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PROPOSED HOUSE COMMITTEE SUBSTITUTE S140-PCS85256-TG-58

Short Title: Financial Exploitation of Older Adults.

(Public)

Sponsors:

Referred to:

February 28, 2013

1 A BILL TO BE ENTITLED
2 AN ACT TO INCREASE THE RECOGNITION, REPORTING, AND PROSECUTION OF
3 THOSE WHO WOULD DEFRAUD OR FINANCIALLY EXPLOIT DISABLED OR
4 OLDER ADULTS AND TO CONTINUE THE TASK FORCE ON FRAUD AGAINST
5 OLDER ADULTS, AS RECOMMENDED BY THE TASK FORCE ON FRAUD
6 AGAINST OLDER ADULTS.

7 The General Assembly of North Carolina enacts:

8 SECTION 1. G.S. 14-112.2 reads as rewritten:

9 "§ 14-112.2. **Exploitation of an elder-older adult or disabled adult.**

10 (a) The following definitions apply in this section:

11 (1) Disabled adult. – A person 18 years of age or older or a lawfully
12 emancipated minor who is present in the State of North Carolina and who is
13 physically or mentally incapacitated as defined in G.S. 108A-101(d).

14 (2) Elder-Older adult. – A person 60 years of age or ~~elder who is not able to~~
15 ~~provide for the social, medical, psychiatric, psychological, financial, or legal~~
16 ~~services necessary to safeguard the person's rights and resources and to~~
17 ~~maintain the person's physical and mental well-being.~~older.

18 (b) It is unlawful for a person: (i) who stands in a position of trust and confidence with
19 an elder-older adult or disabled adult, or (ii) who has a business relationship with an elder-older
20 adult or disabled adult to knowingly, by deception or intimidation, obtain or use, or endeavor to
21 obtain or use, an elder-older adult's or disabled adult's funds, assets, or property with the intent
22 to temporarily or permanently deprive the elder-older adult or disabled adult of the use, benefit,
23 or possession of the funds, assets, or property, or to benefit someone other than the elder-older
24 adult or disabled adult.

25 (c) It is unlawful for a ~~person, who knows or reasonably should know that an elder~~
26 ~~adult or disabled adult lacks the capacity to consent,~~person to knowingly, by deception or
27 intimidation, obtain or use, endeavor to obtain or use, or conspire with another to obtain or use
28 an elder-older adult's or disabled adult's funds, assets, or property with the intent to temporarily
29 or permanently deprive the elder-older adult or disabled adult of the use, benefit, or possession
30 of the funds, assets, or property, or benefit someone other than the elder-older adult or disabled
31 adult. This subsection shall not apply to a person acting within the scope of that person's lawful
32 authority as the agent for the elder-older adult or disabled adult.

33 (d) A violation of subsection (b) of this section is punishable as follows:



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- 1 (1) If the funds, assets, or property involved in the exploitation of the ~~elderly~~
 2 ~~person—older adult~~ or disabled adult is valued at one hundred thousand
 3 dollars (\$100,000) or more, then the offense is a Class F felony.
 4 (2) If the funds, assets, or property involved in the exploitation of the ~~elderly~~
 5 ~~person—older adult~~ or disabled adult is valued at twenty thousand dollars
 6 (\$20,000) or more but less than one hundred thousand dollars (\$100,000),
 7 then the offense is a Class G felony.
 8 (3) If the funds, assets, or property involved in the exploitation of the ~~elderly~~
 9 ~~person—older adult~~ or disabled adult is valued at less than twenty thousand
 10 dollars (\$20,000), then the offense is a Class H felony.
 11 (e) A violation of subsection (c) of this section is punishable as follows:
 12 (1) If the funds, assets, or property involved in the exploitation of the ~~elderly~~
 13 ~~person—older adult~~ or disabled adult is valued at one hundred thousand
 14 dollars (\$100,000) or more, then the offense is a Class G felony.
 15 (2) If the funds, assets, or property involved in the exploitation of the ~~elderly~~
 16 ~~person—older adult~~ or disabled adult is valued at twenty thousand dollars
 17 (\$20,000) or more but less than one hundred thousand dollars (\$100,000),
 18 then the offense is a Class H felony.
 19 (3) If the funds, assets, or property involved in the exploitation of the ~~elderly~~
 20 ~~person—older adult~~ or disabled adult is valued at less than twenty thousand
 21 dollars (\$20,000), then the offense is a Class I felony."

