Comment submitted by Bill Singer, Esq., publisher of the BrokeAndBroker.com Blog and the Securities Industry Commentator Feed:

A potential flaw in the Proposed Rule is presented in Supplementary Material .06 [Ed: emphasis supplied]:

> a registered person **instructing** or **asking** a customer to name another person, such as the registered person's spouse or child, to be a beneficiary of the customer's estate or to receive a bequest from the customer's estate would not be consistent with paragraph (a)(1) of the Rule.

As contemplated in (a)(1) of the Proposed Rule, a registered person shall decline being named a beneficiary of a customer's estate or receiving a bequest from a customer's estate upon learning of such status . . ." As such, the Supplementary Material .06 extends that obligation of declination to a scenario whereby the registered person *instructs* or *asks* a customer to, in effect, name a third-party as a beneficiary or recipient of a bequest. Unfortunately, I can easily imagine a clever stockbroker having a conversation lacking in any prohibited instruction or asking but which, nevertheless, prompts the customer to undertake a bequest. For example, a stockbroker might engage a vulnerable widow along the lines of:

I wish that I could do more for you and I know that you would love to show me all your appreciation for all the free light bulbs and coffee cake that I bought for you over the years, but it would be improper for me to instruct you to name me or another person as your beneficiary and, similarly, it would be improper for me to ask you to name me or another person as the recipient of any kind of bequest. And you know I would never, ever do anything improper. I mean, you know, sure, if you decided on your own to name me or my wife or kids as a beneficiary, well, I would always be grateful, eternally so, but, that would be up to you and, like I said, I would never, ever instruct or ask you to take such a thoughtful step. By the way, let me leave a photo of my kids with you -- we're hoping to send Jack to college this year, and, in another two years, to send Jill. I only hope that I can afford the killer costs of college. Oh, and another thing, before I go, my wife Jane baked you another coffee cake from her mother's recipe.

Notwithstanding the best of intentions, Supplementary Material .06 still leaves the door wide open. Similarly, another glaring loophole is that an unscrupulous stockbroker could simply arrange to have his wife or other third-party ask the customer to undertake the bequest -- and then, the stockbroker could argue (and with some effect) that he was not named as a beneficiary and he did not instruct or ask the

customer to name the third party at issue. Moreover, since the third party would likely not be an associated person of a FINRA member firm, FINRA might find it difficult to compel that individual's testimony during its investigation and any subsequent hearing.

I have been involved with many situations where an estate bequest or transfer-on-death ("TOD") is at issue. When faced with the consequences of such a scenario, the stockbroker's calculation often entails the somewhat pragmatic (and cynical) weighing of the value of the gift versus the financial detriment arising from being fired -- versus any potential suspension or fine that FINRA may impose. If the bequest is in the millions, that often prompts an easy albeit mercenary decision to keep the gift and pay what comes off as a freight charge. In the end, it may well be that FINRA's best intentions can only be extended so far. And when we arrive at the end of that self-regulatory tether, it may be that state and federal laws will need to be revised to best (or better) address the consequences of financial professionals taking advantage of their elderly or vulnerable customers.

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