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SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549
Form 19b-4

File No.* SR - 2016 - * 039
Amendment No. (req. for Amendments *)

Filing by Financial Industry Regulatory Authority

Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

Initial *	Amendment *	Withdrawal	Section 19(b)(2) *	Section 19(b)(3)(A) *	Section 19(b)(3)(B) *
☑	☐	☐	☑	☐	☐

Pilot ☐

Extension of Time Period for Commission Action * ☐

Date Expires *

Rule

☐ 19b-4(f)(1) ☐ 19b-4(f)(4)
☐ 19b-4(f)(2) ☐ 19b-4(f)(5)
☐ 19b-4(f)(3) ☐ 19b-4(f)(6)

Notice of proposed change pursuant to the Payment, Clearing, and Settlement Act of 2010

Section 806(e)(1) * ☐ Section 806(e)(2) * ☐

Security-Based Swap Submission pursuant to the Securities Exchange Act of 1934

Section 3C(b)(2) * ☐

Exhibit 2 Sent As Paper Document ☐ Exhibit 3 Sent As Paper Document ☐

Description

Provide a brief description of the action (limit 250 characters, required when Initial is checked *).

Proposed Rule Change to Adopt FINRA Rule 2165 (Financial Exploitation of Specified Adults)

Contact Information

Provide the name, telephone number, and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the action.

First Name * Jeanette Last Name * Wingler
Title * Associate General Counsel
E-mail * jeanette.wingler@finra.org
Telephone * (202) 728-8013 Fax (202) 728-8264

Signature

Pursuant to the requirements of the Securities Exchange Act of 1934,

has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized.

Date 10/19/2016
By Patrice Gliniecki
(Name *)

(Title *)
Senior Vice President and Deputy General Counsel

Patrice Gliniecki,

NOTE: Clicking the button at right will digitally sign and lock this form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed.

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SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EFFS website.

Form 19b-4 Information * Add Remove View	The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.
Exhibit 1 - Notice of Proposed Rule Change * Add Remove View	The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO] -xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)
Exhibit 1A- Notice of Proposed Rule Change, Security-Based Swap Submission, or Advance Notice by Clearing Agencies * Add Remove View	The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO] -xx-xx). A material failure to comply with these guidelines will result in the proposed rule change, security-based swap submission, or advance notice being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)
Exhibit 2 - Notices, Written Comments, Transcripts, Other Communications Add Remove View Exhibit Sent As Paper Document ☐	Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.
Exhibit 3 - Form, Report, or Questionnaire Add Remove View Exhibit Sent As Paper Document ☐	Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.
Exhibit 4 - Marked Copies Add Remove View	The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.
Exhibit 5 - Proposed Rule Text Add Remove View	The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change.
Partial Amendment Add Remove View	If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

1. Text of the Proposed Rule Change

(a) Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act" or "Exchange Act"),[1] Financial Industry Regulatory Authority, Inc. ("FINRA") is filing with the Securities and Exchange Commission ("SEC" or "Commission") a proposed rule change to: (1) amend FINRA Rule 4512 (Customer Account Information) to require members to make reasonable efforts to obtain the name of and contact information for a trusted contact person for a customer's account; and (2) adopt new FINRA Rule 2165 (Financial Exploitation of Specified Adults) to permit members to place temporary holds on disbursements of funds or securities from the accounts of specified customers where there is a reasonable belief of financial exploitation of these customers.

The text of the proposed rule change is attached as Exhibit 5.

(b) Not applicable.

(c) Not applicable.

2. Procedures of the Self-Regulatory Organization

At its meeting on September 17, 2015, the FINRA Board of Governors authorized the filing of the proposed rule change with the SEC. No other action by FINRA is necessary for the filing of the proposed rule change.

If the Commission approves the proposed rule change, FINRA will announce the effective date of the proposed rule change in a Regulatory Notice to be published no later than 60 days following Commission approval. The effective date will be no later than

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[1] 15 U.S.C. 78s(b)(1).

180 days following publication of the Regulatory Notice announcing Commission approval.

3. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(a) Purpose

With the aging of the U.S. population, financial exploitation of seniors and other vulnerable adults is a serious and growing problem.[2] FINRA's experience with the FINRA Securities Helpline for Seniors® ("Seniors Helpline") has highlighted issues relating to financial exploitation of seniors and other vulnerable adults.[3] A number of reports and studies also have explored various aspects of this important topic.[4] Moreover, studies indicate that financial exploitation is the most common form of elder

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[2] See The MetLife Study of Elder Financial Abuse: Crimes of Occasion, Desperation, and Predation Against America's Elders (June 2011) (discussing the increasing prevalence of elder financial abuse) (hereinafter "MetLife Study"). See also FINRA Investor Education Foundation, Financial Fraud and Fraud Susceptibility in the United States: Research Report from a 2012 National Survey (2013) (which found that U.S. adults age 65 and older are more likely to be targeted for financial fraud, including investment scams, and more likely to lose money once targeted) (hereinafter "FINRA Foundation Study").

[3] See FINRA Launches Toll-Free FINRA Securities Helpline for Seniors (April 20, 2015). See also Report on the FINRA Securities Helpline for Seniors (December 2015) (stating that from its launch on April 20, 2015 until December 2015, the Seniors Helpline received more than 2,500 calls with an average call duration of nearly 25 minutes) (hereinafter "Seniors Helpline Report").

[4] See, e.g., National Senior Investor Initiative: A Coordinated Series of Examinations, SEC's Office of Compliance Inspections and Examinations and FINRA (April 15, 2015) (hereinafter "Senior Investor Initiative"); MetLife Study; and Seniors Helpline Report.

abuse.[5] Financial exploitation can be difficult for any investor, but it can be particularly devastating for seniors and other vulnerable adults, many of whom are living on fixed incomes without the ability to offset significant losses over time or through other means.[6] Financial exploitation can occur suddenly, and once funds leave an account they can be difficult, if not impossible, to recover, especially when they ultimately are transferred outside of the U.S.[7] Members need more effective tools that will allow them to quickly and effectively address suspected financial exploitation of seniors and other vulnerable adults. Currently, however, FINRA rules do not explicitly permit members to contact a non-account holder or to place a temporary hold on disbursements of funds or securities where there is a reasonable belief of financial exploitation of a senior or other vulnerable adult.

To address these issues, the proposed rule change would provide members with a way to quickly respond to situations in which they have a reasonable basis to believe that financial exploitation of vulnerable adults has occurred or will be attempted. FINRA

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5 See Interagency Guidance on Privacy Laws and Reporting Financial Abuse of Older Adults, Board of Governors of the Federal Reserve System, Commodity Futures Trading Commission, Consumer Financial Protection Bureau, Federal Deposit Insurance Corp., Federal Trade Commission, National Credit Union Administration, Office of the Comptroller of the Currency and SEC (September 24, 2013) (hereinafter "Interagency Guidance") (citing Acierno, R., M. A. Hernandez, A. B. Amstadter, H. S. Resnick, K. Steve, W. Muzzy, and D. G. Kilpatrick, "Prevalence and Correlates of Emotional, Physical, Sexual and Financial Abuse and Potential Neglect in the United States: The National Elder Mistreatment Study," American Journal of Public Health 100(2): 292–97; Lifespan of Greater Rochester, Inc., et al., Under the Radar: New York State Elder Abuse Prevention Study, (Rochester, NY: Lifespan of Greater Rochester, Inc., May 2011)) (hereinafter "New York State Elder Abuse Prevention Study").

6 See Seniors Helpline Report.

7 See Seniors Helpline Report.

believes that a member can better protect its customers from financial exploitation if the member can: (1) place a temporary hold on a disbursement of funds or securities from a customer's account; and (2) notify a customer's trusted contact person when there is concern that, among other things, the customer may be the victim of financial exploitation. These measures will assist members in thwarting financial exploitation of seniors and other vulnerable adults before potentially ruinous losses occur. As discussed below, FINRA is proposing a number of safeguards to help ensure that there is not a misapplication of the proposed rule and that customers' ordinary disbursements are not disrupted.

A small number of states have enacted statutes that permit financial institutions, including broker-dealers, to place temporary holds on "disbursements" or "transactions" if financial exploitation of covered persons is suspected.[8] In addition, the North American Securities Administrators Association ("NASAA") created a model state act to protect vulnerable adults from financial exploitation ("NASAA model"). Due to the small number of state statutes currently in effect and the lack of a federal standard in this area, FINRA believes that the proposed rule change would aid in the creation of a uniform national standard for the benefit of members and their customers.

<u>Trusted Contact Person</u>

The proposed rule change would amend Rule 4512 to require members to make reasonable efforts to obtain the name of and contact information for a trusted contact

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8 <u>See, e.g.,</u> DEL. CODE ANN. tit. 31, § 3910 (2015); MO. REV. STAT. §§ 409.600-.630 (2015); WASH. REV. CODE §§ 74.34.215, 220 (2015); and IND. CODE ANN. § 23-19-4.1 (2016).

person upon the opening of a non-institutional customer’s account.[9] The proposed rule change would require that the trusted contact person be age 18 or older.[10] While the proposed rule change does not specify what contact information should be obtained for a trusted contact person, a mailing address, telephone number and email address for the trusted contact person may be the most useful information for members.

The proposal does not prohibit members from opening and maintaining an account if a customer fails to identify a trusted contact person as long as the member made reasonable efforts to obtain a name and contact information.[11] FINRA believes that asking a customer to provide the name and contact information for a trusted contact person ordinarily would constitute reasonable efforts to obtain the information and would satisfy the proposed rule change’s requirements.

Consistent with the current requirements of Rule 4512, a member would not need to attempt to obtain the name of and contact information for a trusted contact person for accounts in existence prior to the effective date of the proposed rule change (“existing accounts”) until such time as the member updates the information for the account either in the course of the member’s routine and customary business or as otherwise required by applicable laws or rules.[12] With respect to any account subject to the requirements of Exchange Act Rule 17a-3(a)(17) to periodically update customer records, a member shall make reasonable efforts to obtain or, if previously obtained, to update where appropriate

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9 See proposed Rule 4512(a)(1)(F).

10 See proposed Rule 4512(a)(1)(F).

11 See proposed Supplementary Material .06(b) to Rule 4512.

12 See Rule 4512(b).

the name of and contact information for a trusted contact person consistent with the requirements in Exchange Act Rule 17a-3(a)(17).[13] With regard to updating the contact information once provided for other accounts that are not subject to the requirements in Exchange Act Rule 17a-3, a member should consider asking the customer to review and update the name of and contact information for a trusted contact person on a periodic basis or when there is a reason to believe that there has been a change in the customer's situation.[14]

The proposed rule change would also require that, at the time of account opening, a member shall disclose in writing (which may be electronic) to the customer that the member or an associated person is authorized to contact the trusted contact person and disclose information about the customer's account to address possible financial exploitation, to confirm the specifics of the customer's current contact information, health status, or the identity of any legal guardian, executor, trustee or holder of a power of attorney, or as otherwise permitted by proposed Rule 2165. With respect to any account that was opened pursuant to a prior FINRA rule, a member shall provide this

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13 See proposed Supplementary Material .06(c) to Rule 4512. The reference to the requirements of Rule 17a-3(a)(17) includes the requirements of Rule 17a-3(a)(17)(i)(A) in conjunction with Rule 17a-3(a)(17)(i)(D). In this regard, Rule 17a-3(a)(17)(i)(D) provides that the account record requirements in Rule 17a-3(a)(17)(i)(A) only apply to accounts for which the member, broker or dealer is, or has within the past 36 months been, required to make a suitability determination under the federal securities laws or under the requirements of a self-regulatory organization of which it is a member.

14 A customer's request to change his or her trusted contact person may be a possible red flag of financial exploitation. For example, a senior customer instructing his registered representative to change his trusted contact person from an immediate family member to a previously unknown third party may be a red flag of financial exploitation.

disclosure in writing, which may be electronic, when updating the information for the account pursuant to Rule 4512(b) either in the course of the member's routine and customary business or as otherwise required by applicable laws or rules.[15]

FINRA believes that members and customers will benefit from the trusted contact information in many different settings. For example, consistent with the disclosure, if a member has been unable to contact a customer after multiple attempts, a member could contact a trusted contact person to inquire about the customer's current contact information. Or if a customer is known to be ill or infirm and the member has been unable to contact the customer after multiple attempts, the member could contact a trusted contact person to inquire about the customer's health status. A member also could reach out to a trusted contact person if it suspects that the customer may be suffering from Alzheimer's disease, dementia or other forms of diminished capacity. A member could contact a trusted contact person to address possible financial exploitation of the customer before placing a temporary hold on a disbursement. In addition, as discussed below, pursuant to proposed Rule 2165, when information about a trusted contact person is available, a member must notify the trusted contact person orally or in writing, which may be electronic, if the member has placed a temporary hold on a disbursement of funds or securities from a customer's account, unless the member

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[15] See proposed Supplementary Material .06(a) to Rule 4512. A member would be required to provide the disclosure at account opening or when updating information for existing accounts pursuant to Rule 4512(b), even if a customer fails to identify a trusted contact person. Among other things, such disclosure may assist a customer in making an informed decision about whether to provide the trusted contact person information.

reasonably believes that the trusted contact person is engaged in the financial exploitation.[16]

The trusted contact person is intended to be a resource for the member in administering the customer's account, protecting assets and responding to possible financial exploitation. A member may use its discretion in relying on any information provided by the trusted contact person. A member may elect to notify an individual that he or she was named as a trusted contact person; however, the proposed rule change would not require such notification.

Temporary Hold on Disbursement of Funds or Securities

The proposed rule change would permit a member that reasonably believes that financial exploitation may be occurring to place a temporary hold on the disbursement of funds or securities from the account of a "specified adult" customer.[17] The proposed rule change creates no obligation to withhold a disbursement of funds or securities where financial exploitation may be occurring. In this regard, Supplementary Material to proposed Rule 2165 would explicitly state that the Rule provides members with a safe harbor from FINRA Rules 2010 (Standards of Commercial Honor and Principles of

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16 See proposed Rule 2165(b)(1)(B)(ii). With respect to disclosing information to the trusted contact person, Regulation S-P excepts from the Regulation's notice and opt-out requirements disclosures made: (A) to comply with federal, state, or local laws, rules and other applicable legal requirements; or (B) made with client consent, provided such consent has not been revoked. See 17 C.F.R §§ 248.15(a)(1) and (a)(7)(i). FINRA believes that disclosures to a trusted contact person pursuant to proposed Rule 2165 or 4512(a)(1)(F) would be consistent with Regulation S-P.

17 See proposed Rule 2165(b)(1). Members also must consider any obligations under FINRA Rule 3310 (Anti-Money Laundering Compliance Program) and the reporting of suspicious transactions required under 31 U.S.C. 5318(g) and the implementing regulations thereunder.

Trade), 2150 (Improper Use of Customers' Securities or Funds; Prohibition Against Guarantees and Sharing in Accounts) and 11870 (Customer Account Transfer Contracts) when members exercise discretion in placing temporary holds on disbursements of funds or securities from the accounts of specified adults under the circumstances denoted in the Rule.[18] The proposed Supplementary Material would further state that the Rule does not require members to place temporary holds on disbursements of funds or securities from the account of a specified adult.[19]

FINRA believes that "specified adults" may be particularly susceptible to financial exploitation.[20] Proposed Rule 2165 would define "specified adult" as: (A) a natural person age 65 and older;[21] or (B) a natural person age 18 and older who the member reasonably believes has a mental or physical impairment that renders the

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18 See proposed Supplementary Material .01 to Rule 2165.

19 See proposed Supplementary Material .01 to Rule 2165. FINRA understands that some members, pursuant to state law or their own policies, may already place temporary holds on disbursements from customers' accounts where financial exploitation is suspected.

20 See Senior Investor Initiative (noting the increase in persons aged 65 and older living in the United States and the concentration of wealth in those persons during a time of downward yield pressure on conservative income-producing investments). See also FINRA Foundation Study (noting that respondents age 65 and over were more likely to be solicited to invest in a potentially fraudulent opportunity (93%), more likely to engage with the offer (49%) and more likely to have lost money (16%) than younger respondents); MetLife Study (noting the many forms of vulnerability that "make elders more susceptible to [financial] abuse," including, among others, poor physical or mental health, lack of mobility, and isolation); Protecting Elderly Investors from Financial Exploitation: Questions to Consider (February 5, 2015) (noting that one of the greatest risk factors for diminished capacity is age).

21 See, e.g., Aging Statistics, U.S. Department of Health and Human Services Administration on Aging (referring to the "older population" as persons "65 years or older"); Senior Investor Initiative (noting the examinations underlying the report "focused on investors aged 65 years old or older").

individual unable to protect his or her own interests.[22] Supplementary Material to proposed Rule 2165 would provide that a member's reasonable belief that a natural person age 18 and older has a mental or physical impairment that renders the individual unable to protect his or her own interests may be based on the facts and circumstances observed in the member's business relationship with the person.[23] The proposed rule change would define the term "account" to mean any account of a member for which a specified adult has the authority to transact business.[24]

Because financial abuse may take many forms, FINRA has proposed a broad definition of "financial exploitation." Specifically, financial exploitation would mean: (A) the wrongful or unauthorized taking, withholding, appropriation, or use of a specified adult's funds or securities; or (B) any act or omission by a person, including through the use of a power of attorney, guardianship, or any other authority, regarding a specified adult, to: (i) obtain control, through deception, intimidation or undue influence, over the specified adult's money, assets or property; or (ii) convert the specified adult's money, assets or property.[25]

The proposed rule change would permit a member to place a temporary hold on a disbursement of funds or securities from the account of a specified adult if the member reasonably believes that financial exploitation of the specified adult has occurred, is

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22 See proposed Rule 2165(a)(1).

23 See proposed Supplementary Material .03 to Rule 2165. A member also may rely on other sources of information in making a determination under proposed Rule 2165(a)(1) (e.g., a court or government agency order finding a customer to be legally incompetent).

24 See proposed Rule 2165(a)(2).

25 See proposed Rule 2165(a)(4).

occurring, has been attempted or will be attempted.[26] A temporary hold pursuant to proposed Rule 2165 may be placed on a particular suspicious disbursement(s) but not on other, non-suspicious disbursements.[27] The proposed rule change would not apply to transactions in securities.[28]

The proposed rule change would require that a member's written supervisory procedures identify the title of each person authorized to place, terminate or extend a temporary hold on behalf of the member pursuant to Rule 2165. The proposed rule change would require that any such person be an associated person of the member who serves in a supervisory, compliance or legal capacity for the member.[29]

If a member places a temporary hold, the proposed rule change would require the member to immediately initiate an internal review of the facts and circumstances that caused the member to reasonably believe that financial exploitation of the specified adult has occurred, is occurring, has been attempted or will be attempted.[30] In addition, the proposed rule change would require the member to provide notification of the hold and

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[26] See proposed Rule 2165(b)(1)(A).