22 **SECTION 2.(a)** G.S. 53B-4 is amended by adding a new subdivision to read as
 23 follows:

24 **"§ 53B-4. Access to financial records.**

25 Notwithstanding any other provision of law, no government authority may have access to a
 26 customer's financial record held by a financial institution unless the financial record is
 27 described with reasonable specificity and access is sought pursuant to any of the following:

28 ...

- 29 (13) A subpoena delivered to the financial institution pursuant to G.S. 108A-116
 30 by (i) a county department of social services director investigating a credible
 31 report of financial exploitation of a disabled adult or (ii) a law enforcement
 32 agency investigating a credible report of financial exploitation of a disabled
 33 adult or older adult."

34 **SECTION 2.(b)** G.S. 53B-9 reads as rewritten:

35 **"§ 53B-9. Duty of financial institutions; fee; limitation of liability.**

36 (a) Upon service of a subpoena or court order pursuant to G.S. 53B-4(1), (3), (9), or
 37 (11) and receipt of certification pursuant to G.S. 53B-5(5), or upon receipt of a subpoena
 38 pursuant to G.S. 53B-4(13), a financial institution shall locate the financial records requested
 39 and prepare to make them available to the government authority seeking access to them. Upon
 40 receipt of notice that a customer has challenged the court order or subpoena, the financial
 41 institution may suspend its efforts to make the records available until after final disposition of
 42 the challenge.

43 (b) Upon receipt of access to financial records pursuant to G.S. 53B-4(1), (3), (9), ~~or~~
 44 ~~(11),~~(11), or (13), a government authority shall pay the financial institution that provided the
 45 financial records a fee for costs directly incurred in assembling and delivering the financial
 46 records. The fee shall be at the rate established pursuant to the Right to Financial Privacy Act §
 47 1115(a), 12 U.S.C. § 3415, and ~~12 C.F.R. 219.12~~ C.F.R. 219, unless waived, in whole or in
 48 part, by the financial institution.

49 (c) A financial institution that discloses a financial record pursuant to this Chapter in
 50 good faith reliance upon certification by a government authority pursuant to G.S. 53B-5(5) is
 51 not liable for damages resulting from the disclosure."

1 All financial institutions are encouraged, but not required, to offer to disabled adult and
2 older adult customers the opportunity to submit, and periodically update, a list of persons that
3 the disabled adult or older adult customer would like the financial institution to contact in case
4 of suspected financial exploitation of the disabled adult or older adult customer. No financial
5 institution, or officer or employee thereof, who acts in good faith in offering to its customer the
6 opportunity to submit and update a list of such contact persons may be held liable in any action
7 for doing so.

8 **§ 108A-115. Duty to report suspected fraud; content of report; immunity for reporting.**

9 (a) Any financial institution, or officer or employee thereof, having reasonable cause to
10 believe that a disabled adult or older adult is the victim or target of financial exploitation shall
11 report such information to the following:

- 12 (1) Persons on the list provided by the customer under G.S. 108A-114, if such a
13 list has been provided by the customer. The financial institution may choose
14 not to contact persons on the provided list if the financial institution suspects
15 that those persons are financially exploiting the disabled adult or older adult.
- 16 (2) The appropriate local law enforcement agency.
- 17 (3) The appropriate county department of social services, if the customer is a
18 disabled adult.

