars ($5,000) per violation, which shall be paid by the financial institution that is the employer of the qualified individual.

B. An action to recover the civil penalty provided for in Subsection A of this section may be brought against the

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financial institution by the attorney general or the district attorney for the benefit of the state or the eligible adult or the eligible adult's authorized representative. The action may be filed in the district court of the county in which the eligible adult resides or in the county where the alleged violation occurred.

C. The remedies provided in this section are in addition to any other remedies provided by law."

SECTION 5. Section 58-13D-4 NMSA 1978 (being Laws 2017, Chapter 106, Section 4) is amended to read:

"58-13D-4. IMMUNITY FOR [~~DISCLOSURES~~] REPORTING.--A [~~broker-dealer, investment adviser or~~] qualified individual who, in exercising reasonable care, [~~complies with~~] makes a report of suspected financial exploitation of an eligible adult pursuant to Section [~~3 of the Protecting Vulnerable Adults from Financial Exploitation Act~~] 58-13D-3 NMSA 1978 and has completed the training required pursuant to Section [~~7 of that act~~] 58-13D-7 NMSA 1978 shall be immune from any administrative or civil liability that might otherwise arise from such [~~disclosure~~] reporting."

SECTION 6. Section 58-13D-5 NMSA 1978 (being Laws 2017, Chapter 106, Section 5) is amended to read:

"58-13D-5. DELAYING DISBURSEMENTS OR TRANSACTIONS.--

A. A [~~broker-dealer or investment adviser~~] qualified individual may delay a disbursement or transaction

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from an account of an eligible adult or an account on which an eligible adult is a beneficiary if:

(1) the [~~broker-dealer, investment adviser or~~] qualified individual reasonably believes, after initiating an internal review of the requested disbursement or transaction and the suspected financial exploitation, that the requested disbursement or transaction may result in financial exploitation of an eligible adult; and

(2) the [~~broker-dealer or investment adviser~~] qualified individual:

(a) immediately, but in no event more than two business days after the requested disbursement or transaction, provides written notification of the delay and the reason for the delay to all parties authorized to transact business on the account, unless any such party is reasonably believed to have engaged in suspected or attempted financial exploitation of the eligible adult;

(b) immediately, but in no event more than two business days after the requested disbursement or transaction, notifies the agencies; and

(c) provides, upon a request by the securities division of the regulation and licensing department, a status report of the internal review required pursuant to Paragraph (1) of this subsection.

B. Any delay of a disbursement or transaction as

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authorized by this section will expire upon the sooner of:

(1) a determination by the [~~broker-dealer or investment adviser~~] qualified individual that the disbursement or transaction will not result in financial exploitation of the eligible adult; or

(2) fifteen business days after the date on which the [~~broker-dealer or investment adviser~~] qualified individual first delayed disbursement or transaction, unless [~~either~~] one or more of the agencies requests that the [~~broker-dealer or investment adviser~~] qualified individual extend the delay, in which case the delay shall expire no more than twenty-five business days after the date on which the [~~broker-dealer or investment adviser~~] qualified individual first delayed disbursement or transaction unless otherwise terminated or extended by [~~either~~] one or more of the agencies or an order of a court of competent jurisdiction.

C. A court of competent jurisdiction may enter an order extending the delay of the disbursement or transaction or may order other protective relief based on the petition of the director of the securities division of the regulation and licensing department, the director of the financial institutions division of the regulation and licensing department, the director of the adult protective services division of the aging and long-term services department, the [~~broker-dealer or investment adviser~~] qualified individual that

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initiated the delay under this section or other interested party."

SECTION 7. Section 58-13D-6 NMSA 1978 (being Laws 2017, Chapter 106, Section 6) is amended to read:

"58-13D-6. IMMUNITY FOR DELAYING DISBURSEMENTS OR TRANSACTIONS.--A [~~broker-dealer or investment adviser~~] qualified individual that, in exercising reasonable care, [~~complies with~~] delays a disbursement or transaction pursuant to Section [~~5 of the Protecting Vulnerable Adults from Financial Exploitation Act~~] 58-13D-5 NMSA 1978 and has completed the training required pursuant to Section [~~7 of that act~~] 58-13D-7 NMSA 1978 shall be immune from any administrative or civil liability that might otherwise arise from such delay in a disbursement or transaction in accordance with this section."

SECTION 8. Section 58-13D-7 NMSA 1978 (being Laws 2017, Chapter 106, Section 7) is amended to read:

"58-13D-7. TRAINING.--

A. The director of the securities division of the regulation and licensing department or the director of the financial institutions division of the regulation and licensing department, or both, shall promulgate, by rule, training guidelines or a standardized training curriculum that [~~broker-dealers and investment advisers~~] qualified individuals may use. A [~~broker-dealer or investment adviser~~] qualified individual

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may develop the [~~broker-dealer's or investment adviser's~~] qualified individual's own training as approved by the director or directors. The training required by this section may include indicators of financial exploitation of an eligible adult and the process for reporting suspected financial exploitation both internally and to the agencies.

B. A [~~broker-dealer or investment adviser~~] financial institution shall provide training concerning the financial exploitation of eligible adults to its employees who [~~are required to be registered in New Mexico as agents or investment adviser representatives and who~~] have contact with eligible adults and access to account information on a regular basis and as part of their job."

SECTION 9. Section 58-13D-8 NMSA 1978 (being Laws 2017, Chapter 106, Section 8) is amended to read:

"58-13D-8. RECORDS.--A [~~broker-dealer or investment adviser~~] financial institution or qualified individual shall provide access to or copies of records that are relevant to the suspected or attempted financial exploitation of an eligible adult to the agencies and to law enforcement, either as part of a referral to the agencies, as part of a referral to law enforcement or upon request of the agencies or law enforcement pursuant to an investigation. The records may include historical records as well as records relating to the most recent transaction or transactions that may comprise financial

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exploitation of an eligible adult. All records made available pursuant to [~~this section~~] the Protecting Elderly and Incapacitated Adults from Financial Exploitation Act shall not be considered a public record as defined in Subsection G of Section 14-2-6 NMSA 1978. Nothing in this provision shall limit or otherwise impede the authority of the director of the securities division of the regulation and licensing department or the director of the financial institutions division of the regulation and licensing department to access or examine the books and records of [~~broker-dealers and investment advisers~~] financial institutions and qualified individuals as otherwise provided by law."

SECTION 10. A new section of the Protecting Elderly and Incapacitated Adults from Financial Exploitation Act, Section 58-13D-9 NMSA 1978, is enacted to read:

"58-13D-9. [NEW MATERIAL] CIVIL LIABILITY FOR FAILING TO PREVENT FINANCIAL EXPLOITATION OF AN ELIGIBLE ADULT.--

A. A financial institution is liable to an eligible adult for damages caused by financial exploitation by a third party if the financial institution had actual knowledge of, or acted in reckless disregard of facts indicating, the financial exploitation of the eligible adult by a third party.

B. An eligible adult, or a guardian, conservator, personal representative or other lawful representative acting on behalf of the eligible adult, may bring a civil action in

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district court for damages resulting from a violation of this section.

C. A prevailing plaintiff may recover:

(1) actual damages;

(2) reasonable attorney fees and costs; and

(3) punitive damages upon a showing of willful or reckless disregard of the rights of the eligible adult.

D. This section shall not impose liability on a financial institution for actions taken in good faith and in compliance with the Protecting Elderly and Incapacitated Adults from Financial Exploitation Act."

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