[27] FINRA recognizes that a single disbursement could involve all of the assets in an account.

[28] For example, the proposed rule change would not apply to a customer's order to sell his shares of a stock. However, if a customer requested that the proceeds of a sale of shares of a stock be disbursed out of his account at the member, then the proposed rule change could apply to the disbursement of the proceeds where the customer is a "specified adult" and there is reasonable belief of financial exploitation.

[29] See proposed Rule 2165(c)(2). This provision is intended to ensure that a member's decision to place a temporary hold is elevated to an associated person with appropriate authority.

[30] See proposed Rule 2165(b)(1)(C).

the reason for the hold to all parties authorized to transact business on the account, including, but not limited to, the customer, and, if available, the trusted contact person, no later than two business days after the date that the member first placed the hold.[31] While oral or written (including electronic) notification would be permitted under the proposed rule change, a member would be required to retain records evidencing the notification.[32]

The proposed rule change does not preclude a member from terminating a temporary hold after communicating with either the customer or trusted contact person. FINRA believes that a customer's objection to a temporary hold or information obtained during an exchange with the customer or trusted contact person may be used in determining whether a hold should be placed or lifted. FINRA believes that while not dispositive members should weigh a customer's objection against other information in determining whether a hold should be placed or lifted.

While the proposed rule change does not require notifying the customer's registered representative of suspected financial exploitation, a customer's registered representative may be the first person to detect potential financial exploitation. If the detection occurs in another way, a member may choose to notify and discuss the suspected financial exploitation with the customer's registered representative.

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[31] See proposed Rule 2165(b)(1)(B). FINRA understands that a member may not necessarily be able to speak with or otherwise get a response from such persons within the two-business-day period. FINRA would consider, for example, a member's mailing a letter, sending an email, or placing a telephone call and leaving a message with appropriate person(s) within the two-business-day period to constitute notification for purposes of proposed Rule 2165. Moreover, as further discussed herein, FINRA would consider the inability to contact a trusted contact person to mean that the trusted contact person was not available for purposes of the Rule.

[32] See proposed Rule 2165(d).

For purposes of proposed Rule 2165, FINRA would consider the lack of an identified trusted contact person, the inability to contact the trusted contact person or a person's refusal to act as a trusted contact person to mean that the trusted contact person was not available. A member may use the temporary-hold provision under proposed Rule 2165 when a trusted contact person is not available.

The temporary hold authorized by proposed Rule 2165 would expire not later than 15 business days after the date that the member first placed the temporary hold on the disbursement of funds or securities, unless sooner terminated or extended by an order of a state regulator or agency or court of competent jurisdiction.[33] In addition, provided that the member's internal review of the facts and circumstances supports its reasonable belief that the financial exploitation of the specified adult has occurred, is occurring, has been attempted or will be attempted, the proposed rule change would permit the member to extend the temporary hold for an additional 10 business days, unless sooner terminated or extended by an order of a state regulator or agency or court of competent jurisdiction.[34]

Proposed Rule 2165 would require members to retain records related to compliance with the Rule, which shall be readily available to FINRA, upon request. Retained records required by the proposed rule change are records of: (1) requests for disbursement that may constitute financial exploitation of a specified adult and the resulting temporary hold; (2) the finding of a reasonable belief that financial exploitation has occurred, is occurring, has been attempted or will be attempted underlying the decision to place a temporary hold on a disbursement; (3) the name and title of the

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[33] See proposed Rule 2165(b)(2).

[34] See proposed Rule 2165(b)(3).

associated person that authorized the temporary hold on a disbursement; (4) notification(s) to the relevant parties pursuant to the Rule; and (5) the internal review of the facts and circumstances supporting the member's reasonable belief that the financial exploitation of the specified adult has occurred, is occurring, has been attempted or will be attempted.[35]

The proposed rule change would require a member that anticipates using a temporary hold in appropriate circumstances to establish and maintain written supervisory procedures reasonably designed to achieve compliance with the Rule, including procedures on the identification, escalation and reporting of matters related to financial exploitation of specified adults.[36] The proposed rule change would require that the member's written supervisory procedures identify the title of each person authorized to place, terminate or extend a temporary hold on behalf of the member pursuant to the Rule.[37] The proposed rule change would also require a member that anticipates placing a temporary hold pursuant to the Rule to develop and document training policies or programs reasonably designed to ensure that associated persons comply with the requirements of the Rule.[38]

As noted in Item 2 of this filing, if the Commission approves the proposed rule change, FINRA will announce the effective date of the proposed rule change in a Regulatory Notice to be published no later than 60 days following Commission approval.

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35 See proposed Rule 2165(d).

36 See proposed Rule 2165(c)(1).

37 See proposed Rule 2165(c)(2).

38 See proposed Supplementary Material .02 to Rule 2165.

The effective date will be no later than 180 days following publication of the Regulatory Notice announcing Commission approval.

(b) Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[39] which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. The proposed rule change will promote investor protection by relieving members from FINRA rules that might otherwise discourage them from exercising discretion to protect customers through placing a temporary hold on disbursements of funds or securities. Such a hold, combined with contacting a trusted contact person, also may assist these customers in stopping unwanted disbursements and better protecting themselves from financial exploitation.

4. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. All members would be subject to the proposed amendments to Rule 4512, so they would be affected in the same manner, and FINRA has narrowly tailored the requirements to minimize the impacts on members. Moreover, proposed Rule 2165 is a safe-harbor provision that permits, but does not require, members to place temporary holds on disbursements in appropriate circumstances.

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[39] 15 U.S.C. 78o-3(b)(6).

The population of seniors and other vulnerable adults in the United States is large. According to the U.S. Department of Health and Human Services, the number of older Americans (persons 65 years of age or older) is estimated to be 44.7 million, slightly over 14% of the U.S. population.[40] Of these Americans, approximately 57%, just under 25.5 million individuals, are invested in the stock market.[41] Further, in a recent survey, 75% of older households—that is, those where the survey respondent was 65 years of age or older—reported having securities investments in retirement or taxable accounts. This compares to only 61% for households where the survey respondent was younger than 65.[42] These figures represent conservative estimates of the individuals who may be better protected by this proposed rule change as it excludes any estimate of other vulnerable adults along with the anticipated continued growth of the older population.

As noted above, the proposed rule change would provide members with a way to quickly respond to situations in which they have a reasonable basis to believe that financial exploitation of vulnerable adults has occurred or will be attempted. The proposed rule change not only better safeguards customers, to the extent that members today do not provide additional protections for specified adults, but also better protects those members that are already doing so. FINRA believes that the proposed rule change would protect investors by relieving members from FINRA rules that might otherwise discourage members from exercising discretion to protect customers through placing a

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40 See Aging Statistics, U.S. Department of Health and Human Services Administration.

41 See Gallup 2013 Economy and Personal Finance survey at http://www.gallup.com/poll/162353/stock-ownership-stays-record-low.aspx.

42 See FINRA Investor Education Foundation's 2015 National Financial Capability Study (State-by-State Survey) at http://www.usfinancialcapability.org/.

temporary hold on disbursements of funds or securities. Such a hold, combined with notifying a trusted contact person, also may assist these customers in stopping unwanted disbursements and better protecting themselves from financial exploitation.

FINRA does not believe that the proposed rule change will impose undue operational costs on members. The proposed amendments to Rule 4512 would require members to attempt to collect the name and contact information for a trusted contact person at the time of account opening or, with respect to existing accounts, in the course of the member's routine and customary business. Members also would incur additional responsibilities to provide disclosure about the member's right to share certain personal information with the customer's trusted contact person.

While FINRA recognizes that there will be some operational costs to members in complying with the proposed trusted contact person requirement, FINRA has lessened the cost of compliance by not requiring members to notify the trusted contact person of his or her designation as such. Furthermore, the proposed rule change would permit a member to deliver the disclosure and notification required by Rule 4512 or 2165 to trusted contact persons in paper or electronic form thereby giving the member alternative methods of complying with the requirements.

In addition, there may be impacts with respect to legal risks and attendant costs to members that choose to rely on the proposed rule change in placing temporary holds on disbursements, although the direction of the impact is ambiguous. The proposed rule change may provide some legal protection to members if they are sued for withholding disbursements where there is a reasonable belief of financial exploitation as they can point to the rule as a rationale for their actions. At the same time, while proposed Rule

2165 creates no obligation to withhold disbursements where financial exploitation may be occurring or to refrain from opening or maintaining an account where no trusted contact person is identified, the proposed rule change might serve as a rationale for a private action against members that do not withhold disbursements when there is a reasonable belief of financial exploitation. To reduce the latter risk, proposed Rule 2165 explicitly states that it provides members with a safe harbor from FINRA Rules 2010, 2150 and 11870 when members exercise discretion in placing temporary holds on disbursements of funds or securities, but does not require members to place such holds.

To the extent that members today have reasons to suspect financial exploitation of their customers, they may make judgments with regard to withholding disbursements of funds or securities. As such, these members may already face litigation risk with regard to their actions, whether or not they choose to disburse funds or securities, and without the benefit of a rule that supports their actions.

In developing the proposed rule change, FINRA considered several alternatives to help to ensure that it is narrowly tailored to achieve its purposes described previously without imposing unnecessary costs and burdens on members or resulting in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change addresses many of the concerns noted by commenters in response to the proposal published for public comment in Regulatory Notice 15-37 ("Notice 15-37 Proposal").

First, the Notice 15-37 Proposal would have prohibited a person who is authorized to transact business on an account from being designated a customer's trusted contact person under Rule 4512(a)(1)(F). Commenters raised concerns that this restriction may prohibit trustees or individuals with powers of attorney from being designated as trusted contact persons. In response to these comments, FINRA agrees that prohibiting persons authorized to transact business on an account from being designated a trusted contact person could present an overly restrictive burden on some customers. Accordingly, FINRA has proposed removing the prohibition on trusted contact persons being authorized to transact business on an account so as to permit joint accountholders, trustees, individuals with powers of attorney and other natural persons authorized to transact business on an account to be designated as trusted contact persons.

Second, under the Notice 15-37 Proposal, the temporary hold on disbursements of funds or securities would have expired not later than 15 business days after the date that the hold was initially placed, unless sooner terminated or extended by an order of a court of competent jurisdiction. Provided that the member's internal review of the facts and circumstances supported the reasonable belief of financial exploitation, the Notice 15-37 Proposal would have permitted the temporary hold to be extended for an additional 15 business days, unless sooner terminated by an order of a court of competent jurisdiction. FINRA has proposed revising the time periods to up to 15 business days in the initial period and up to 10 business days (down from 15 business days) in any subsequent period. The shortened overall period responds to commenters' concerns about disbursement delays and better aligns proposed Rule 2165 with the NASAA model. The proposed subsequent period of up to 10 business days provides members with an additional period to address the issue if concerns about financial exploitation exist after the initial period, during which time the member must contact account holders and perform an appropriate investigation. FINRA believes that the proposed time periods are appropriately tailored to provide members with an adequate time period to address concerns about financial exploitation, while also responding to commenters' concerns about disbursement delays.

Third, the Notice 15-37 Proposal incorporated the concept of the temporary hold being terminated or extended by an order of a court of competent jurisdiction. In response to comments, FINRA agrees that the Notice 15-37 Proposal may be considered overly narrow in not permitting temporary holds to be terminated or extended by a state regulator or agency of competent jurisdiction in addition to a court of competent jurisdiction. In light of the important role of state regulators and agencies in dealing with financial exploitation, FINRA has revised proposed Rule 2165 to incorporate the concept of a temporary hold being terminated or extended by a state regulator or agency in addition to a court of competent jurisdiction.

Fourth, the Notice 15-37 Proposal would have required a qualified person to place a temporary hold pursuant to proposed Rule 2165. Commenters suggested that the member should place a temporary hold, not the qualified person. In response to comments, FINRA has revised proposed Rule 2165 to provide that the member would place a hold under the rule. As revised, proposed Rule 2165 also would require that a member's written supervisory procedures identify the title of each person authorized to place, terminate or extend a temporary hold on behalf of the member pursuant to Rule 2165, and that any such person be an associated person of the member who serves in a supervisory, compliance or legal capacity for the member. In addition, proposed Rule 2165 would require that a member's records include the name and title of the associated person that authorized the temporary hold on a disbursement. FINRA believes that the revised proposed rule change is appropriately tailored to apply the obligations at the member-level, while preserving a role for associated persons serving in a supervisory, compliance or legal capacity in placing, terminating or extending the hold on behalf of the member.

Fifth, the Notice 15-37 Proposal would have required that the supervisory, compliance or legal capacity be "reasonably related to the account" in question. Commenters raised concerns over how they should determine whether the capacity was reasonably related to the account, citing in particular some members' practice of using a centralized group to respond to senior or fraud issues. After considering these comments, FINRA is now proposing to eliminate the requirement that the supervisory, compliance or legal capacity be "reasonably related to the account."

Sixth, under the Notice 15-37 Proposal, if the trusted contact person was not available or the member reasonably believed that the trusted contact person was involved in the financial exploitation of the specified adult, the member would have been required to contact an immediate family member, unless the member reasonably believed that the immediate family member was involved in the financial exploitation of the specified adult. Some commenters raised operational and privacy concerns regarding disclosing information to an immediate family member who the customer did not designate as a trusted contact person. In response to comments, FINRA has proposed removing the requirement to contact an immediate family member under proposed Rule 2165.

For these reasons, FINRA believes that the proposed rule change would strengthen FINRA's regulatory structure and provide additional protection to investors without imposing any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

5. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

The proposed rule change was published for comment in Regulatory Notice 15-37 (October 2015). FINRA received 40 comment letters in response to the Notice 15-37 Proposal. A copy of Notice 15-37 is attached as Exhibit 2a. Copies of the comment letters received in response to Notice 15-37 are attached as Exhibit 2c.[43] The comments and FINRA's responses are set forth in detail below.

General Support and Opposition to the Notice 15-37 Proposal

Twenty-seven commenters supported FINRA's efforts to protect seniors and other vulnerable adults but did not support all aspects of the proposal.[44] Chambers supported the proposal as promoting investor protection and preventing fraud in customer accounts. Twelve commenters raised significant concerns about the proposal.[45]

FINRA has considered the concerns raised by commenters and, as discussed in detail below, has addressed many of the concerns noted by commenters in response to the Notice 15-37 Proposal. Seniors are constantly subjected to a spectrum of exploitation

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43 See Exhibit 2b for a list of abbreviations assigned to commenters.

44 See Cowan, IJEC, NAELA, CFA Institute, GSU, Commonwealth, NAPSA, ICI, PIABA, CAI, Cetera, Lincoln, Miami Investor Rights Clinic, PIRC, AARP, Wells Fargo, NASAA, FSI, SIFMA, Coughlin, Yaakov, IRI, First U.S. Community Credit Union, NAIFA, Alzheimer's Assoc., BDA and GWFS.

45 See FSR, FIBA, Thomson, Girdler, Christian Financial Services, Rich, Stoehr, Ros, Hayden, Anderson, Liberman and Pisenti.

scams, including scams centered on financial exploitation.[46] FINRA believes that the proposed rule change is needed to provide members with a defined way to respond to situations where there is a reasonable belief of financial exploitation of seniors and other vulnerable adults, including the ability to share customer information with a trusted contact person. Furthermore, the proposed rule change would promote investor protection by providing members with a safe harbor from FINRA rules that might otherwise discourage them from exercising discretion to protect customers through placing a temporary hold on disbursements of funds or securities.

As noted above, studies indicate that financial exploitation is the most common form of elder abuse and is a growing concern.[47] A member's relationship with its customers and its knowledge of customers' accounts and financial situations may enable the member to detect unusual account activity or other indicators of possible financial exploitation. However, due to uncertainty about the ability to place holds on disbursements under FINRA rules or privacy-related concerns about sharing customer information, members may be unsure how to proceed when there is a reasonable belief of financial exploitation.

Safe Harbor

Proposed Rule 2165 would provide members with a safe harbor from FINRA Rules 2010, 2150 and 11870 when members exercise discretion in placing temporary

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46 See, e.g., New York State Elder Abuse Prevention Study (stating that financial exploitation was the most common form of mistreatment self-reported by study respondents); and National Adult Protective Services Association: Policy & Advocacy – Elder Financial Exploitation (discussing the widespread nature of financial exploitation of seniors and vulnerable adults) available at http://www.napsa-now.org/policy-advocacy/exploitation/.

47 See supra notes 2 and 5.

holds on disbursements of funds or securities from accounts of specified adults under the circumstances denoted in the Rule.

FSI supported providing a safe harbor when members choose to place temporary holds on disbursements of funds or securities from the account of a specified adult. CFA Institute supported providing a safe harbor, but stated that FINRA should encourage, not just permit, members to make use of the safe harbor. Rather than providing a safe harbor when members choose to place temporary holds, three commenters supported requiring members to place temporary holds where there is a reasonable belief of financial exploitation.[48] PIABA further supported penalizing members for willfully ignoring evidence of financial exploitation.

The proposed rule change retains the approach in the Notice 15-37 Proposal. FINRA believes that a member can better protect its customers from financial exploitation if the member can use its discretion in placing a temporary hold on a disbursement of funds or securities from a customer's account.

Other commenters supported expanding the scope of the safe harbor. CAI supported expanding the scope of the safe harbor to explicitly extend to situations in which: (1) a name and contact information for a trusted contact person has not been obtained for an existing account; and (2) the member was not able to obtain a name and contact information for a trusted contact person for an account. If, despite reasonable efforts, the member is unable to obtain or the customer declines to provide the name and contact information for a trusted contact person, FINRA would consider the trusted contact person to be "unavailable" for purposes of proposed Rule 2165. The

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48 See GSU, PIABA and Miami Rights Clinic.

unavailability of a trusted contact person would not preclude a member from availing itself of the safe harbor in proposed Rule 2165. Furthermore, for existing accounts, a member may avail itself of the safe harbor even if the member had not yet sought to obtain trusted contact person information in the course of its routine and customary business.

FIBA supported expanding the scope of the safe harbor to explicitly cover a decision by a member that a temporary hold is not appropriate, as well as the due diligence process leading to the decision. Similarly, SIFMA suggested that the scope of the safe harbor be extended to cover the final decision of a member that financial exploitation of a specified adult has occurred. FINRA does not interpret the proposed safe harbor from FINRA rules to cover final decisions by members that financial exploitation does or does not exist. Rather, proposed Rule 2165 provides members with a safe harbor from FINRA rules when members exercise discretion in placing temporary holds on disbursements of funds or securities from the account of a specified adult. FINRA believes that the proposal is appropriately tailored to provide members with a defined way of addressing possible financial exploitation.