19 (b) The report may be made orally or in writing. The report shall include the name and
20 address of the disabled adult or older adult, the nature of the suspected financial exploitation,
21 and any other pertinent information.

22 (c) No financial institution, or officer or employee thereof, who acts in good faith in
23 making a report under this section may be held liable in any action for doing so.

24 **§ 108A-116. Production of customers' financial records in cases of suspected financial**
25 **exploitation; immunity; records may not be used against account owner.**

26 (a) An investigating entity may, under the conditions specified in this section, obtain a
27 subpoena directing a financial institution to provide to the investigating entity the financial
28 records of a disabled adult or older adult customer. The subpoena may be issued by any judge
29 of the superior court, judge of the district court, or magistrate in the county of residence of the
30 disabled adult or older adult customer whose financial records are being subpoenaed, upon
31 finding that all of the following conditions are met:

- 32 (1) The investigating entity is investigating, pursuant to the investigating entity's
33 statutory authority, a credible report that the disabled adult or older adult is
34 being or has been financially exploited.
- 35 (2) The disabled adult's or older adult's financial records are needed in order to
36 substantiate or evaluate the report.
- 37 (3) Time is of the essence in order to prevent further exploitation of that
38 disabled adult or older adult.

39 (b) Delivery of the subpoena may be effected by hand, via certified mail, return receipt
40 requested, or through a designated delivery service authorized pursuant to 26 U.S.C. §
41 7502(f)(2) and may be addressed to the financial institution's local branch or office vice
42 president, its local branch or office manager or assistant branch or office manager, or the agent
43 for service of process listed by the financial institution with the North Carolina Secretary of
44 State or, if there is none, with the agent for service of process listed by the financial institution
45 in any state in which it is domiciled.

46 (c) A financial institution shall promptly provide to the head of an investigating entity,
47 or his or her designated agent, the financial records of a disabled adult or older adult customer
48 upon receipt of a subpoena delivered pursuant to subsection (b) of this section identifying the
49 disabled adult or older adult customer.

50 (d) All produced copies of the disabled adult's or older adult's financial records, as well
51 as any information obtained pursuant to the duty to report found in G.S. 108A-115, shall be

1 kept confidential by the investigating entity unless required by court rules to be disclosed to a
2 party to a court proceeding or introduced and admitted into evidence in an open court
3 proceeding.

4 (e) No financial institution or investigating entity, or officer or employee thereof, who
5 acts in good faith in providing, seeking, or obtaining financial records or any other information
6 in accordance with this section, or in providing testimony in any judicial proceeding based
7 upon the contents thereof, may be held liable in any action for doing so.

8 (f) No customer may be subject to indictment, criminal prosecution, criminal
9 punishment, or criminal penalty by reason of or on account of anything disclosed by a financial
10 institution pursuant to this section, nor may any information obtained through such disclosure
11 be used as evidence against the customer in any criminal or civil proceeding. Notwithstanding
12 the foregoing, information obtained may be used against a person who is a joint account owner
13 accused of financial exploitation of a disabled adult or older adult joint account holder, but
14 solely for criminal or civil proceedings directly related to the alleged financial exploitation of
15 the disabled adult or older adult joint account holder.

16 **"§ 108A-117. Notice to customer; delayed notice.**

17 (a) Upon the issuance of a subpoena pursuant to G.S. 108A-116, the investigating entity
18 shall immediately provide the customer with written notice of its action by first-class mail to
19 the customer's last known address, unless an order for delayed notice is obtained pursuant to
20 subsection (b) of this section. The notice shall be sufficient to inform the customer of the name
21 of the investigating entity that has obtained the subpoena, the financial records subject to
22 production pursuant to the subpoena, and the purpose of the investigation.

