

How To Maximize Immunity Under State Senior Reporting Statutes

By Andrew Mount



This month's featured NSCP *Currents* Podcast



About the Author:

Andrew Mount is an associate in both the Senior & Vulnerable Investor Group and the Financial Institutions Group at the law firm **Bressler, Amery & Ross**. He can be reached at amount@bressler.com.

As of the date of this article, thirty-two states have enacted some specific form of legislation applicable to broker-dealers and investment advisers to protect senior and vulnerable investors from financial exploitation.¹ Twenty-nine states have adopted, in whole or in part, a statute modeled after the North American Securities Administrators Association (“NASAA”) Model Act. The state statutes typically require or permit (i) reports to government agencies, (ii) disclosure to third parties; and (iii) holds on suspicious disbursements and/or transactions.

Along with these relatively new laws, firms must comply with reporting obligations under long-standing “adult protective services” (APS) statutes that aim to protect the state’s senior and vulnerable population generally. Often, in the states that have adopted financial exploitation statutes, firms that suspect financial exploitation do not also consider making a report under the APS statute. This can often be a mistake.

Immunity for Reporting Financial Exploitation and Adult Protective Services Statutes

Financial exploitation statutes and APS statutes both grant firms immunity for reporting suspected financial exploitation. This immunity could shield firms from liability for allegations such as violating a customer’s privacy or acting as an unwitting co-conspirator in a bad actor’s fraud. However, with one exception, the immunities granted are different in a critical way. In 28 of the 29 states that have adopted financial exploitation statutes based on the NASAA Model Act, firms are granted *civil and administrative immunity* for making a good faith report to government agencies or a third party.² Under the APS statutes in most states³, firms that report suspected financial exploitation to a government agency in good faith are granted civil, administrative and *criminal* immunity.

In certain states, the financial exploitation statute and APS statute require or permit reporting to the same agencies. In these states, a firm can fulfill its reporting responsibility under the APS statute (and gain the respective criminal immunity) simply by complying with the state’s financial exploitation statute.

For example, under the New Mexico APS statute, a firm that suspects financial exploitation must immediately make a report to APS. Under the financial exploitation statute, a firm must promptly make a report to *both* APS and the New Mexico Securities Division. Therefore, a firm that is compliant with the financial exploitation statute in New Mexico is also compliant with the APS statute – and gains the resulting criminal immunity. It is important to note that the words “immediately” and “promptly” are not defined in either statute. However, as a best practice, firms should interpret these terms to require reporting within one to two business days after a suspicion of financial exploitation arises.

In many other states, the analysis is more complicated. Under Montana’s financial exploitation statute, a firm is allowed to report suspected financial exploitation to the Montana Office of the Securities Commissioner. If a firm makes such a report in good faith, it receives immunity from administrative and civil liability. Under the APS statute, however, a firm is permitted to make a report to APS and it gains criminal immunity for doing so. To gain civil, administrative and *criminal* immunity for a report in Montana, a firm must act under both statutes and make reports to both

1. As of the date of this article, the following states have passed some form of legislation applicable to broker-dealers and investment advisers to protect their senior and vulnerable populations: Florida, Alabama, Mississippi, Louisiana, Texas, Oklahoma, Arkansas, Tennessee, Kentucky, West Virginia, Maine, New Hampshire, Vermont, Rhode Island, New Jersey, Delaware, Maryland, Virginia, North Dakota, Minnesota, Missouri, Indiana, Washington, Oregon, California, Nevada, Montana, Colorado, New Mexico, Utah, Arizona and Alaska.

2. The only exception, Minnesota, also grants *criminal* immunity making a report under the state’s financial exploitation statute.

3. The following states grant criminal immunity for making a report under the state’s APS statute: Florida, Georgia, Mississippi, Louisiana, Texas, Oklahoma, Arkansas, Tennessee, Kentucky, West Virginia, North Carolina, South Carolina, New Hampshire, Vermont, Massachusetts, Rhode Island, New Jersey, Connecticut, Pennsylvania, Delaware, Virginia, North Dakota, South Dakota, Nebraska, Minnesota, Iowa, Missouri, Illinois, Indiana, Ohio, Washington, Idaho, Nevada, Montana, Wyoming, Colorado, New Mexico, Utah, Arizona, Alaska, Hawaii.

the Montana Office of the Securities Commissioner and APS. In states such as Montana – where the two statutes require reporting to different agencies – firms may be best served by reporting suspected exploitation to all applicable agencies in order to secure criminal immunity.

How Firms Can Secure Immunity and Help Protect Senior and Vulnerable Investors

The interplay between the different reporting laws in each state are not always intuitive and securing civil, administrative and criminal immunity can be difficult. However, there are steps that firms can take to ease the burden and ensure that their sales practices are in adherence with the rules and regulations to protect seniors.

Training

Firms should ensure that their employees are trained to identify both diminished capacity and red flags indicating possible exploitation. Signs of diminished capacity include: (1) making decisions inconsistent with history or stated goals; (2) interest in “get rich quick” schemes; (3) inability to understand important or basic aspects of the account; (4) memory loss; (5) disorientation; (6) change in appearance; (7) inability to pay bills or multiple bills at the same time; and (8) repeated calls and/or repeated resetting of online account access passwords.

With regard to possible exploitation, firms should train employees to watch out for: (1) dramatic, unexplained shifts in investment style; (2) sudden withdrawals or changes in amount/frequency of withdrawals; and (3) suspicious signatures on documents; and (4) abrupt changes in trusted contact, beneficiary or estate planning documents.

Documentation

Firms should document how they developed a reasonable belief of financial exploitation including any and all aspects of their investigation. In a potential enforcement proceeding, litigation, or arbitration, firms should be prepared to present documentary evidence showing why a particular report was made.

Centralize Reporting Functions

Firms that employ a centralized reporting group (or individual) are more likely to appreciate the requirements imposed under different state laws. Individuals within a centralized group operate at an “expert” level that is not achievable for the registered representative and/or adviser. These groups can ensure that the proper government agencies are contacted under each state’s financial exploitation and APS statutes.

Clear Escalation and Reporting Procedures

As is already required by FINRA Rule 2165, firms should develop clear escalation procedures for registered representatives and/or advisers to follow when they develop a reasonable suspicion of financial exploitation. Firms should create and/or utilize a resource for each state which clearly identifies the reporting mechanism that will guarantee achieving civil, administrative and criminal immunity.

Utilize Available Resources

There are many helpful resources available to help firms comply with state law, protect their senior and vulnerable investors and maximize immunity:

- NASAA’s <http://serveourseniors.org>
- FINRA’s <http://www.finra.org/industry/senior-investors>
- FINRA’s Securities Helpline for Seniors – 844-57-HELPS

- AARP Foundation's [ElderWatch](#)
- Bressler, Amery & Ross, P.C.'s [Senior and Vulnerable Investor Issues Map](#), which is a state-by-state guide of the financial exploitation and APS laws in each state.

Conclusion

Firms should recognize that to achieve civil, administrative and criminal immunity under state law, they must comply with both state financial exploitation statutes and APS statutes. ■