SIFMA suggested that the safe harbor approach should recognize that members have the ability to develop and implement alternative protection structures under existing law (e.g., a customer's right to voluntarily enter into an alternative protection structure through agreement with the member). The safe harbor approach in proposed Rule 2165 does not preclude members from developing or implementing alternative protection structures consistent with existing law and FINRA rules.

Two commenters requested that FINRA clarify to which rules the safe harbor would apply.[49] In response to these comments, FINRA modified proposed Rule 2165, which now explicitly states that it provides a safe harbor from FINRA Rules 2010 (Standards of Commercial Honor and Principles of Trade), 2150 (Improper Use of Customers' Securities or Funds; Prohibition Against Guarantees and Sharing in Accounts) and 11870 (Customer Account Transfer Contracts).

Three commenters supported extending the safe harbor protection of proposed Rule 2165 to associated persons of the member.[50] Proposed Rule 2165 would provide a safe harbor from FINRA rules for members and their associated persons when placing temporary holds on disbursements in accordance with the Rule.

BDA suggested that any associated person that acted in good faith not be subject to complaints reportable on Form U4 (Uniform Application for Securities Industry Registration or Transfer). The proposed safe harbor from FINRA rules would not extend to complaints about an associated person that are reportable on Form U4. An associated person may respond to any such complaints on Form U4, including with an explanation of actions taken pursuant to proposed Rule 2165. The proposed safe harbor from FINRA rules also would not extend to reporting required pursuant to FINRA Rule 4530 (Reporting Requirements), although FINRA would consider whether a member or associated person had acted consistent with the proposed rule when FINRA assesses reported information about a hold on a disbursement.

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49 See CAI and SIFMA.

50 See Cetera, NAIFA and BDA.

NAIFA suggested that the reference to the safe harbor from FINRA rules be moved out of Supplementary Material and into the body of proposed Rule 2165. Because Supplementary Material is part of the rule, FINRA declines to move the reference as requested.

Alternative Approaches

FINRA requested comment in the Notice 15-37 Proposal regarding approaches other than the proposed rulemaking that FINRA should consider. Two commenters suggested that FINRA adopt a principles-based approach that would allow a member to develop policies and procedures to fit its business model.[51] FINRA declines to make the suggested change. The safe harbor approach in proposed Rule 2165 is optional for members. Moreover, FINRA believes that the safeguards outlined in the safe harbor approach are important so that the ability to place temporary holds is not abused.

Liberman suggested that FINRA consider alternatives to the proposed rule change, such as working more closely with authorities that are knowledgeable about financial exploitation of seniors. FINRA has long had a strong interest in issues related to financial exploitation of seniors and other vulnerable adults. FINRA has extensive knowledge about financial exploitation of seniors, including working with members, federal and state agencies, and senior groups, and in administering the Seniors Helpline. Based on that information, FINRA believes that the ability to place temporary holds on disbursements is an important tool to guard against financial exploitation of seniors and other vulnerable adults.[52]

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[51] See FSR and Lincoln.

[52] See also supra note 8 (regarding state laws) and NASAA model.

Pisenti suggested establishing a government hotline for members to provide information about customers and allowing the hotline's staffers to address the situation, including providing a reasonable time to delay disbursements under the guidance of the staffers. Certain states require reporting of suspected financial exploitation to adult protective services or another agency, and FINRA expects members to comply with these state reporting requirements. However, with the right tools, members may be able to more effectively serve as the first line of defense against financial exploitation of seniors and other vulnerable adults. As discussed above, financial exploitation can occur suddenly and cause irreversible damage to customers' assets if action is not taken before funds or securities are disbursed. The proposed rule change would thus provide members with a critical tool to further protect customers from financial exploitation by explicitly allowing members to place temporary holds on disbursements of funds or securities consistent with the rule's requirements.

Anderson suggested requiring that members monitor accounts of senior customers for possible fraud rather than permitting members to place temporary holds on disbursements. FINRA recognizes that allowing members to place temporary holds on disbursements of funds or securities may be viewed as a significant action. Accordingly, the proposed rule change would impose numerous safeguards to help ensure that temporary holds are used only in appropriate circumstances and for the protection of customers. FINRA believes that members understand the problem of financial exploitation and will act to address potential financial exploitation of customers. A temporary hold would halt a potentially fraudulent disbursement or other problematic situation quickly, before significant harm to the customer occurs.

Reasonable Belief of Financial Exploitation

The proposed rule change would permit members to place a temporary hold on disbursements of funds or securities where there is a reasonable belief of financial exploitation of a specified adult. Cetera requested guidance as to what would constitute a reasonable belief of financial exploitation. Ros commented that the reasonable belief standard is vague.

Other commenters suggested alternatives to the reasonable belief standard. Cowen commented that the reasonable belief standard may be too high and suggested instead "substantial suspicion" of potential fraud or abuse as the standard. To cover red flags of financial exploitation, FSR suggested an alternative standard of a "reasonable basis to suspect the customer may be the subject of financial exploitation." AARP suggested that FINRA consider requiring members and their associated persons to act with "reasonable care."

FINRA believes that the proposed standard is appropriate in that it permits members to use their judgment, based on their assessment of the facts, to place temporary holds without requiring actual knowledge of financial exploitation. The reasonable belief standard is present in other FINRA rules (e.g., FINRA Rules 2040 (Payments to Unregistered Persons) and 2111 (Suitability)). The standard also is consistent with similar state statutes and the NASAA model.

While not required by the proposed rule change, members may find it beneficial to develop their own red flags to guide the formation of a reasonable belief of financial exploitation. Among the commonly identified red flags of potential financial exploitation are: (1) attempts to transfer money to engage in commonly known fraudulent schemes (e.g., foreign lottery schemes); (2) uncharacteristic attempts to wire securities or funds, particularly with a customer who is unable to explain the attempts; (3) when a caretaker, relative, or friend of the customer requests disbursements on behalf of the customer without proper documentation; (4) abrupt increases in disbursements, particularly with a customer who is accompanied by another person who appears to be directing the disbursements; (5) attempted forgery of the customer's signature on account documentation or a power of attorney; and (6) a customer's unusual degree of fear, anxiety, submissiveness or deference related to another person. While not dispositive, red flags may be used by members to detect and prevent financial exploitation.

Three commenters suggested expanding the proposed rule change beyond financial exploitation of specified adults to permit temporary holds on disbursements of funds and securities when a customer is showing signs of diminished capacity.[53] FINRA appreciates that diminished capacity can make seniors especially vulnerable to financial exploitation and believes that the proposed rule would cover most situations involving questionable disbursements by customers suffering from such a condition. In many instances where a customer is suffering from diminished capacity and requests that a member make a potentially problematic disbursement, the member is likely to have a reasonable belief, at least initially, that financial exploitation may be occurring. For those situations where that may not be the case, FINRA recognizes that this is an important issue for future consideration.

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53 See NAELA, Lincoln and Alzheimer's Assoc.

Definition of "Specified Adults"

The proposed rule change would define "specified adults" to include: (A) a natural person age 65 and older; or (B) a natural person age 18 and older who the member reasonably believes has a mental or physical impairment that renders the individual unable to protect his or her own interests. FINRA requested comment in the Notice 15-37 Proposal regarding whether the ages used in the definition of "specified adult" in proposed Rule 2165 should be modified or eliminated.

Two commenters suggested extending the proposed rule change to apply to all customers and not be otherwise limited.[54] Cetera suggested raising the age in the proposed definition above 65, which it believes is under the age of retirement for many customers. Other commenters suggested lowering the age in the proposed definition from 65 to 60.[55] FINRA has proposed defining specified adults to include natural persons age 65 and older. Federal agencies, FINRA and NASAA have focused on persons age 65 and older for various senior initiatives.[56] Moreover, FINRA believes that the concentration of wealth among older investors makes this group more vulnerable to financial exploitation.[57] With regard to suggestions to extend coverage to all customers, the proposed rule, as discussed above, also would apply to natural persons age 18 and older who the member reasonably believes has a mental or physical impairment that renders the individual unable to protect his or her own interest. FINRA believes that

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54 See Cowan and Thomson.

55 See IRI, Wells Fargo, NASAA and SIFMA.

56 See supra note 21. See also NASAA model.

57 See supra note 20.

these two categories of “specified adults” appropriately protect those adults who are most vulnerable to financial exploitation and that they are therefore neither over nor under inclusive in scope.

Ros commented that the application of the proposed rule change to persons age 65 and older is an unreasonable intrusion into the financial affairs of competent adults. Proposed Rule 2165 would permit placing a temporary hold only where there is a reasonable belief of financial exploitation and only with regard to a specific disbursement(s). Given these limitations, FINRA does not believe that the proposed rule change is an unreasonable intrusion into the financial affairs of customers.

NAPSA suggested revising the definition to cover natural persons age 60 and older or a natural person deemed vulnerable under a state’s adult protective services statute. FINRA believes that this approach would present operational challenges for members as the customers covered by the definition would vary by jurisdiction. As such, FINRA declines to make the suggested change.

Girdler suggested that the definition of specified adult be modified to consider customer vulnerability due to circumstances beyond cognitive ability. In contrast, CAI suggested that, because of administrative challenges in implementing the definition, vulnerable adults should be removed from the definition. FINRA has proposed defining “specified adults” to include an adult who the member reasonably believes has a mental or physical impairment that renders the individual unable to protect his or her own interests. FINRA declines to omit such individuals from the definition of specified adult; however, FINRA also declines at this time to expand the definition to include additional potentially vulnerable adults. FINRA recognizes that customers who do not have a physical or mental impairment may also be vulnerable; however, the proposed rule change is intended to cover those customers most susceptible to financial exploitation.

Some commenters requested that FINRA provide guidance as to what would constitute a mental or physical impairment covered by the proposed definition.[58] Members have reasonable latitude in determining whether there is a mental or physical impairment that renders an adult unable to protect his or her own interests for purposes of the Rule. A member may base such a determination on the facts and circumstances observed in the member's business relationship with the person or on other sources of information, such as a court or government agency order.

SIFMA requested clarification as to whether the definition would cover temporary impairments, as well as permanent or chronic impairments. FINRA would consider the proposed rule change to apply to temporary, as well as permanent or chronic impairments that render an adult unable to protect his or her own interests.

NAIFA suggested revising proposed Supplementary Material .03 to Rule 2165 to provide that a member's belief of a customer's impairment shall not create an assumption or implication that the member or its associated persons are qualified to make determinations about a customer's impairment. While FINRA declines to revise the proposed Supplementary Material as suggested, FINRA does not intend proposed Rule 2165 to create an assumption or implication that a member or its associated persons are qualified to make impairment determinations beyond the limited purposes of the proposed rule. A member's relationship with its customers and its knowledge of

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58 See SIFMA, Cetera and GWFS.

customers' accounts and financial situations puts the member in a unique position to thwart possible financial exploitation. The proposal will aid members in doing so.

CAI suggested that FINRA work with state regulators to ensure consistency between the proposed rule change and state requirements for members. As discussed below, while the proposed rule change and NASAA model are not identical, FINRA and NASAA have worked together to achieve consistency where possible and appropriate.

Definition of "Qualified Person"

In the Notice 15-37 Proposal, a "qualified person" was defined to include an associated person of a member who serves in a supervisory, compliance or legal capacity that is reasonably related to an account. FINRA requested comment in the Notice 15-37 Proposal regarding whether the scope of the persons included in the definition of "qualified person" in proposed Rule 2165 be modified.

Some commenters suggested expanding the proposed definition to include all employees,[59] all associated persons[60] or all registered persons of a member.[61] GWFS suggested that the definition cover associated persons designated as qualified by the member. PIABA further suggested that, at a minimum, registered representatives should be required to report any suspicious behavior or conduct to a supervisor. FSR suggested that persons serving in a legal or compliance capacity not be included in the definition of "qualified person," as such persons would seldom witness events that would provide a reasonable belief of financial exploitation.

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59 See NASAA.

60 See Wells Fargo.

61 See GSU and PIABA.

Under the proposed rule change, a member's written supervisory procedures shall identify the title of each person authorized to place, terminate or extend a temporary hold on behalf of the member pursuant to proposed Rule 2165. Furthermore, any such person shall be an associated person of a member who serves in a supervisory, compliance or legal capacity. While the benefits of preventing financial exploitation are significant to both the member and customer, placing a temporary hold on a disbursement is a serious action on the part of a member and may lead to difficult but necessary conversations with customers that could impact the member-customer relationship. Given the seriousness of placing a temporary hold on a disbursement, FINRA believes that it is reasonable to limit authority for placing holds on disbursements to a select group of individuals associated with the member and believes that persons serving in a supervisory, compliance or legal capacity are well positioned to make these determinations on behalf of the member.

The scope of proposed Rule 2165(c)(2) does not cover registered representatives who are not otherwise serving in supervisory, compliance or legal capacities. FINRA recognizes that registered representatives may often be the first persons to notice behavior or conduct indicating financial exploitation. To encourage appropriate escalation of these matters, proposed Rule 2165(c)(1) would require that a member relying on proposed Rule 2165 establish and maintain written supervisory procedures related to the escalation of matters involving the financial exploitation of specified adults. As such, FINRA believes that it is reasonable to expect a registered representative to report any suspicious behavior or conduct to a supervisor or a person serving in a compliance or legal capacity.

Some commenters suggested clarifying or eliminating the requirement in the Notice 15-37 Proposal that the associated person serve in a supervisory, compliance or legal capacity that is "reasonably related to an account."[62] In light of commenters' concerns regarding how to determine whether a person is serving in a supervisory, compliance or legal capacity that is "reasonably related to an account," FINRA has proposed eliminating the "reasonably related to an account" requirement.

To apply the obligations at the member-level, not the individual level, SIFMA suggested replacing "qualified person" with "member" in the provisions in proposed Rule 2165 related to the decision to place a temporary hold. FINRA has revised proposed Rule 2165 to provide that the member may place the hold on a disbursement, provided that the member's written supervisory procedures identify the title of each person authorized to place, terminate or extend a hold on behalf of the member and that each such person be serving in a supervisory, compliance or legal capacity for the member. In addition, proposed Rule 2165 would require that a member's records include the name and title of the associated person who authorized the temporary hold on a disbursement.

Definition of "Account"

The proposed rule change would define "account" to mean any account of a member for which a specified adult has the authority to transact business. FINRA requested comment in the Notice 15-37 Proposal regarding whether the definition of account should be expanded to include accounts for which a specified adult is a named beneficiary.

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[62] See FSR, BDA and SIFMA.

Some commenters supported expanding the definition of account to accounts for which a specified adult is a named beneficiary.[63] Commonwealth did not support expanding the definition to include accounts for which a specified adult is a named beneficiary. FINRA recognizes that members may not have current contact information for each named beneficiary. In addition, members may lack other critical information about beneficiaries that would preclude them from forming a reasonable belief that the beneficiaries are the subject of financial exploitation. Due to the operational challenges for members in applying the proposed rule to beneficiaries, FINRA has not proposed including accounts for which a specified adult is a named beneficiary.

BDA suggested excluding accounts where there is a designated guardian, custodian or power of attorney because such accounts should receive protection under FINRA rules beyond the scope of the safe harbor. If these accounts are included in the scope of the proposal, BDA suggested that members should be provided with a heightened level of protection when they suspect financial exploitation by a designated guardian, custodian or power of attorney "since the account holder themselves would have had to know that this person has transaction capacity for the account, resulting in an enhanced burden to the firm when suspicion arose." It is not clear what heightened protections the commenter suggests for members with respect to accounts where there is a designated guardian, custodian or power of attorney. As discussed above, the proposed rule does not require members to place temporary holds on disbursements of funds or securities, and FINRA does not intend to provide through the proposed rule change

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[63] See IJEC, AARP and SIFMA.

additional protections on accounts where there is guardian, custodian or power of attorney.

Disbursements

The proposed rule change would permit members to place temporary holds on disbursements of funds or securities. The proposed rule change would not apply to transactions in securities. Some commenters supported extending the proposed rule change to apply to transactions in securities.[64] While the proposed rule change does not apply to transactions, FINRA may consider extending the safe harbor to transactions in securities in future rulemaking.

PIABA requested that the proposed rule change define "disbursement." PIABA also requested that FINRA clarify that the temporary hold may be placed on particular disbursement(s). FINRA would consider a disbursement to include a movement of cash or securities out of an account. In addition, a temporary hold pursuant to proposed Rule 2165 may be placed on a particular suspicious disbursement(s) but not on other, non-suspicious disbursements (e.g., member may choose to place a hold on a questionable disbursement but not on a contemporaneous regular mortgage or tax payment where there is no reasonable belief of exploitation regarding such payment).

Two commenters requested that FINRA explicitly permit temporary holds on Automated Customer Account Transfer Service ("ACATS") transfers under the proposed rule change.[65] For purposes of proposed Rule 2165, FINRA would consider disbursements to include ACATS transfers but, as with any temporary hold, a member

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64 See IRI, FSR, Lincoln, SIFMA and FSI.

65 See FSR and SIFMA.

would need to have a reasonable belief of financial exploitation in order to place a temporary hold on the processing of an ACATS transfer request pursuant to the Rule. FINRA also reminds members of the application of FINRA Rule 2140 (Interfering With the Transfer of Customer Accounts in the Context of Employment Disputes) to the extent that there is not a reasonable belief of financial exploitation.

FINRA recognizes that, depending on the facts and circumstances, placing a temporary hold on the processing of an ACATS transfer request could also lead the member to place a temporary hold on all assets in an account, for the same reasons. However, if a temporary hold is placed on the processing of an ACATS transfer request, the member must permit disbursements from the account where there is not a reasonable belief of financial exploitation regarding such disbursements (e.g., a customer's regular bill payments). FINRA emphasizes that where a questionable disbursement involves less than all assets in an account, a member may not place a blanket hold on the entire account. Each disbursement must be analyzed separately.