23 (b) An investigating entity may include in its application for a subpoena pursuant to
24 G.S. 108A-116 a request for an order delaying the customer notice required pursuant to
25 subsection (a) of this section. The judge or magistrate issuing the subpoena may order a
26 delayed notice in accordance with subsection (c) of this section if it finds, based on affidavit or
27 oral testimony under oath or affirmation before the issuing judge or magistrate, that all of the
28 following conditions are met:

29 (1) The investigating entity is investigating a credible report that the adult is
30 being or has been financially exploited.

31 (2) There is reason to believe that the notice will result in at least one of the
32 following:

33 a. Endangering the life or physical safety of any person.

34 b. Flight from prosecution.

35 c. Destruction of or tampering with evidence.

36 d. Intimidation of potential witnesses.

37 e. Serious jeopardy to an investigation or official proceeding.

38 f. Undue delay of a trial or official proceeding.

39 (c) Upon making the findings required in subsection (b) of this section, the judge or
40 magistrate shall enter an ex parte order granting the requested delay for a period not to exceed
41 30 days. If the court finds there is reason to believe that the notice may endanger the life or
42 physical safety of any person, the court may order that the delay be for a period not to exceed
43 180 days. An order delaying notice shall direct that:

44 (1) The financial institution not disclose to any person the existence of the
45 investigation, of the subpoena, or of the fact that the customer's financial
46 records have been provided to the investigating entity for the duration of the
47 period of delay authorized in the order;

48 (2) The investigating entity deliver a copy of the order to the financial institution
49 along with the subpoena that is delivered pursuant to G.S. 108-116(b); and

50 (3) The order be sealed until otherwise ordered by the judge or magistrate.

1 (d) Upon application by the investigating entity, further extensions of the delay of
2 notice may be granted by order of a judge or magistrate in the county of residence of the
3 disabled adult or older adult customer whose financial records are being subpoenaed, upon a
4 finding of the continued existence of the conditions set forth in subdivisions (1) and (2) of
5 subsection (b) of this section, and subject to the requirements of subsection (c) of this section.
6 If the initial delay was granted for a period not to exceed 30 days, the delay may be extended
7 by additional periods of up to 30 days each and the total delay in notice granted under this
8 section shall not exceed 90 days. If the initial delay was granted for a period not to exceed 180
9 days, the delay may be extended by additional periods of up to 180 days each and may continue
10 to be extended until the court finds the notice would no longer endanger the life or physical
11 safety of any person.

12 (e) Upon the expiration of the period of delay of notice granted under this section,
13 including any extensions thereof, the customer shall be served with a copy of the notice
14 required by subsection (a) of this section."

15 **SECTION 5.(a)** Section 1(c) of S.L. 2011-189 reads as rewritten:

16 **"SECTION 1.(c)** The Task Force shall make ~~an interim~~ a report to the North Carolina
17 Study Commission on Aging on or before November 1, 2011, and a ~~final~~ report including
18 findings, recommendations, and draft legislation to the Joint Legislative Oversight Committee
19 on Health and Human Services on or before ~~October 1, 2012~~ February 1, 2013. The Task Force
20 shall report to the Joint Legislative Oversight Committee on Health and Human Services prior
21 to the 2014 Regular Session of the 2013 General Assembly on the efficacy of any of the Task
22 Force's recommendations that are adopted. The Task Force shall terminate on May 1, 2015, or
23 upon the filing of its final report, whichever occurs first."

24 **SECTION 5.(b)** The Consumer Protection Division, Department of Justice, shall
25 add the following to its list of approved associations represented on the Task Force:

- 26 (1) The North Carolina Credit Union League.
- 27 (2) An association representing nondepository financial institutions.
- 28 (3) The North Carolina Bar Association, whose participating representatives
29 shall include attorneys involved in protecting the privacy and property
30 interests of disabled and older adults.

31 **SECTION 6.** Section 1 of this act becomes effective December 1, 2013, and
32 applies to offenses committed on or after that date. Sections 2, 3, and 4 of this act become
33 effective December 1, 2013. The remainder of this act is effective when it becomes law.