While supporting the proposed rule change, Yaakov requested clarification about how the proposed rule change would apply to certain types of disbursements from a customer's account. Specifically, Yaakov requested that the proposed rule change provide that disbursements would include payments from a customer's account to a customer's bank. Yaakov also requested that FINRA clarify whether a temporary hold may be placed on disbursements related to a customer's checkbook, credit card or debit card associated with a brokerage account at a member. FINRA would consider disbursements to include, among other things, questionable payments to a bank or other financial institution, credit/debit card payments or issued checks associated with a brokerage account at a member. However, members need to consider the recipient of the disbursement when determining whether there is a reasonable belief of financial exploitation. For example, a monthly disbursement to a customer's mortgage lender likely represents a lower risk of financial exploitation than a one-time, sizable disbursement to a non-U.S. person. In addition, the temporary hold is on the disbursement-level not the account-level, so that a member must permit a disbursement where there is not a reasonable belief of financial exploitation (e.g., a regular mortgage payment to a bank), but may place a temporary hold on another disbursement where there is a reasonable belief of financial exploitation.

CAI questioned whether the ability to place temporary holds on disbursements would conform to the requirements of Section 22(e) of the Investment Company Act of 1940 ("1940 Act") for redemptions of a redeemable security. CAI noted that the proposed rule change could be seen as reconcilable with the 1940 Act requirements to the extent that a disbursement request directed to a broker-dealer does not constitute a disbursement request to the issuer of a variable annuity. Section 22(e) of the 1940 Act generally prohibits registered funds from suspending the right of redemption, or postponing the date of payment or satisfaction upon redemption of any redeemable security for more than seven days after tender of such security to the fund or its agent, except for certain periods specified in that section. The safe harbor under proposed Rule 2165 applies to disbursements of proceeds and securities and does not apply to transactions, including redemptions of securities.

Most mutual fund customer accounts are serviced and record kept by intermediaries, such as broker-dealers. FINRA does not believe that a member's ability to place a hold on a disbursement of proceeds from its customer's account under the proposed rule change creates a conflict with Section 22(e) of the 1940 Act as the mutual fund does not have a role in the disbursement from the customer's account held by an intermediary.

In certain limited circumstances, the customer's account may be maintained by a mutual fund's principal underwriter. In light of the role of the principal underwriter with respect to these accounts, the ability to place a temporary hold on a disbursement of proceeds under the proposed rule change may be viewed as conflicting with Section 22(e) of the 1940 Act.

Period of Temporary Hold

Under the Notice 15-37 Proposal, the temporary hold on disbursements of funds or securities would have expired not later than 15 business days after the date that the hold was initially placed, unless sooner terminated or extended by an order of a court of competent jurisdiction. In addition, provided that the member's internal review of the facts and circumstances supported the reasonable belief of financial exploitation, the Notice 15-37 Proposal would have permitted the temporary hold to be extended for an additional 15 business days, unless sooner terminated by an order of a court of competent jurisdiction. FINRA requested comment in the Notice 15-37 Proposal on whether the permissible time periods for placing and extending a temporary hold pursuant to proposed Rule 2165 should be modified.

Some commenters supported permitting longer time periods. IRI supported changing the time periods to 45 business days for the initial period and an additional 45 business days for any subsequent period. IRI also supported automatic extensions of the temporary hold upon notification to FINRA until such time that a court of competent jurisdiction or FINRA takes action.

First U.S. Community Credit Union commented that 15 business days may not be sufficient time for a member to obtain a court order or receive input from adult protective services. FIBA commented that the proposed time periods may not be sufficient, particularly for non-U.S. customers and suggested that FINRA create different time periods or establish different processes for non-U.S. customers. CAI suggested changing the time periods to 25 business days for the initial period to recognize the need to have adequate time at the outset and an additional 10 business days for any subsequent period.

FSR supported permitting members to place a temporary hold for any period of time within the reasonable discretion of the member or until a third party (e.g., a court of competent jurisdiction or adult protective services) notified the member that the hold has expired or subsequent events indicate that the threat of financial exploitation no longer exists.

Other commenters supported shorter time periods. AARP suggested that the temporary hold expire no later than 10 business days after the hold is placed. NASAA commented that the proposed time periods were too long. NASAA supported requiring both FINRA and state regulatory review of any extension of a temporary hold by a member.

FINRA has proposed revising the time periods to up to 15 business days in the initial period and up to 10 business days (down from 15 business days) in any subsequent period. These time periods are consistent with the NASAA model and the shortened extension period responds to commenters’ concerns about disbursement delays. The proposed extension period of up to 10 business days provides members with a longer period to address the issue if concerns about financial exploitation exist after the initial period, during which time the member must contact persons authorized to transact business on the account and trusted contact persons, as available, and perform an appropriate investigation.

CFA Institute supported giving a member the ability to extend the temporary hold for an additional period if the member's internal review supported the additional time period. FINRA has tried to strike a reasonable balance in giving members adequate time to investigate and contact the relevant parties, as well as seek input from a state regulator or agency (e.g., state securities regulator or state adult protective services agency) or a court order if needed, but also not permitting an open-ended or overly long hold period in recognition of the seriousness of placing a temporary hold on a disbursement.

SIFMA supported the proposed time periods but suggested including language permitting the expiration or extension of the hold as otherwise permitted by state or federal law, through agreement with the specified adult or their authorized representative, or in accordance with prior written instructions or lawful orders, or sooner terminated or extended by an order of a court of competent jurisdiction. SIFMA also suggested that an investigating state government regulator or agency should be able to terminate or extend a hold on a disbursement. FINRA has revised proposed Rule 2165 to incorporate the concept of a temporary hold being terminated or extended by a state regulator or agency in addition to a court of competent jurisdiction.

FINRA has not revised proposed Rule 2165 to expressly permit lifting the hold "through agreement with the specified adult or their authorized representative, or in accordance with prior written client instructions or lawful orders." While the proposed rule change would not prohibit members from lifting a hold, for example, upon a determination that there is no financial exploitation, FINRA believes that the commenter's suggested language is overly broad (e.g., allowing an authorized representative to lift the hold may enable an abuser to lift the hold and gain access to the customer's funds).

Lincoln requested that FINRA provide guidance on what members should do after the expiration of the temporary hold. Alzheimer's Assoc. requested clarification on the process for lifting or extending a temporary hold. FINRA believes that the proposed time period of up to 25 business days total is sufficient time for a member to resolve an issue. Moreover, the proposed rule change allows the time to be further extended by a court or a state regulator or agency. If a member is unable to resolve an issue due to circumstances beyond its control, there may be circumstances in which a member may hold a disbursement after the period provided under the safe harbor. A member should assess the facts and circumstances to determine whether a disbursement is appropriate after the expiration of the period provided in the safe harbor.

BDA questioned whether the proposed rule change would only permit terminating the temporary hold with an order of a court of competent jurisdiction. The proposed rule change would not prohibit a member from lifting a hold without a court order, provided that the member would have to comply with an order of a court of competent jurisdiction or of a state regulator or agency terminating or extending a temporary hold.

ICI supported limiting the number of temporary holds that a member may place on an account during a calendar year or other specified period. FINRA declines to limit the number of holds that a member may place. However, taking into account a member's size and business, FINRA would closely examine a member that places an outsized number of holds on customer accounts to determine whether there was any wrongdoing on the part of the member.

Potential Harm

Some commenters expressed concern that permitting members to place temporary holds may result in customer harm. NAPSA supported allowing members to place temporary holds where there is a reasonable belief of financial exploitation but suggested that members be required to take measures to ensure that any holds will not cause undue harm to customers (e.g., if a customer's payments are not made in a timely manner).

Some commenters questioned whether the proposed rule change would permit lifting a temporary hold if the customer disagrees with the hold.[66] Rich expressed concern that a temporary hold may result in a customer defaulting on legal or contractual obligations and supported a mechanism other than a court order for lifting the hold (e.g., the trusted contact person's approval to lift the hold). Liberman expressed concern that the proposed rule change could be abused by members in refusing to disburse funds or securities. ICI supported FINRA providing customers with recourse for lifting the temporary hold other than obtaining a court order and indicated that such recourse may limit a member's civil liability.

FINRA recognizes that placing a temporary hold on a disbursement is a serious step for a member and the affected customer. While FINRA recognizes that customers may be affected by temporary holds, the costs of financial exploitation can be significant

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[66] See Stoehr and Hayden.

and devastating to customers, particularly older customers who rely on their savings and investments to pay their living expenses and who may not have the ability to offset a significant loss over time. FINRA believes that the harm to customers of financial exploitation justifies permitting members to place temporary holds.

To minimize the potential harm to customers that may arise from unnecessarily holding customer funds, FINRA believes that members should consider the recipient of the disbursement in determining whether there is a reasonable belief of financial exploitation. As noted above, FINRA believes that members should weigh a customer's objection against other information in determining whether a hold should be placed or lifted. While not dispositive, a customer's objection and explanation may indicate to the member that the hold should be lifted.

FIBA commented that the proposed rule change does not explicitly contemplate the customer disagreeing with the temporary hold and that relying on a trusted contact person to maintain a hold may conflict with the interests of the customer. Although FINRA believes that a member may use its discretion in relying on any information provided by the trusted contact person, a member also must consider a customer's objection and explanation, as well as other pertinent facts and circumstances, in determining whether a hold should be maintained or lifted.

Legal Risks

FINRA requested comment in the Notice 15-37 Proposal regarding members' current practices when they suspect financial exploitation has occurred, is occurring, has been attempted or will be attempted, including whether the proposed rules would change members' current practices. Commenters did not provide any information regarding their current practices when financial exploitation of a customer is suspected.

FINRA also requested comment in the Notice 15-37 Proposal on members' views on any potential legal risks associated with placing or not placing temporary holds on disbursements of funds or securities at present and under the proposal. Some commenters suggested that the proposed rule change creates legal risks for members in placing or not placing a temporary hold.

Christian Financial Services objected to the proposed rule change as making "a broker responsible for the behavior of an incapacitated senior" and that such a rule "invites lawsuits and abuse." GWFS commented that placing a temporary hold under the proposed rule change allows for discretion, which causes members to be more susceptible to litigation for acting or failing to act. GWFS also commented that the proposed rule change does not provide "comprehensive immunity" from liability in a civil action.

Lincoln requested that FINRA expressly state that no private right of action is created by a member's decision to place or not place a temporary hold. Cetera commented that the safe harbor under proposed Rule 2165 may not protect members from liability under state laws. NAIFA requested that the proposed rule change provide protection from liability for reporting financial exploitation to state regulators.

On the other hand, PIABA commented that FINRA should clarify that a private right of action would exist when a member willfully ignores evidence of abuse. Yaakov requested that FINRA state that members would not be "insure[d]" for liabilities that may be created by placing a temporary hold in good faith.

FINRA believes that members today make judgments with regard to making or withholding disbursements and already face litigation risks with respect to these decisions. The proposed rule change is designed to provide regulatory relief to members by providing a safe harbor from FINRA rules for a determination to place a hold. Some states may separately provide immunity to members under state law.

To mitigate any civil claims that a member had a duty to place a temporary hold, ICI suggested that FINRA clarify in proposed Rule 2165 that: (1) no member is required by FINRA to place a temporary hold; and (2) a member's failure to place a temporary hold shall not be deemed an abrogation of the member's duties under FINRA rules. FINRA believes that Supplementary Material .01 stating that proposed Rule 2165 is a safe harbor and that the Rule does not require placing holds clearly indicates that there is not a requirement to place a hold on a disbursement.

Notifying Parties Authorized to Transact Business on the Account

Under the Notice 15-37 Proposal, proposed Rule 2165 would have required a member to provide notification of the hold and the reason for the hold to all parties authorized to transact business on the account no later than two business days after placing the hold.

PIRC supported requiring notification to all parties authorized to transact business on an account. SIFMA commented that the term "authorized to transact business on an account" is vague and can be expansive and burdensome. IRI commented that the requirement to notify all parties authorized to transact business on an account could result in a member being unable to place a temporary hold on a disbursement and suggested instead requiring that a member notify "any" party rather than "all" parties authorized to transact business on an account.

FINRA believes that each person authorized to transact business on an account should be notified that the member has placed a temporary hold on a disbursement from the account.[67] In the case of jointly held accounts, each person authorized to transact business on the account should be notified of the temporary hold on a particular disbursement.

There are a number of reasons why it is important to notify all persons authorized to transact business on the account. By reaching out to all persons authorized to transact business on an account, there is a greater likelihood of someone intervening to assist in thwarting the financial exploitation at an early stage. Moreover, persons authorized to transact business on an account would have a reasonable expectation that they would be contacted when a member places a temporary hold on a disbursement based on a reasonable belief that financial exploitation may be occurring. The notification requirement, moreover, should not impact a member's decision to place a hold as it is a post-hold obligation.

Trusted Contact Person

The proposed rule change would amend Rule 4512 to require members to make reasonable efforts to obtain the name of and contact information for a trusted contact person upon the opening of a non-institutional customer's account. In addition, under the Notice 15-37 Proposal, proposed Rule 2165 would have required the member to provide

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[67] See FINRA Rule 2090 (Know Your Customer) (requiring that members use reasonable diligence, in regard to the opening and maintenance of every account, to know (and retain) the essential facts concerning every customer and concerning the authority of each person acting on behalf of such customer).

notification of the hold and the reason for the hold to the trusted contact person, if available, no later than two business days after placing the hold.

Some commenters supported requiring members to make reasonable efforts to obtain the name and contact information for a trusted contact person, as well as notification to the trusted contact person when a temporary hold is placed pursuant to proposed Rule 2165.[68] First U.S. Community Credit Union commented that the trusted contact person may be useful to members.

Ros and SIFMA suggested that members should have the option of seeking trusted contact person information rather than requiring it under Rule 4512. FINRA is mindful of the efforts that some members may need to undertake in order to comply with a requirement that they make reasonable efforts to obtain trusted contact person information. However, the benefits to both members and investors of having trusted contact person information when serious problems arise will be far greater. And the likelihood of members encountering situations when such information is necessary will continue to increase with the aging of our population. Moreover, trusted persons can assist members in any number of ways beyond the more serious situations of, for example, financial exploitation or diminished capacity. Members may find them helpful in administering accounts (e.g., where a customer has been unresponsive to multiple contact attempts).

CAI suggested that the requirement that members make reasonable efforts to obtain the name and contact information for a trusted contact person apply only when the customer is age 55 or older. Because members may place temporary holds in situations

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[68] See NAPSA, ICI, PIRC and FSI.

where financial exploitation is occurring to a customer younger than age 55 who is suffering from an incapacity, it is important that members seek to obtain trusted contact person information for all customers, not simply those age 55 or older.

Some comments related to the ability to have more than one trusted contact person. IJEC suggested revising the proposal to require more than one trusted contact person and that such persons be independent of each other. Cowan suggested the alternative approach of having a “protectors’ committee” consisting of several individuals for each account of a senior investor. SIFMA requested clarification on whether an organization or practice could be a trusted contact person and whether a customer could designate multiple contact persons. While FINRA declines to require more than one trusted contact person, the proposed rule change would not prohibit members from requesting or customers from naming more than one trusted contact person. Given the role of the trusted contact person and that the member is authorized to disclose information about the account to such person, FINRA does not believe that an organization or practice, such as a law firm or an accounting firm, could serve as the trusted contact person in the capacity intended by the proposed rule change. However, a customer could designate an attorney or an accountant as a trusted contact person.

SIFMA commented that the proposed rule change should contemplate situations where a customer orally notifies a member of the name and contact information for a trusted contact person. Rule 4512 requires that the member maintain the trusted contact person’s name and contact information, as well as the written notification to the customer that the member may contact the trusted contact person. The proposed rule change would allow members to rely on oral conversations with customers that members then document, provided that the written notification requirement of proposed Supplementary Material .06 to Rule 4512 is satisfied.

With respect to notifying the trusted contact person that a temporary hold has been placed, SIFMA suggested that FINRA adopt a voluntary reporting process that is separate from the process for placing a temporary hold under proposed Rule 2165. SIFMA's concerns are twofold: (1) potential difficulty in reaching a trusted contact person; and (2) a desire not to embarrass a customer by notifying a trusted contact person if the matter can be resolved through a discussion with the customer. Not all commenters agreed that the notification to the trusted contact person should be voluntary and some believed the requirement should be more stringent. For instance, Rich suggested a "more substantial" requirement than "attempting" to contact the trusted contact person.

Proposed Rule 2165 requires that the member notify the trusted contact person orally or in writing, which may be electronic, within two business days of placing a temporary hold. While FINRA appreciates the desire to ensure that a member actually discusses a hold with a trusted contact person, doing so may not be possible in every situation. As discussed above, FINRA would consider a member's mailing a letter, sending an email, or placing a telephone call and leaving a message with appropriate person(s) within the two-business-day period to constitute notification for purposes of proposed Rule 2165. Moreover, FINRA would consider the inability to contact a trusted contact person (e.g., an email is returned as undeliverable, a telephone number is out of service or a trusted contact person does not respond to a member's notification attempts) to mean that the trusted contact person was not available for purposes of the Rule. With regard to SIFMA's concern over potentially embarrassing a customer by being required to notify a trusted contact person, FINRA notes that a member may attempt to resolve a matter with a customer before placing a temporary hold on a disbursement without having to notify a trusted contact person.[69] However, once a member places a hold on a disbursement, FINRA believes a member should notify a trusted contact person.

Rich further commented that a member should be required to notify both the customer and the trusted contact person when the member has a reasonable belief of financial exploitation. When placing a hold on a disbursement, proposed Rule 2165 would require a member to notify all persons authorized to transact business on an account, including the customer, as well as the trusted contact person, if available. Even where a member has not placed a temporary hold on an account, however, FINRA would expect a member to reach out to a customer as one step in addressing potential financial exploitation of the customer.

FSR requested that FINRA clarify that a member is not liable if it contacts a trusted contact person designated by a customer pursuant to Rule 4512 or proposed Rule 2165, so long as the customer has not directed the member to remove or replace the trusted contact person. FINRA would consider a member contacting the trusted contact person identified by a customer to be consistent with the proposed rule change, provided that the customer had not previously directed the member to remove or replace the trusted contact person.

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69 As discussed above, FINRA's proposed amendments to Rule 4512 would permit a member to contact a trusted contact person to address, among other things, potential financial exploitation. In the context of SIFMA's concern, FINRA emphasizes that Rule 4512, as amended, would permit, but not require, a member to contact a trusted contact person about financial exploitation prior to placing a temporary hold on a disbursement. Thus, a member could resolve a matter with a customer prior to placing a hold on a disbursement without having to contact a trusted contact person.

Some commenters requested that FINRA clarify what would constitute reasonable efforts to obtain a name and contact information for a trusted contact person.[70] For purposes of the proposed rule change, FINRA would consider reasonable efforts to include actions such as incorporating a request for trusted contact person name and contact information on an account opening form or sending a letter, an electronic communication or other similar form of communication to existing customers requesting the name and contact information for a trusted contact person.

SIFMA requested that FINRA provide guidance on the appropriate place on new account forms for customers to designate a trusted contact person. Members may use their discretion in determining the appropriate place on new account forms for customers to designate a trusted contact person. Commonwealth supported the trusted contact person-related provisions and suggested that FINRA provide template language that members can use in account applications or other customer forms. If the SEC approves the proposed rule change, FINRA will make template language available for optional use by members in complying with the trusted contact person-related provisions of Rule 4512.[71]

SIFMA also requested that FINRA provide clarification as to whether the reasonable efforts requirement would apply to accounts opened after the proposed rule

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70 See CAI, FSR, BDA, GWFS and SIFMA.

71 In 2008, FINRA developed a New Account Application Template, available on FINRA's website that firms may use as a model form. See http://www.finra.org/industry/new-account-application-template. This New Account Application Template permits a customer to name a back-up contact who the member may contact. If the SEC approves the proposed rule change, FINRA will update the New Account Application Template to reflect the amendments to Rule 4512.

change becomes effective. The reasonable efforts requirement in Rule 4512 would apply to all accounts. FINRA would consider reasonable efforts for existing accounts to include asking the customer for the information when the member updates the information for the account either in the course of the member's routine and customary business or as otherwise required by applicable laws or rules.

FSR requested clarification on the role of the trusted contact person and the extent to which a member may rely on the information provided by the trusted contact person. BDA expressed concern that members could become responsible for evaluating the mental capabilities of trusted contact persons and that such capabilities could change over time. FINRA intends the trusted contact person to be a resource for a member in administering a customer's account and believes that a member may use its discretion in relying on any information provided by the trusted contact person. The proposed rule change does not make a member responsible for evaluating mental capabilities of trusted contact persons.

Requirement to Notify Trusted Contact Person of Designation

In the Notice 15-37 Proposal, FINRA stated that a member may elect to notify an individual that he or she was named as a trusted contact person; however, the proposal would not require notification. Some commenters supported requiring members to notify an individual that he or she was named as a trusted contact person.[72] Alzheimer's Assoc. supported also requiring a member to notify an individual designated as a trusted contact person if the customer later designates another individual to be his or her trusted contact

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72 See IJEC, GSU and Alzheimer's Assoc.

person. FSR suggested that the trusted contact person should be required to acknowledge his or her role at the time of designation by the customer.

The proposed rule change does not require that a member notify a trusted contact person of his or her designation. FINRA believes that the administrative burdens of requiring notification would outweigh the benefits. However, a member may elect to notify a trusted contact person of his or her designation (e.g., if the member determines that notifying the trusted contact person may be helpful in administering a customer account).

Limitations on Who Can Be a Trusted Contact Person

Under the Notice 15-37 Proposal, the proposed amendments to Rule 4512 would have required that the trusted contact person be age 18 or older and not be authorized to transact business on behalf of the account. Commonwealth supported the age limitation but suggested that FINRA revise the proposed rule to explicitly permit members to rely on the representations of the customer regarding the trusted contact person's age so that members do not have to independently verify the age. While FINRA declines to revise the proposed rule as suggested, FINRA would not expect a member to verify the age of a designated trusted contact person.

SIFMA requested clarification of the meaning of the term "not authorized to transact business on the account." Some commenters did not support the limitation on persons not authorized to transact business on behalf of the account.[73] NAELA commented that the limitation would presumably prohibit persons with powers of attorney from serving as trusted contact persons. FSR and Lincoln supported permitting

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73 See Cowan and NAELA.

individuals with powers of attorney to be trusted contact persons. Lincoln further supported permitting trustees to be trusted contact persons.

In light of the concerns raised by commenters, FINRA has proposed removing the prohibition on those authorized to transact on the account so as to permit joint accountholders, trustees, individuals with powers of attorney and other natural persons authorized to transact business on an account to be designated as trusted contact persons.

Authorization to Contact the Trusted Contact Person

Under the Notice 15-37 Proposal, the proposed amendments to Rule 4512 would have required that, at the time of account opening, a member shall disclose in writing (which may be electronic) to the customer that the member or an associated person is authorized to contact the trusted contact person. In the Notice 15-37 Proposal, FINRA requested comment on whether Rule 4512 should require customer consent to contact the trusted contact person or if customer notice is sufficient.

Some commenters questioned whether customer notice would be sufficient under the Regulation S-P exception for disclosing information to a third party with unrevoked customer consent.[74] Lincoln suggested requiring customer consent to contact the trusted contact person. Commonwealth stated that customer notice should be sufficient and that requiring customer consent could jeopardize a member's ability to protect investors. FINRA believes that disclosures to a trusted contact person pursuant to proposed Rules 2165 or 4512(a)(1)(F) would be consistent with Regulation S-P.

SIFMA requested guidance on how the disclosure requirements in proposed Supplementary Material .06 to Rule 4512 could be met (e.g., in an account agreement,

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[74] See CAI, Lincoln and SIFMA.

privacy policy or other form). The proposed rule change does not mandate any particular form of written disclosure. A member has flexibility in choosing which document should include the required disclosure (e.g., in an account application or another customer form) or whether to provide the disclosure in a separate document.

Information That May Be Disclosed to a Trusted Contact Person

Under the Notice 15-37 Proposal, pursuant to proposed Supplementary Material .06 to Rule 4512, a member may disclose to the trusted contact person information about the customer's account to confirm the specifics of the customer's current contact information, health status, and the identity of any legal guardian, executor, trustee or holder of a power of attorney, and as otherwise permitted by proposed Rule 2165. In the Notice 15-37 Proposal, FINRA requested comment on whether the types of information that may be disclosed to the trusted contact person under Rule 4512 should be modified.

Some commenters supported addressing in Rule 4512 the information that may be shared by a member with a trusted contact person.[75] SIFMA further supported removing any restrictions on the information that may be discussed with a trusted contact person. IRI commented that members should have discretion to disclose to and discuss with the trusted contact person any information relevant to an investment under proposed Rule 2165. CAI supported a more general "catch all" category for information that may be disclosed to and discussed with a trusted contact person.

ICI suggested revising the proposed Supplementary Material to Rule 4512 to provide that a member is prohibited from contacting a trusted contact person except as permitted by Rule 2165 to protect the customer's privacy. GWFS commented that a

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75 See FSR, Lincoln, BDA and SIFMA.

member does not request or receive health information from customers and, if the member should have health information, it would be responsible for additional regulatory requirements.

FINRA has proposed retaining the approach in the Notice 15-37 Proposal regarding the types of information that may be disclosed to the trusted contact person under Rule 4512, with the addition of information to address possible financial exploitation. FINRA has sought to identify reasonable categories of information that may be discussed with a trusted contact person, including information that will assist a member in administering the customer's account. Given privacy considerations, FINRA does not propose to give the member absolute latitude to discuss any information with trusted contact persons. With respect to health status, while members generally do not receive health information from customers, FINRA believes it is reasonable to permit members to reach out to the trusted contact person when they are concerned about a customer's health (e.g., when a customer who is known to be frail or ill has not responded to multiple telephone calls over a period of time). FINRA also believes that members should be allowed to contact the trusted contact person to address possible financial exploitation of the customer (e.g., when the member is concerned that the customer is being financially exploited but the member has not yet decided to place a temporary hold on a particular disbursement).

Some commenters suggested including in the list of information that may be disclosed to the trusted contact person the reason for any temporary hold, as well as details about the disbursement request.[76] Proposed Supplementary Material to Rule 4512

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[76] See Commonwealth and Alzheimer's Assoc.

contemplates a member contacting the trusted contact person as otherwise permitted by Rule 2165. FINRA would consider discussing the temporary hold, including the rationale for the hold, with the trusted contact person to be covered by Supplementary Material to Rule 4512.

Two commenters stated that FINRA should explicitly permit members to share information concerning an account with the financial institution that is the receiving party in an ACATS transfer.[77] SIFMA also stated that such information sharing should be permitted even if a temporary hold is not placed on a disbursement pursuant to proposed Rule 2165. As noted above, FINRA would consider disbursements to include processing of an ACATS transfer but a member would need to have a reasonable belief of financial exploitation in order to place a temporary hold on an ACATS transfer request pursuant to proposed Rule 2165. Furthermore, FINRA believes that the reasonableness of a member discussing a questionable ACATS transfer with the financial institution that is to receive the transferring assets would depend on the facts and circumstances. Members considering whether to discuss an ACATS transfer with another financial institution may wish to consider the availability of the Regulation S-P exception for allowing sharing of information in order to protect against or prevent actual or potential fraud, unauthorized transactions, claims, or other liability.[78] FINRA would consider providing guidance, as appropriate, if specific questions regarding the application of the proposed rule change to ACATS transfers arise.

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77 See FSR and SIFMA.

78 See 17 C.F.R §§ 248.15(a)(2)(ii).

Application of Rule 4512 Requirements to Existing Accounts

Consistent with the current requirements of Rule 4512, a member would not need to attempt to obtain the name of and contact information for a trusted contact person for existing accounts until such time as the member updates the information for the account either in the course of the member's routine and customary business or as otherwise required by applicable laws or rules.

Some commenters stated that members should be required to request the name and contact information for a trusted contact person for existing accounts not later than 12 months after the adoption of the proposed rule change.[79] NASAA supported requiring members to obtain the name and contact information for a trusted contact person from customers and to update the information on a regular basis in the manner in which members collect and maintain suitability information. CFA Institute supported requiring members to update trusted contact person-related information during periodic reviews and when a customer's situation changes. Commonwealth stated that members should be able to rely on existing procedures for updating accounts pursuant to Rule 17a-3 under the Exchange Act. Commonwealth further stated that it should be sufficient to indicate that no trusted contact person-related information has been provided to the member and that the customer should contact the member if he or she would like to provide the name of and contact information for a trusted contact person.

With respect to an account that was opened pursuant to a prior FINRA rule, FINRA Rule 4512(b) requires members to update the information for such an account in compliance with FINRA Rule 4512 whenever they update the account information in the

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[79] See Cowan and Alzheimer's Assoc.

course of their routine and customary business, or as required by other applicable laws or rules. With respect to any account that was opened pursuant to a prior FINRA rule, a member shall provide the required disclosure in writing, which may be electronic, when updating the information for the account pursuant to Rule 4512(b) either in the course of the member's routine and customary business or as otherwise required by applicable laws or rules. Such an approach promotes greater uniformity and consistency of account record information, while also minimizing burdens to members with respect to updating information for existing accounts. Applying the same standard to trusted contact person information would ensure that members use reasonable efforts to obtain such information for existing accounts in the course of their routine business, while not imposing undue burdens on firms to immediately contact all existing accountholders.

Immediate Family Member

Under the Notice 15-37 Proposal, if the trusted contact person is not available or the member reasonably believes that the trusted contact person has engaged, is engaged or will engage in the financial exploitation of the specified adult, the member would have been required to contact an immediate family member, unless the member reasonably believes that the immediate family member has engaged, is engaged or will engage in the financial exploitation of the specified adult.

Some commenters raised privacy concerns regarding disclosing information to an immediate family member. GSU commented that an immediate family member who has not been designated as a customer's trusted contact person should be contacted only for the purpose of gathering information about the identity of a guardian, executor, trustee or holder of a power of attorney so as to ensure that the customer's personal and private information is not disclosed to persons that the customer does not wish to receive the information. ICI suggested that contacting an immediate family member or other person about an account without the customer's explicit approval would not be permitted by Regulation S-P. NASAA stated that contacting immediate family members implicates privacy concerns and may exacerbate the problems that the proposed rule change seeks to address. IRI supported giving a member discretion not to contact an immediate family member where the member may have reason to believe that the customer would not want the family member contacted. Some commenters suggested including "immediate family members" in the proposed Supplementary Material .06 to Rule 4512 to make it clear that such persons may be contacted under proposed Rule 2165.[80]

Some commenters expressed operational concerns with contacting an immediate family member. Alzheimer's Assoc. commented that it is unclear how a member would identify an immediate family member to contact in the event that the trusted contact person was unavailable. FSR suggested an alternative approach that where time is of the essence, a member may in its discretion contact an immediate family member in instances where the trusted contact person is not immediately available.

Some commenters supported looking beyond immediate family members to provide members with discretion regarding whom to contact about a customer's account.[81] FSI suggested permitting members to also contact an individual who shares a trusted relationship with a customer (e.g., an attorney or an accountant).

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80 See CAI and Wells Fargo.

81 See Lincoln and Wells Fargo.

Under the Notice 15-37 Proposal, the term "immediate family member" was defined to include a spouse, child, grandchild, parent, brother or sister, mother-in-law or father-in-law, brother-in-law or sister-in-law, and son-in-law or daughter-in-law, each of whom must be age 18 or older. SIFMA suggested revising the definition to include a customer's niece or nephew.

Due to the privacy and operational challenges noted by commenters, FINRA has proposed removing the requirements in the Notice 15-37 Proposal with respect to notifying an immediate family member when a temporary hold is placed. While a customer may name an immediate family member as his or her trusted contact person, the proposed rule change would not require that a member notify an immediate family member who is not authorized to transact business on the customer's account or who has not been named a trusted contact person. However, the proposed rule change would not preclude a member from contacting an immediate family member or any other person if the member has customer consent to do so. Moreover, contacting such persons may be useful to members in administering customer accounts.

Notification Period

Under the Notice 15-37 Proposal, proposed Rule 2165 would have required the member to provide notification of the hold and the reason for the hold to all parties authorized to transact business on the account and, if available, the trusted contact person, no later than two business days after placing the hold. In the Notice 15-37 Proposal, FINRA requested comment on whether the two-business-day period for notifying the appropriate parties under proposed Rule 2165 is appropriate. If not, FINRA requested comment on what circumstances may warrant a shorter or longer period.

Commenters suggested extending the period from two business days to four business days,[82] five business days[83] and seven business days.[84] Commonwealth commented that the two-business-day period may be insufficient. Commonwealth suggested that if a member is unable to reach the trusted contact person or an immediate family member within two business days, then the member should have up to ten business days for notification. Alzheimer's Assoc. suggested reducing the period from two business days to 24 hours.

Other commenters suggested not requiring notification within a specific time period. Wells Fargo suggested requiring notification "promptly" or "as is reasonable under the circumstances." Because the two-business-day period may be insufficient, SIFMA suggested requiring "reasonable efforts" to notify the appropriate parties without imposing a specific time period.

Given the need for urgency in dealing with financial exploitation, FINRA has proposed retaining the requirement to notify all parties authorized to transact business on an account not later than two business days after the hold is placed. To ease members' administrative and operational burdens, FINRA has proposed eliminating the requirement to contact an immediate family member under proposed Rule 2165.

Commenters suggested clarifying when the time period would begin and end.[85] Many FINRA rules require calculating business days. For purposes of calculating the

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[82] See CAI.

[83] See FSR and FSI.

[84] See IRI.

[85] See CAI and FSR.

two-business-day period within which a member must provide notification of the temporary hold to parties authorized to transact business on the account, and consistent with the approach taken in FINRA Rule 9138(b) (Computation of Time), the day when the member places the temporary hold should not be included, so the two-business-day period would begin to run on the next business day and would thus run until the end of the second business day thereafter. For example, assuming no intermediate federal holiday, if a member placed a temporary hold on a Monday, the two-business-day period would run until the end of Wednesday. If a member placed a hold on a Friday, then the two-business-day period would run until the end of the following Tuesday, again assuming no intermediate federal holiday. FINRA intends this same approach to be used for the calculation of the period for the temporary hold under proposed Rule 2165.

Internal Review

Under the Notice 15-37 Proposal, if a member places a temporary hold, proposed Rule 2165 would require the member to immediately initiate an internal review of the facts and circumstances that caused the qualified person to reasonably believe that financial exploitation of the specified adult has occurred, is occurring, has been attempted or will be attempted.

PIRC supported requiring members to immediately initiate an internal review. SIFMA commented that the requirement to immediately initiate an internal review is unnecessarily duplicative because the proposed rule change already tacitly requires members to initiate an internal review prior to placing the temporary hold. CAI suggested requiring members to initiate an internal review as soon as reasonably practicable. FINRA intends the requirement to immediately initiate an internal review to signify that a member should not delay in reviewing the appropriateness of the temporary hold and determining appropriate next steps. Moreover, because a member's internal review is part of determining appropriate next steps once a hold has been placed, FINRA does not believe that the requirement is unnecessarily duplicative of any other requirements in the proposed rule change.

FSR requested that FINRA clarify the scope of the internal review requirement, including what factors should be considered and the nature of the inquiry. FINRA believes that the appropriate internal review will depend on the facts and circumstances of the situation. Members have discretion in conducting a reasonable internal review under proposed Rule 2165.

Policies and Procedures

Proposed Rule 2165 would require a member that anticipates using a temporary hold in appropriate circumstances to establish and maintain written supervisory procedures reasonably designed to achieve compliance with the Rule, including, but not limited to, procedures on the identification, escalation and reporting of matters related to financial exploitation of specified adults. In the Notice 15-37 Proposal, FINRA requested comment on whether to mandate specific procedures for escalating matters related to financial exploitation.

Lincoln commented that FINRA should not prescribe or mandate any specific procedures for escalating matters. On the other hand, Miami Investor Rights Clinic supported requiring all members to establish written supervisory procedures for all registered persons related to the identification and escalation of matters involving financial exploitation.

FINRA has proposed retaining the approach in the Notice 15-37 Proposal requiring policies and procedures reasonably designed to achieve compliance with proposed Rule 2165. FINRA is committed to protecting seniors and other vulnerable adults and believes that the proposed rule change would assist members in addressing financial exploitation of such individuals. FINRA recognizes however that placing holds on disbursements, even on a temporary basis, could have negative implications for the customer's financial situation and the member-customer relationship. In light of the complexities surrounding financial exploitation and to help protect against potential misapplication of the proposed rule, FINRA believes that members must have written supervisory procedures reasonably designed to achieve compliance with proposed Rule 2165. Such procedures would help to ensure that members give careful consideration to their responsibilities in identifying and escalating matters related to financial exploitation of specified adults and that there is a consistent approach across the member's organization.

Training

Under the Notice 15-37 Proposal, the proposal would also require members to develop and document training policies or programs reasonably designed to ensure that registered persons comply with the requirements of the Rule. Some commenters supported requiring broad training of the members' staffs regarding the risks of financial exploitation.[86] Miami Investor Rights Clinic supported requiring members to establish training policies and programs for all registered persons.

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86 See NAELA and AARP.

GSU suggested that FINRA oversee training policies or programs related to proposed Rule 2165, including the creation of continuing education requirements for registered persons and web-based training for all qualified persons. Commonwealth supported FINRA providing guidance on appropriate training of registered persons related to proposed Rule 2165, including FINRA-created training modules.

FINRA has proposed retaining the approach in the Notice 15-37 Proposal to require members to develop and document training policies or programs. FINRA has modified the requirement to mandate training for associated persons – not just registered persons. Because the proposed rule change permits an associated person of the member who serves in a supervisory, compliance or legal capacity for the member to place, terminate or extend a temporary hold on behalf of the member, FINRA believes that it is appropriate to require members to develop and document training policies or programs reasonably designed to ensure that associated persons – not just registered persons – comply with the proposed rule.

FINRA believes that the requirement will further strengthen compliance by members and associated persons that anticipate placing holds on disbursements of funds or securities consistent with the requirements of the Rule. The proposed rule change provides members with reasonable discretion in determining how best to structure such training policies or programs. FINRA has developed material for the Continuing Education Regulatory Element Program that addresses the financial exploitation of senior investors. FINRA will consider whether to develop additional continuing education content specifically addressing financial exploitation of seniors and providing additional guidance to members, as appropriate.

Reporting

Some commenters supported revising the proposal to require members to report financial exploitation to local adult protective services and law enforcement.[87] Some commenters also supported revising the proposal to require members to report financial exploitation to FINRA.[88] SIFMA also supported providing members with explicit permission to share records with local adult protective services and law enforcement.

CAI commented that FINRA needs to provide a more definitive mechanism under which members may refer a matter to the proper agency or governmental body for handling. NAPSA supported requiring members to report financial exploitation to adult protective services under the Regulation S-P exceptions for allowing sharing of information in order to prevent actual or potential fraud and to comply with authorized civil investigations. FSR suggested that the proposed rule change should permit members to petition a government agency for a determination concerning a proposed disbursement, which would allow the applicable jurisdiction's adult protective services to intervene. FSI suggested that requiring the reporting of potential financial exploitation or exposing members to potential civil liability will lead to members reporting even the slightest suspicions to regulators, thereby over-taxing regulatory resources.

The proposed rule change does not require that members report a reasonable belief of financial exploitation to a state or local authority. Some states mandate such reporting by financial institutions, including broker-dealers. Given the varying and evolving reporting requirements under state law, FINRA believes that states are well

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87 See NAELA, PIABA, Miami Investor Rights Clinic, NAIFA, PIRC, Alzheimer's Assoc., AARP, NASAA and SIFMA.

88 See PIRC and NASAA.

positioned to determine whether a broker-dealer or any other entity has satisfied its reporting requirements under state law. FINRA would expect members to comply with all applicable state requirements, including reporting requirements.[89]

Alzheimer's Assoc. supported requiring members to document any referral to an external agency, as well as the final outcome of any holds placed. Because the proposed rule change would not require referring matters to an external agency, proposed Rule 2165 does not require members to document any such referrals. However, FINRA would expect members to comply with all applicable state recordkeeping requirements.

Costs

In the Notice 15-37 Proposal, FINRA requested comment on the costs that may result from the proposed rules. Commonwealth stated that it will need to make changes to existing account profile systems that will require development time, at an estimated cost of approximately $40,000. Wells Fargo stated that it will need to incorporate the trusted contact person into the account opening process and make other necessary system updates, at an estimated cost of approximately $1.25 million.

Other commenters indicated that the proposed rule change will result in costs to members but did not attempt to quantify such costs. GWFS commented that in order to capture, retain and periodically update trusted contact person information, systems changes will be required resulting in additional costs to the member. FSR suggested that the proposed recordkeeping requirement will result in significant costs for members.

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89 See Interagency Guidance clarifying that reporting suspected financial abuse to appropriate local, state, or federal agencies does not, in general, violate the privacy provisions of the Gramm-Leach-Bliley Act or its implementing regulations, including Regulation S-P.

FSR suggested that FINRA's economic impact assessment present findings that show evidence that a customer designating a trusted contact person is, or is likely to be, an effective mitigant against the financial exploitation the proposed rule change is designed to address.

PIRC suggested that FINRA seek more information on the logistics and costs of expanding the proposed rule change to apply to all investors or to otherwise expand the definition of "specified adults."

As discussed in greater detail in Item 4 of this filing, FINRA does not believe that the proposed rule change will impose undue operational costs on members. While FINRA recognizes that there will be some operational costs to members in complying with the proposed trusted contact person requirement, FINRA has lessened the cost of compliance by not requiring members to notify the trusted contact person of his or her designation as such. Furthermore, the proposed rule change would permit a member to deliver the disclosure and notification required by Rule 4512 or Rule 2165 to trusted contact persons in paper or electronic form thereby giving the member alternative methods of complying with the requirements.

FIBA suggested that the reasonable costs associated with due diligence and investigatory processes, including responding to inquiries from the trusted contact person, immediate family members and other parties, should be borne by the customer and chargeable against the relevant account(s). FINRA would closely examine the reasonableness of a member charging a customer for costs associated with placing a temporary hold on the customer's account.

Additional Privacy Considerations

FIBA commented that the disclosure of confidential information pursuant to the proposed rule change may run afoul of U.S. and foreign privacy laws. The proposed rule change addresses Regulation S-P requirements. Members will need to separately consider any applicable non-U.S. privacy requirements in determining whether to place temporary holds consistent with the requirements of proposed Rule 2165.

CAI questioned whether the Regulation S-P exception for disclosure of information pursuant to a law or rule would be available if proposed Rule 2165 permits, but does not require, a temporary hold. FINRA believes that a member disclosing information pursuant to proposed Rule 2165 would be consistent with the Regulation S-P exception for disclosures to comply with federal, state, or local laws, rules and other applicable legal requirements.

Additional Suggestions for Clarification or Guidance

CAI requested guidance on the status of funds during the time of the temporary hold and, in particular, on the obligations of different parties related to the temporary hold on disbursements of funds related to a variable annuity contract withdrawal or surrender, or how to address such funds when the member is not authorized to hold customer funds. Proposed Rule 2165 applies to disbursements of funds or securities out of a customer account and does not apply to redemptions of securities or other transactions. As such, FINRA does not anticipate a member that is not authorized to hold funds being required to hold funds under the proposed rule change. Rather, while the temporary hold on a disbursement is in effect, the funds or securities would remain in a customer's account and would not be released.

GWFS requested clarification as to the application of the proposed rule to members primarily involved with the retirement plan business, such as where a retirement plan sponsor's relationship is with a financial intermediary unaffiliated with the member but the member provides recordkeeping services. GWFS questioned which broker-dealer is "responsible for rule compliance."

More than one financial institution may be providing services in some arrangements and business models (e.g., retirement plans or introducing and clearing firm arrangements). In such arrangements, the financial institution that has a reasonable belief that financial exploitation is occurring may not hold the assets that are subject to the disbursement request. For example, with respect to introducing and clearing firm arrangements, an introducing firm may make the determination that placing a temporary hold pursuant to the proposed rule change is appropriate. The clearing firm may then place the temporary hold at the direction of and in reasonable reliance on the information provided by the introducing firm. FINRA recognizes that members making a determination or recommendation to place a hold on a disbursement may not be in the position to place the actual hold on the funds or securities.

Coordination with Other Regulators

As noted above, NASAA has separately proposed model legislation relating to financial exploitation of seniors and other vulnerable adults. NASAA stated that it hopes that the final outcomes of the FINRA proposal and the NASAA model are complementary. Some commenters recommended consistency between the FINRA proposal and NASAA model as being in the best interests of both investors and financial institutions.[90] Other commenters stated that FINRA should coordinate with NASAA and state regulators to develop a cohesive framework.[91]

While the proposed rule change and NASAA model are not identical, FINRA and NASAA have worked together to achieve consistency where possible and appropriate. Both the proposed rule change and NASAA model would apply to accounts of natural persons age 65 and older and would permit temporary holds of up to 25 business days, including the initial and subsequent periods. Proposed Rule 2165 also would incorporate the concept of a temporary hold being terminated or extended by a state regulator or agency or court of competent jurisdiction.

Implementation Period

Some commenters requested that if the proposed rule change is approved, FINRA allow at least 12 months for members to implement the requirements so as to provide adequate time to make updates to members' systems and written supervisory procedures.[92] If the proposed rule change is approved, FINRA will consider the need for members to make necessary changes to their systems, forms, and supervisory procedures in establishing an implementation date for the proposed rule change.

6. Extension of Time Period for Commission Action

FINRA does not consent at this time to an extension of the time period for Commission action specified in Section 19(b)(2) of the Act.[93]

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90 See ICI, Lincoln, AARP and FSI.

91 See FSR, IRI, BDA and SIFMA.

92 See Commonwealth, CAI and Wells Fargo.

93 15 U.S.C. 78s(b)(2).

7. <u>Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2) or Section 19(b)(7)(D)</u>

Not applicable.

8. <u>Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission</u>

Not applicable.

9. <u>Security-Based Swap Submissions Filed Pursuant to Section 3C of the Act</u>

Not applicable.

10. <u>Advance Notices Filed Pursuant to Section 806(e) of the Payment, Clearing and Settlement Supervision Act</u>

Not applicable.

11. <u>Exhibits</u>

Exhibit 1. Completed notice of proposed rule change for publication in the <u>Federal</u> <u>Register</u>.

Exhibit 2a. <u>Regulatory Notice</u> 15-37 (October 2015).

Exhibit 2b. List of commenters.

Exhibit 2c. Comments received in response to <u>Regulatory Notice</u> 15-37.

Exhibit 5. Text of proposed rule change.

EXHIBIT 1

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34- ; File No. SR-FINRA-2016-039)

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of a Proposed Rule Change to Adopt FINRA Rule 2165 (Financial Exploitation of Specified Adults)

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b-4 thereunder,[2] notice is hereby given that on , Financial Industry Regulatory Authority, Inc. ("FINRA") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by FINRA. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. <u>Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change</u>

FINRA is proposing to: (1) amend FINRA Rule 4512 (Customer Account Information) to require members to make reasonable efforts to obtain the name of and contact information for a trusted contact person for a customer's account; and (2) adopt new FINRA Rule 2165 (Financial Exploitation of Specified Adults) to permit members to place temporary holds on disbursements of funds or securities from the accounts of specified customers where there is a reasonable belief of financial exploitation of these customers.

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1 15 U.S.C. 78s(b)(1).

2 17 CFR 240.19b-4.

The text of the proposed rule change is available on FINRA's website at http://www.finra.org, at the principal office of FINRA and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FINRA included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

With the aging of the U.S. population, financial exploitation of seniors and other vulnerable adults is a serious and growing problem.[3] FINRA's experience with the FINRA Securities Helpline for Seniors® ("Seniors Helpline") has highlighted issues relating to financial exploitation of seniors and other vulnerable adults.[4] A number of

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3 See The MetLife Study of Elder Financial Abuse: Crimes of Occasion, Desperation, and Predation Against America's Elders (June 2011) (discussing the increasing prevalence of elder financial abuse) (hereinafter "MetLife Study"). See also FINRA Investor Education Foundation, Financial Fraud and Fraud Susceptibility in the United States: Research Report from a 2012 National Survey (2013) (which found that U.S. adults age 65 and older are more likely to be targeted for financial fraud, including investment scams, and more likely to lose money once targeted) (hereinafter "FINRA Foundation Study").

4 See FINRA Launches Toll-Free FINRA Securities Helpline for Seniors (April 20, 2015). See also Report on the FINRA Securities Helpline for Seniors (December 2015) (stating that from its launch on April 20, 2015 until December 2015, the Seniors Helpline received more than 2,500 calls with an average call duration of nearly 25 minutes) (hereinafter "Seniors Helpline Report").

reports and studies also have explored various aspects of this important topic.[5] Moreover, studies indicate that financial exploitation is the most common form of elder abuse.[6] Financial exploitation can be difficult for any investor, but it can be particularly devastating for seniors and other vulnerable adults, many of whom are living on fixed incomes without the ability to offset significant losses over time or through other means.[7] Financial exploitation can occur suddenly, and once funds leave an account they can be difficult, if not impossible, to recover, especially when they ultimately are transferred outside of the U.S.[8] Members need more effective tools that will allow them to quickly and effectively address suspected financial exploitation of seniors and other vulnerable adults. Currently, however, FINRA rules do not explicitly permit members to contact a non-account holder or to place a temporary hold on disbursements of funds or securities

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5 See, e.g., National Senior Investor Initiative: A Coordinated Series of Examinations, SEC's Office of Compliance Inspections and Examinations and FINRA (April 15, 2015) (hereinafter "Senior Investor Initiative"); MetLife Study; and Seniors Helpline Report.

6 See Interagency Guidance on Privacy Laws and Reporting Financial Abuse of Older Adults, Board of Governors of the Federal Reserve System, Commodity Futures Trading Commission, Consumer Financial Protection Bureau, Federal Deposit Insurance Corp., Federal Trade Commission, National Credit Union Administration, Office of the Comptroller of the Currency and SEC (September 24, 2013) (hereinafter "Interagency Guidance") (citing Acierno, R., M. A. Hernandez, A. B. Amstadter, H. S. Resnick, K. Steve, W. Muzzy, and D. G. Kilpatrick, "Prevalence and Correlates of Emotional, Physical, Sexual and Financial Abuse and Potential Neglect in the United States: The National Elder Mistreatment Study," American Journal of Public Health 100(2): 292–97; Lifespan of Greater Rochester, Inc., et al., Under the Radar: New York State Elder Abuse Prevention Study, (Rochester, NY: Lifespan of Greater Rochester, Inc., May 2011)) (hereinafter "New York State Elder Abuse Prevention Study").

7 See Seniors Helpline Report.

8 See Seniors Helpline Report.

where there is a reasonable belief of financial exploitation of a senior or other vulnerable adult.

To address these issues, the proposed rule change would provide members with a way to quickly respond to situations in which they have a reasonable basis to believe that financial exploitation of vulnerable adults has occurred or will be attempted. FINRA believes that a member can better protect its customers from financial exploitation if the member can: (1) place a temporary hold on a disbursement of funds or securities from a customer's account; and (2) notify a customer's trusted contact person when there is concern that, among other things, the customer may be the victim of financial exploitation. These measures will assist members in thwarting financial exploitation of seniors and other vulnerable adults before potentially ruinous losses occur. As discussed below, FINRA is proposing a number of safeguards to help ensure that there is not a misapplication of the proposed rule and that customers' ordinary disbursements are not disrupted.

A small number of states have enacted statutes that permit financial institutions, including broker-dealers, to place temporary holds on "disbursements" or "transactions" if financial exploitation of covered persons is suspected.[9] In addition, the North American Securities Administrators Association ("NASAA") created a model state act to protect vulnerable adults from financial exploitation ("NASAA model"). Due to the small number of state statutes currently in effect and the lack of a federal standard in this

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9 See, e.g., DEL. CODE ANN. tit. 31, § 3910 (2015); MO. REV. STAT. §§ 409.600-.630 (2015); WASH. REV. CODE §§ 74.34.215, 220 (2015); and IND. CODE ANN. § 23-19-4.1 (2016).

area, FINRA believes that the proposed rule change would aid in the creation of a uniform national standard for the benefit of members and their customers.

Trusted Contact Person

The proposed rule change would amend Rule 4512 to require members to make reasonable efforts to obtain the name of and contact information for a trusted contact person upon the opening of a non-institutional customer's account.[10] The proposed rule change would require that the trusted contact person be age 18 or older.[11] While the proposed rule change does not specify what contact information should be obtained for a trusted contact person, a mailing address, telephone number and email address for the trusted contact person may be the most useful information for members.

The proposal does not prohibit members from opening and maintaining an account if a customer fails to identify a trusted contact person as long as the member made reasonable efforts to obtain a name and contact information.[12] FINRA believes that asking a customer to provide the name and contact information for a trusted contact person ordinarily would constitute reasonable efforts to obtain the information and would satisfy the proposed rule change's requirements.

Consistent with the current requirements of Rule 4512, a member would not need to attempt to obtain the name of and contact information for a trusted contact person for accounts in existence prior to the effective date of the proposed rule change ("existing accounts") until such time as the member updates the information for the account either

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10 See proposed Rule 4512(a)(1)(F).

11 See proposed Rule 4512(a)(1)(F).

12 See proposed Supplementary Material .06(b) to Rule 4512.

in the course of the member's routine and customary business or as otherwise required by applicable laws or rules.[13] With respect to any account subject to the requirements of Exchange Act Rule 17a-3(a)(17) to periodically update customer records, a member shall make reasonable efforts to obtain or, if previously obtained, to update where appropriate the name of and contact information for a trusted contact person consistent with the requirements in Exchange Act Rule 17a-3(a)(17).[14] With regard to updating the contact information once provided for other accounts that are not subject to the requirements in Exchange Act Rule 17a-3, a member should consider asking the customer to review and update the name of and contact information for a trusted contact person on a periodic basis or when there is a reason to believe that there has been a change in the customer's situation.[15]

The proposed rule change would also require that, at the time of account opening, a member shall disclose in writing (which may be electronic) to the customer that the member or an associated person is authorized to contact the trusted contact person and disclose information about the customer's account to address possible financial

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13 See Rule 4512(b).

14 See proposed Supplementary Material .06(c) to Rule 4512. The reference to the requirements of Rule 17a-3(a)(17) includes the requirements of Rule 17a-3(a)(17)(i)(A) in conjunction with Rule 17a-3(a)(17)(i)(D). In this regard, Rule 17a-3(a)(17)(i)(D) provides that the account record requirements in Rule 17a-3(a)(17)(i)(A) only apply to accounts for which the member, broker or dealer is, or has within the past 36 months been, required to make a suitability determination under the federal securities laws or under the requirements of a self-regulatory organization of which it is a member.

15 A customer's request to change his or her trusted contact person may be a possible red flag of financial exploitation. For example, a senior customer instructing his registered representative to change his trusted contact person from an immediate family member to a previously unknown third party may be a red flag of financial exploitation.

exploitation, to confirm the specifics of the customer's current contact information, health status, or the identity of any legal guardian, executor, trustee or holder of a power of attorney, or as otherwise permitted by proposed Rule 2165. With respect to any account that was opened pursuant to a prior FINRA rule, a member shall provide this disclosure in writing, which may be electronic, when updating the information for the account pursuant to Rule 4512(b) either in the course of the member's routine and customary business or as otherwise required by applicable laws or rules.[16]

FINRA believes that members and customers will benefit from the trusted contact information in many different settings. For example, consistent with the disclosure, if a member has been unable to contact a customer after multiple attempts, a member could contact a trusted contact person to inquire about the customer's current contact information. Or if a customer is known to be ill or infirm and the member has been unable to contact the customer after multiple attempts, the member could contact a trusted contact person to inquire about the customer's health status. A member also could reach out to a trusted contact person if it suspects that the customer may be suffering from Alzheimer's disease, dementia or other forms of diminished capacity. A member could contact a trusted contact person to address possible financial exploitation of the customer before placing a temporary hold on a disbursement. In addition, as discussed below, pursuant to proposed Rule 2165, when information about a trusted contact person is available, a member must notify the trusted contact person orally or in

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16 See proposed Supplementary Material .06(a) to Rule 4512. A member would be required to provide the disclosure at account opening or when updating information for existing accounts pursuant to Rule 4512(b), even if a customer fails to identify a trusted contact person. Among other things, such disclosure may assist a customer in making an informed decision about whether to provide the trusted contact person information.

writing, which may be electronic, if the member has placed a temporary hold on a disbursement of funds or securities from a customer's account, unless the member reasonably believes that the trusted contact person is engaged in the financial exploitation.[17]

The trusted contact person is intended to be a resource for the member in administering the customer's account, protecting assets and responding to possible financial exploitation. A member may use its discretion in relying on any information provided by the trusted contact person. A member may elect to notify an individual that he or she was named as a trusted contact person; however, the proposed rule change would not require such notification.

Temporary Hold on Disbursement of Funds or Securities

The proposed rule change would permit a member that reasonably believes that financial exploitation may be occurring to place a temporary hold on the disbursement of funds or securities from the account of a "specified adult" customer.[18] The proposed rule change creates no obligation to withhold a disbursement of funds or securities where financial exploitation may be occurring. In this regard, Supplementary Material to

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17 See proposed Rule 2165(b)(1)(B)(ii). With respect to disclosing information to the trusted contact person, Regulation S-P excepts from the Regulation's notice and opt-out requirements disclosures made: (A) to comply with federal, state, or local laws, rules and other applicable legal requirements; or (B) made with client consent, provided such consent has not been revoked. See 17 C.F.R §§ 248.15(a)(1) and (a)(7)(i). FINRA believes that disclosures to a trusted contact person pursuant to proposed Rule 2165 or 4512(a)(1)(F) would be consistent with Regulation S-P.

18 See proposed Rule 2165(b)(1). Members also must consider any obligations under FINRA Rule 3310 (Anti-Money Laundering Compliance Program) and the reporting of suspicious transactions required under 31 U.S.C. 5318(g) and the implementing regulations thereunder.

proposed Rule 2165 would explicitly state that the Rule provides members with a safe harbor from FINRA Rules 2010 (Standards of Commercial Honor and Principles of Trade), 2150 (Improper Use of Customers' Securities or Funds; Prohibition Against Guarantees and Sharing in Accounts) and 11870 (Customer Account Transfer Contracts) when members exercise discretion in placing temporary holds on disbursements of funds or securities from the accounts of specified adults under the circumstances denoted in the Rule.[19] The proposed Supplementary Material would further state that the Rule does not require members to place temporary holds on disbursements of funds or securities from the account of a specified adult.[20]

FINRA believes that "specified adults" may be particularly susceptible to financial exploitation.[21] Proposed Rule 2165 would define "specified adult" as: (A) a natural person age 65 and older;[22] or (B) a natural person age 18 and older who the

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19 See proposed Supplementary Material .01 to Rule 2165.

20 See proposed Supplementary Material .01 to Rule 2165. FINRA understands that some members, pursuant to state law or their own policies, may already place temporary holds on disbursements from customers' accounts where financial exploitation is suspected.

21 See Senior Investor Initiative (noting the increase in persons aged 65 and older living in the United States and the concentration of wealth in those persons during a time of downward yield pressure on conservative income-producing investments). See also FINRA Foundation Study (noting that respondents age 65 and over were more likely to be solicited to invest in a potentially fraudulent opportunity (93%), more likely to engage with the offer (49%) and more likely to have lost money (16%) than younger respondents); MetLife Study (noting the many forms of vulnerability that "make elders more susceptible to [financial] abuse," including, among others, poor physical or mental health, lack of mobility, and isolation); Protecting Elderly Investors from Financial Exploitation: Questions to Consider (February 5, 2015) (noting that one of the greatest risk factors for diminished capacity is age).

22 See, e.g., Aging Statistics, U.S. Department of Health and Human Services Administration on Aging (referring to the "older population" as persons "65 years

member reasonably believes has a mental or physical impairment that renders the individual unable to protect his or her own interests.[23] Supplementary Material to proposed Rule 2165 would provide that a member's reasonable belief that a natural person age 18 and older has a mental or physical impairment that renders the individual unable to protect his or her own interests may be based on the facts and circumstances observed in the member's business relationship with the person.[24] The proposed rule change would define the term "account" to mean any account of a member for which a specified adult has the authority to transact business.[25]

Because financial abuse may take many forms, FINRA has proposed a broad definition of "financial exploitation." Specifically, financial exploitation would mean: (A) the wrongful or unauthorized taking, withholding, appropriation, or use of a specified adult's funds or securities; or (B) any act or omission by a person, including through the use of a power of attorney, guardianship, or any other authority, regarding a specified adult, to: (i) obtain control, through deception, intimidation or undue influence, over the specified adult's money, assets or property; or (ii) convert the specified adult's money, assets or property.[26]

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or older"); Senior Investor Initiative (noting the examinations underlying the report "focused on investors aged 65 years old or older").

23 See proposed Rule 2165(a)(1).

24 See proposed Supplementary Material .03 to Rule 2165. A member also may rely on other sources of information in making a determination under proposed Rule 2165(a)(1) (e.g., a court or government agency order finding a customer to be legally incompetent).

25 See proposed Rule 2165(a)(2).

26 See proposed Rule 2165(a)(4).

The proposed rule change would permit a member to place a temporary hold on a disbursement of funds or securities from the account of a specified adult if the member reasonably believes that financial exploitation of the specified adult has occurred, is occurring, has been attempted or will be attempted.[27] A temporary hold pursuant to proposed Rule 2165 may be placed on a particular suspicious disbursement(s) but not on other, non-suspicious disbursements.[28] The proposed rule change would not apply to transactions in securities.[29]

The proposed rule change would require that a member's written supervisory procedures identify the title of each person authorized to place, terminate or extend a temporary hold on behalf of the member pursuant to Rule 2165. The proposed rule change would require that any such person be an associated person of the member who serves in a supervisory, compliance or legal capacity for the member.[30]

If a member places a temporary hold, the proposed rule change would require the member to immediately initiate an internal review of the facts and circumstances that caused the member to reasonably believe that financial exploitation of the specified adult

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27 See proposed Rule 2165(b)(1)(A).

28 FINRA recognizes that a single disbursement could involve all of the assets in an account.

29 For example, the proposed rule change would not apply to a customer's order to sell his shares of a stock. However, if a customer requested that the proceeds of a sale of shares of a stock be disbursed out of his account at the member, then the proposed rule change could apply to the disbursement of the proceeds where the customer is a "specified adult" and there is reasonable belief of financial exploitation.

30 See proposed Rule 2165(c)(2). This provision is intended to ensure that a member's decision to place a temporary hold is elevated to an associated person with appropriate authority.

has occurred, is occurring, has been attempted or will be attempted.[31] In addition, the proposed rule change would require the member to provide notification of the hold and the reason for the hold to all parties authorized to transact business on the account, including, but not limited to, the customer, and, if available, the trusted contact person, no later than two business days after the date that the member first placed the hold.[32] While oral or written (including electronic) notification would be permitted under the proposed rule change, a member would be required to retain records evidencing the notification.[33]

The proposed rule change does not preclude a member from terminating a temporary hold after communicating with either the customer or trusted contact person. FINRA believes that a customer's objection to a temporary hold or information obtained during an exchange with the customer or trusted contact person may be used in determining whether a hold should be placed or lifted. FINRA believes that while not dispositive members should weigh a customer's objection against other information in determining whether a hold should be placed or lifted.

While the proposed rule change does not require notifying the customer's registered representative of suspected financial exploitation, a customer's registered

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31 See proposed Rule 2165(b)(1)(C).

32 See proposed Rule 2165(b)(1)(B). FINRA understands that a member may not necessarily be able to speak with or otherwise get a response from such persons within the two-business-day period. FINRA would consider, for example, a member's mailing a letter, sending an email, or placing a telephone call and leaving a message with appropriate person(s) within the two-business-day period to constitute notification for purposes of proposed Rule 2165. Moreover, as further discussed herein, FINRA would consider the inability to contact a trusted contact person to mean that the trusted contact person was not available for purposes of the Rule.

33 See proposed Rule 2165(d).

representative may be the first person to detect potential financial exploitation. If the detection occurs in another way, a member may choose to notify and discuss the suspected financial exploitation with the customer's registered representative.

For purposes of proposed Rule 2165, FINRA would consider the lack of an identified trusted contact person, the inability to contact the trusted contact person or a person's refusal to act as a trusted contact person to mean that the trusted contact person was not available. A member may use the temporary-hold provision under proposed Rule 2165 when a trusted contact person is not available.

The temporary hold authorized by proposed Rule 2165 would expire not later than 15 business days after the date that the member first placed the temporary hold on the disbursement of funds or securities, unless sooner terminated or extended by an order of a state regulator or agency or court of competent jurisdiction.[34] In addition, provided that the member's internal review of the facts and circumstances supports its reasonable belief that the financial exploitation of the specified adult has occurred, is occurring, has been attempted or will be attempted, the proposed rule change would permit the member to extend the temporary hold for an additional 10 business days, unless sooner terminated or extended by an order of a state regulator or agency or court of competent jurisdiction.[35]

Proposed Rule 2165 would require members to retain records related to compliance with the Rule, which shall be readily available to FINRA, upon request. Retained records required by the proposed rule change are records of: (1) requests for disbursement that may constitute financial exploitation of a specified adult and the

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34 See proposed Rule 2165(b)(2).

35 See proposed Rule 2165(b)(3).

resulting temporary hold; (2) the finding of a reasonable belief that financial exploitation has occurred, is occurring, has been attempted or will be attempted underlying the decision to place a temporary hold on a disbursement; (3) the name and title of the associated person that authorized the temporary hold on a disbursement; (4) notification(s) to the relevant parties pursuant to the Rule; and (5) the internal review of the facts and circumstances supporting the member's reasonable belief that the financial exploitation of the specified adult has occurred, is occurring, has been attempted or will be attempted.[36]

The proposed rule change would require a member that anticipates using a temporary hold in appropriate circumstances to establish and maintain written supervisory procedures reasonably designed to achieve compliance with the Rule, including procedures on the identification, escalation and reporting of matters related to financial exploitation of specified adults.[37] The proposed rule change would require that the member's written supervisory procedures identify the title of each person authorized to place, terminate or extend a temporary hold on behalf of the member pursuant to the Rule.[38] The proposed rule change would also require a member that anticipates placing a temporary hold pursuant to the Rule to develop and document training policies or programs reasonably designed to ensure that associated persons comply with the requirements of the Rule.[39]

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[36] See proposed Rule 2165(d).

[37] See proposed Rule 2165(c)(1).

[38] See proposed Rule 2165(c)(2).

[39] See proposed Supplementary Material .02 to Rule 2165.

If the Commission approves the proposed rule change, FINRA will announce the effective date of the proposed rule change in a Regulatory Notice to be published no later than 60 days following Commission approval. The effective date will be no later than 180 days following publication of the Regulatory Notice announcing Commission approval.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[40] which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. The proposed rule change will promote investor protection by relieving members from FINRA rules that might otherwise discourage them from exercising discretion to protect customers through placing a temporary hold on disbursements of funds or securities. Such a hold, combined with contacting a trusted contact person, also may assist these customers in stopping unwanted disbursements and better protecting themselves from financial exploitation.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. All members would be subject to the proposed amendments to Rule 4512, so they would be affected in the same manner, and FINRA has narrowly tailored the requirements to minimize the impacts on members. Moreover, proposed Rule 2165 is a

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[40] 15 U.S.C. 78o-3(b)(6).

safe-harbor provision that permits, but does not require, members to place temporary holds on disbursements in appropriate circumstances.

The population of seniors and other vulnerable adults in the United States is large. According to the U.S. Department of Health and Human Services, the number of older Americans (persons 65 years of age or older) is estimated to be 44.7 million, slightly over 14% of the U.S. population.[41] Of these Americans, approximately 57%, just under 25.5 million individuals, are invested in the stock market.[42] Further, in a recent survey, 75% of older households—that is, those where the survey respondent was 65 years of age or older—reported having securities investments in retirement or taxable accounts. This compares to only 61% for households where the survey respondent was younger than 65.[43] These figures represent conservative estimates of the individuals who may be better protected by this proposed rule change as it excludes any estimate of other vulnerable adults along with the anticipated continued growth of the older population.

As noted above, the proposed rule change would provide members with a way to quickly respond to situations in which they have a reasonable basis to believe that financial exploitation of vulnerable adults has occurred or will be attempted. The proposed rule change not only better safeguards customers, to the extent that members today do not provide additional protections for specified adults, but also better protects those members that are already doing so. FINRA believes that the proposed rule change

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41 See Aging Statistics, U.S. Department of Health and Human Services Administration.

42 See Gallup 2013 Economy and Personal Finance survey at http://www.gallup.com/poll/162353/stock-ownership-stays-record-low.aspx.

43 See FINRA Investor Education Foundation's 2015 National Financial Capability Study (State-by-State Survey) at http://www.usfinancialcapability.org/.

would protect investors by relieving members from FINRA rules that might otherwise discourage members from exercising discretion to protect customers through placing a temporary hold on disbursements of funds or securities. Such a hold, combined with notifying a trusted contact person, also may assist these customers in stopping unwanted disbursements and better protecting themselves from financial exploitation.

FINRA does not believe that the proposed rule change will impose undue operational costs on members. The proposed amendments to Rule 4512 would require members to attempt to collect the name and contact information for a trusted contact person at the time of account opening or, with respect to existing accounts, in the course of the member's routine and customary business. Members also would incur additional responsibilities to provide disclosure about the member's right to share certain personal information with the customer's trusted contact person.

While FINRA recognizes that there will be some operational costs to members in complying with the proposed trusted contact person requirement, FINRA has lessened the cost of compliance by not requiring members to notify the trusted contact person of his or her designation as such. Furthermore, the proposed rule change would permit a member to deliver the disclosure and notification required by Rule 4512 or 2165 to trusted contact persons in paper or electronic form thereby giving the member alternative methods of complying with the requirements.

In addition, there may be impacts with respect to legal risks and attendant costs to members that choose to rely on the proposed rule change in placing temporary holds on disbursements, although the direction of the impact is ambiguous. The proposed rule change may provide some legal protection to members if they are sued for withholding disbursements where there is a reasonable belief of financial exploitation as they can point to the rule as a rationale for their actions. At the same time, while proposed Rule 2165 creates no obligation to withhold disbursements where financial exploitation may be occurring or to refrain from opening or maintaining an account where no trusted contact person is identified, the proposed rule change might serve as a rationale for a private action against members that do not withhold disbursements when there is a reasonable belief of financial exploitation. To reduce the latter risk, proposed Rule 2165 explicitly states that it provides members with a safe harbor from FINRA Rules 2010, 2150 and 11870 when members exercise discretion in placing temporary holds on disbursements of funds or securities, but does not require members to place such holds.

To the extent that members today have reasons to suspect financial exploitation of their customers, they may make judgments with regard to withholding disbursements of funds or securities. As such, these members may already face litigation risk with regard to their actions, whether or not they choose to disburse funds or securities, and without the benefit of a rule that supports their actions.

In developing the proposed rule change, FINRA considered several alternatives to help to ensure that it is narrowly tailored to achieve its purposes described previously without imposing unnecessary costs and burdens on members or resulting in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change addresses many of the concerns noted by commenters in response to the proposal published for public comment in Regulatory Notice 15-37 ("Notice 15-37 Proposal").

First, the Notice 15-37 Proposal would have prohibited a person who is authorized to transact business on an account from being designated a customer's trusted contact person under Rule 4512(a)(1)(F). Commenters raised concerns that this restriction may prohibit trustees or individuals with powers of attorney from being designated as trusted contact persons. In response to these comments, FINRA agrees that prohibiting persons authorized to transact business on an account from being designated a trusted contact person could present an overly restrictive burden on some customers. Accordingly, FINRA has proposed removing the prohibition on trusted contact persons being authorized to transact business on an account so as to permit joint accountholders, trustees, individuals with powers of attorney and other natural persons authorized to transact business on an account to be designated as trusted contact persons.

Second, under the Notice 15-37 Proposal, the temporary hold on disbursements of funds or securities would have expired not later than 15 business days after the date that the hold was initially placed, unless sooner terminated or extended by an order of a court of competent jurisdiction. Provided that the member's internal review of the facts and circumstances supported the reasonable belief of financial exploitation, the Notice 15-37 Proposal would have permitted the temporary hold to be extended for an additional 15 business days, unless sooner terminated by an order of a court of competent jurisdiction. FINRA has proposed revising the time periods to up to 15 business days in the initial period and up to 10 business days (down from 15 business days) in any subsequent period. The shortened overall period responds to commenters' concerns about disbursement delays and better aligns proposed Rule 2165 with the NASAA model. The proposed subsequent period of up to 10 business days provides members with an additional period to address the issue if concerns about financial exploitation exist after the initial period, during which time the member must contact account holders and perform an appropriate investigation. FINRA believes that the proposed time periods are appropriately tailored to provide members with an adequate time period to address concerns about financial exploitation, while also responding to commenters' concerns about disbursement delays.

Third, the Notice 15-37 Proposal incorporated the concept of the temporary hold being terminated or extended by an order of a court of competent jurisdiction. In response to comments, FINRA agrees that the Notice 15-37 Proposal may be considered overly narrow in not permitting temporary holds to be terminated or extended by a state regulator or agency of competent jurisdiction in addition to a court of competent jurisdiction. In light of the important role of state regulators and agencies in dealing with financial exploitation, FINRA has revised proposed Rule 2165 to incorporate the concept of a temporary hold being terminated or extended by a state regulator or agency in addition to a court of competent jurisdiction.

Fourth, the Notice 15-37 Proposal would have required a qualified person to place a temporary hold pursuant to proposed Rule 2165. Commenters suggested that the member should place a temporary hold, not the qualified person. In response to comments, FINRA has revised proposed Rule 2165 to provide that the member would place a hold under the rule. As revised, proposed Rule 2165 also would require that a member's written supervisory procedures identify the title of each person authorized to place, terminate or extend a temporary hold on behalf of the member pursuant to Rule 2165, and that any such person be an associated person of the member who serves in a supervisory, compliance or legal capacity for the member. In addition, proposed Rule 2165 would require that a member's records include the name and title of the associated person that authorized the temporary hold on a disbursement. FINRA believes that the revised proposed rule change is appropriately tailored to apply the obligations at the member-level, while preserving a role for associated persons serving in a supervisory, compliance or legal capacity in placing, terminating or extending the hold on behalf of the member.

Fifth, the Notice 15-37 Proposal would have required that the supervisory, compliance or legal capacity be "reasonably related to the account" in question. Commenters raised concerns over how they should determine whether the capacity was reasonably related to the account, citing in particular some members' practice of using a centralized group to respond to senior or fraud issues. After considering these comments, FINRA is now proposing to eliminate the requirement that the supervisory, compliance or legal capacity be "reasonably related to the account."

Sixth, under the Notice 15-37 Proposal, if the trusted contact person was not available or the member reasonably believed that the trusted contact person was involved in the financial exploitation of the specified adult, the member would have been required to contact an immediate family member, unless the member reasonably believed that the immediate family member was involved in the financial exploitation of the specified adult. Some commenters raised operational and privacy concerns regarding disclosing information to an immediate family member who the customer did not designate as a trusted contact person. In response to comments, FINRA has proposed removing the requirement to contact an immediate family member under proposed Rule 2165.

For these reasons, FINRA believes that the proposed rule change would strengthen FINRA's regulatory structure and provide additional protection to investors without imposing any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

The proposed rule change was published for comment in Regulatory Notice 15-37 (October 2015). FINRA received 40 comment letters in response to the Notice 15-37 Proposal. A copy of Notice 15-37 is attached as Exhibit 2a. Copies of the comment letters received in response to Notice 15-37 are attached as Exhibit 2c.[44] The comments and FINRA's responses are set forth in detail below.

General Support and Opposition to the Notice 15-37 Proposal

Twenty-seven commenters supported FINRA's efforts to protect seniors and other vulnerable adults but did not support all aspects of the proposal.[45] Chambers supported the proposal as promoting investor protection and preventing fraud in customer accounts. Twelve commenters raised significant concerns about the proposal.[46]

FINRA has considered the concerns raised by commenters and, as discussed in detail below, has addressed many of the concerns noted by commenters in response to the Notice 15-37 Proposal. Seniors are constantly subjected to a spectrum of exploitation

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[44] See Exhibit 2b for a list of abbreviations assigned to commenters.

[45] See Cowan, IJEC, NAELA, CFA Institute, GSU, Commonwealth, NAPSA, ICI, PIABA, CAI, Cetera, Lincoln, Miami Investor Rights Clinic, PIRC, AARP, Wells Fargo, NASAA, FSI, SIFMA, Coughlin, Yaakov, IRI, First U.S. Community Credit Union, NAIFA, Alzheimer's Assoc., BDA and GWFS.

[46] See FSR, FIBA, Thomson, Girdler, Christian Financial Services, Rich, Stoehr, Ros, Hayden, Anderson, Liberman and Pisenti.

scams, including scams centered on financial exploitation.[47] FINRA believes that the proposed rule change is needed to provide members with a defined way to respond to situations where there is a reasonable belief of financial exploitation of seniors and other vulnerable adults, including the ability to share customer information with a trusted contact person. Furthermore, the proposed rule change would promote investor protection by providing members with a safe harbor from FINRA rules that might otherwise discourage them from exercising discretion to protect customers through placing a temporary hold on disbursements of funds or securities.

As noted above, studies indicate that financial exploitation is the most common form of elder abuse and is a growing concern.[48] A member's relationship with its customers and its knowledge of customers' accounts and financial situations may enable the member to detect unusual account activity or other indicators of possible financial exploitation. However, due to uncertainty about the ability to place holds on disbursements under FINRA rules or privacy-related concerns about sharing customer information, members may be unsure how to proceed when there is a reasonable belief of financial exploitation.

Safe Harbor

Proposed Rule 2165 would provide members with a safe harbor from FINRA Rules 2010, 2150 and 11870 when members exercise discretion in placing temporary

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[47] See, e.g., New York State Elder Abuse Prevention Study (stating that financial exploitation was the most common form of mistreatment self-reported by study respondents); and National Adult Protective Services Association: Policy & Advocacy – Elder Financial Exploitation (discussing the widespread nature of financial exploitation of seniors and vulnerable adults) available at http://www.napsa-now.org/policy-advocacy/exploitation/.

[48] See supra notes 3 and 6.

holds on disbursements of funds or securities from accounts of specified adults under the circumstances denoted in the Rule.

FSI supported providing a safe harbor when members choose to place temporary holds on disbursements of funds or securities from the account of a specified adult. CFA Institute supported providing a safe harbor, but stated that FINRA should encourage, not just permit, members to make use of the safe harbor. Rather than providing a safe harbor when members choose to place temporary holds, three commenters supported requiring members to place temporary holds where there is a reasonable belief of financial exploitation.[49] PIABA further supported penalizing members for willfully ignoring evidence of financial exploitation.

The proposed rule change retains the approach in the Notice 15-37 Proposal. FINRA believes that a member can better protect its customers from financial exploitation if the member can use its discretion in placing a temporary hold on a disbursement of funds or securities from a customer's account.

Other commenters supported expanding the scope of the safe harbor. CAI supported expanding the scope of the safe harbor to explicitly extend to situations in which: (1) a name and contact information for a trusted contact person has not been obtained for an existing account; and (2) the member was not able to obtain a name and contact information for a trusted contact person for an account. If, despite reasonable efforts, the member is unable to obtain or the customer declines to provide the name and contact information for a trusted contact person, FINRA would consider the trusted contact person to be "unavailable" for purposes of proposed Rule 2165. The

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49 See GSU, PIABA and Miami Rights Clinic.

unavailability of a trusted contact person would not preclude a member from availing itself of the safe harbor in proposed Rule 2165. Furthermore, for existing accounts, a member may avail itself of the safe harbor even if the member had not yet sought to obtain trusted contact person information in the course of its routine and customary business.

FIBA supported expanding the scope of the safe harbor to explicitly cover a decision by a member that a temporary hold is not appropriate, as well as the due diligence process leading to the decision. Similarly, SIFMA suggested that the scope of the safe harbor be extended to cover the final decision of a member that financial exploitation of a specified adult has occurred. FINRA does not interpret the proposed safe harbor from FINRA rules to cover final decisions by members that financial exploitation does or does not exist. Rather, proposed Rule 2165 provides members with a safe harbor from FINRA rules when members exercise discretion in placing temporary holds on disbursements of funds or securities from the account of a specified adult. FINRA believes that the proposal is appropriately tailored to provide members with a defined way of addressing possible financial exploitation.

SIFMA suggested that the safe harbor approach should recognize that members have the ability to develop and implement alternative protection structures under existing law (e.g., a customer’s right to voluntarily enter into an alternative protection structure through agreement with the member). The safe harbor approach in proposed Rule 2165 does not preclude members from developing or implementing alternative protection structures consistent with existing law and FINRA rules.

Two commenters requested that FINRA clarify to which rules the safe harbor would apply.[50] In response to these comments, FINRA modified proposed Rule 2165, which now explicitly states that it provides a safe harbor from FINRA Rules 2010 (Standards of Commercial Honor and Principles of Trade), 2150 (Improper Use of Customers' Securities or Funds; Prohibition Against Guarantees and Sharing in Accounts) and 11870 (Customer Account Transfer Contracts).

Three commenters supported extending the safe harbor protection of proposed Rule 2165 to associated persons of the member.[51] Proposed Rule 2165 would provide a safe harbor from FINRA rules for members and their associated persons when placing temporary holds on disbursements in accordance with the Rule.

BDA suggested that any associated person that acted in good faith not be subject to complaints reportable on Form U4 (Uniform Application for Securities Industry Registration or Transfer). The proposed safe harbor from FINRA rules would not extend to complaints about an associated person that are reportable on Form U4. An associated person may respond to any such complaints on Form U4, including with an explanation of actions taken pursuant to proposed Rule 2165. The proposed safe harbor from FINRA rules also would not extend to reporting required pursuant to FINRA Rule 4530 (Reporting Requirements), although FINRA would consider whether a member or associated person had acted consistent with the proposed rule when FINRA assesses reported information about a hold on a disbursement.

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50 See CAI and SIFMA.

51 See Cetera, NAIFA and BDA.

NAIFA suggested that the reference to the safe harbor from FINRA rules be moved out of Supplementary Material and into the body of proposed Rule 2165. Because Supplementary Material is part of the rule, FINRA declines to move the reference as requested.

Alternative Approaches

FINRA requested comment in the Notice 15-37 Proposal regarding approaches other than the proposed rulemaking that FINRA should consider. Two commenters suggested that FINRA adopt a principles-based approach that would allow a member to develop policies and procedures to fit its business model.[52] FINRA declines to make the suggested change. The safe harbor approach in proposed Rule 2165 is optional for members. Moreover, FINRA believes that the safeguards outlined in the safe harbor approach are important so that the ability to place temporary holds is not abused.

Liberman suggested that FINRA consider alternatives to the proposed rule change, such as working more closely with authorities that are knowledgeable about financial exploitation of seniors. FINRA has long had a strong interest in issues related to financial exploitation of seniors and other vulnerable adults. FINRA has extensive knowledge about financial exploitation of seniors, including working with members, federal and state agencies, and senior groups, and in administering the Seniors Helpline. Based on that information, FINRA believes that the ability to place temporary holds on disbursements is an important tool to guard against financial exploitation of seniors and other vulnerable adults.[53]

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52 See FSR and Lincoln.

53 See also supra note 9 (regarding state laws) and NASAA model.

Pisenti suggested establishing a government hotline for members to provide information about customers and allowing the hotline's staffers to address the situation, including providing a reasonable time to delay disbursements under the guidance of the staffers. Certain states require reporting of suspected financial exploitation to adult protective services or another agency, and FINRA expects members to comply with these state reporting requirements. However, with the right tools, members may be able to more effectively serve as the first line of defense against financial exploitation of seniors and other vulnerable adults. As discussed above, financial exploitation can occur suddenly and cause irreversible damage to customers' assets if action is not taken before funds or securities are disbursed. The proposed rule change would thus provide members with a critical tool to further protect customers from financial exploitation by explicitly allowing members to place temporary holds on disbursements of funds or securities consistent with the rule's requirements.

Anderson suggested requiring that members monitor accounts of senior customers for possible fraud rather than permitting members to place temporary holds on disbursements. FINRA recognizes that allowing members to place temporary holds on disbursements of funds or securities may be viewed as a significant action. Accordingly, the proposed rule change would impose numerous safeguards to help ensure that temporary holds are used only in appropriate circumstances and for the protection of customers. FINRA believes that members understand the problem of financial exploitation and will act to address potential financial exploitation of customers. A temporary hold would halt a potentially fraudulent disbursement or other problematic situation quickly, before significant harm to the customer occurs.

Reasonable Belief of Financial Exploitation

The proposed rule change would permit members to place a temporary hold on disbursements of funds or securities where there is a reasonable belief of financial exploitation of a specified adult. Cetera requested guidance as to what would constitute a reasonable belief of financial exploitation. Ros commented that the reasonable belief standard is vague.

Other commenters suggested alternatives to the reasonable belief standard. Cowen commented that the reasonable belief standard may be too high and suggested instead “substantial suspicion” of potential fraud or abuse as the standard. To cover red flags of financial exploitation, FSR suggested an alternative standard of a “reasonable basis to suspect the customer may be the subject of financial exploitation.” AARP suggested that FINRA consider requiring members and their associated persons to act with “reasonable care.”

FINRA believes that the proposed standard is appropriate in that it permits members to use their judgment, based on their assessment of the facts, to place temporary holds without requiring actual knowledge of financial exploitation. The reasonable belief standard is present in other FINRA rules (e.g., FINRA Rules 2040 (Payments to Unregistered Persons) and 2111 (Suitability)). The standard also is consistent with similar state statutes and the NASAA model.

While not required by the proposed rule change, members may find it beneficial to develop their own red flags to guide the formation of a reasonable belief of financial exploitation. Among the commonly identified red flags of potential financial exploitation are: (1) attempts to transfer money to engage in commonly known fraudulent schemes (e.g., foreign lottery schemes); (2) uncharacteristic attempts to wire securities or funds, particularly with a customer who is unable to explain the attempts; (3) when a caretaker, relative, or friend of the customer requests disbursements on behalf of the customer without proper documentation; (4) abrupt increases in disbursements, particularly with a customer who is accompanied by another person who appears to be directing the disbursements; (5) attempted forgery of the customer's signature on account documentation or a power of attorney; and (6) a customer's unusual degree of fear, anxiety, submissiveness or deference related to another person. While not dispositive, red flags may be used by members to detect and prevent financial exploitation.

Three commenters suggested expanding the proposed rule change beyond financial exploitation of specified adults to permit temporary holds on disbursements of funds and securities when a customer is showing signs of diminished capacity.[54] FINRA appreciates that diminished capacity can make seniors especially vulnerable to financial exploitation and believes that the proposed rule would cover most situations involving questionable disbursements by customers suffering from such a condition. In many instances where a customer is suffering from diminished capacity and requests that a member make a potentially problematic disbursement, the member is likely to have a reasonable belief, at least initially, that financial exploitation may be occurring. For those situations where that may not be the case, FINRA recognizes that this is an important issue for future consideration.

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[54] See NAELA, Lincoln and Alzheimer's Assoc.

Definition of "Specified Adults"

The proposed rule change would define "specified adults" to include: (A) a natural person age 65 and older; or (B) a natural person age 18 and older who the member reasonably believes has a mental or physical impairment that renders the individual unable to protect his or her own interests. FINRA requested comment in the Notice 15-37 Proposal regarding whether the ages used in the definition of "specified adult" in proposed Rule 2165 should be modified or eliminated.

Two commenters suggested extending the proposed rule change to apply to all customers and not be otherwise limited.[55] Cetera suggested raising the age in the proposed definition above 65, which it believes is under the age of retirement for many customers. Other commenters suggested lowering the age in the proposed definition from 65 to 60.[56] FINRA has proposed defining specified adults to include natural persons age 65 and older. Federal agencies, FINRA and NASAA have focused on persons age 65 and older for various senior initiatives.[57] Moreover, FINRA believes that the concentration of wealth among older investors makes this group more vulnerable to financial exploitation.[58] With regard to suggestions to extend coverage to all customers, the proposed rule, as discussed above, also would apply to natural persons age 18 and older who the member reasonably believes has a mental or physical impairment that renders the individual unable to protect his or her own interest. FINRA believes that

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55 See Cowan and Thomson.

56 See IRI, Wells Fargo, NASAA and SIFMA.

57 See supra note 22. See also NASAA model.

58 See supra note 21.

these two categories of "specified adults" appropriately protect those adults who are most vulnerable to financial exploitation and that they are therefore neither over nor under inclusive in scope.

Ros commented that the application of the proposed rule change to persons age 65 and older is an unreasonable intrusion into the financial affairs of competent adults. Proposed Rule 2165 would permit placing a temporary hold only where there is a reasonable belief of financial exploitation and only with regard to a specific disbursement(s). Given these limitations, FINRA does not believe that the proposed rule change is an unreasonable intrusion into the financial affairs of customers.

NAPSA suggested revising the definition to cover natural persons age 60 and older or a natural person deemed vulnerable under a state's adult protective services statute. FINRA believes that this approach would present operational challenges for members as the customers covered by the definition would vary by jurisdiction. As such, FINRA declines to make the suggested change.

Girdler suggested that the definition of specified adult be modified to consider customer vulnerability due to circumstances beyond cognitive ability. In contrast, CAI suggested that, because of administrative challenges in implementing the definition, vulnerable adults should be removed from the definition. FINRA has proposed defining "specified adults" to include an adult who the member reasonably believes has a mental or physical impairment that renders the individual unable to protect his or her own interests. FINRA declines to omit such individuals from the definition of specified adult; however, FINRA also declines at this time to expand the definition to include additional potentially vulnerable adults. FINRA recognizes that customers who do not have a physical or mental impairment may also be vulnerable; however, the proposed rule change is intended to cover those customers most susceptible to financial exploitation.

Some commenters requested that FINRA provide guidance as to what would constitute a mental or physical impairment covered by the proposed definition.[59] Members have reasonable latitude in determining whether there is a mental or physical impairment that renders an adult unable to protect his or her own interests for purposes of the Rule. A member may base such a determination on the facts and circumstances observed in the member's business relationship with the person or on other sources of information, such as a court or government agency order.

SIFMA requested clarification as to whether the definition would cover temporary impairments, as well as permanent or chronic impairments. FINRA would consider the proposed rule change to apply to temporary, as well as permanent or chronic impairments that render an adult unable to protect his or her own interests.

NAIFA suggested revising proposed Supplementary Material .03 to Rule 2165 to provide that a member's belief of a customer's impairment shall not create an assumption or implication that the member or its associated persons are qualified to make determinations about a customer's impairment. While FINRA declines to revise the proposed Supplementary Material as suggested, FINRA does not intend proposed Rule 2165 to create an assumption or implication that a member or its associated persons are qualified to make impairment determinations beyond the limited purposes of the proposed rule. A member's relationship with its customers and its knowledge of

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59 See SIFMA, Cetera and GWFS.

customers' accounts and financial situations puts the member in a unique position to thwart possible financial exploitation. The proposal will aid members in doing so.

CAI suggested that FINRA work with state regulators to ensure consistency between the proposed rule change and state requirements for members. As discussed below, while the proposed rule change and NASAA model are not identical, FINRA and NASAA have worked together to achieve consistency where possible and appropriate.

Definition of "Qualified Person"

In the Notice 15-37 Proposal, a "qualified person" was defined to include an associated person of a member who serves in a supervisory, compliance or legal capacity that is reasonably related to an account. FINRA requested comment in the Notice 15-37 Proposal regarding whether the scope of the persons included in the definition of "qualified person" in proposed Rule 2165 be modified.

Some commenters suggested expanding the proposed definition to include all employees,[60] all associated persons[61] or all registered persons of a member.[62] GWFS suggested that the definition cover associated persons designated as qualified by the member. PIABA further suggested that, at a minimum, registered representatives should be required to report any suspicious behavior or conduct to a supervisor. FSR suggested that persons serving in a legal or compliance capacity not be included in the definition of "qualified person," as such persons would seldom witness events that would provide a reasonable belief of financial exploitation.

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[60] See NASAA.

[61] See Wells Fargo.

[62] See GSU and PIABA.

Under the proposed rule change, a member's written supervisory procedures shall identify the title of each person authorized to place, terminate or extend a temporary hold on behalf of the member pursuant to proposed Rule 2165. Furthermore, any such person shall be an associated person of a member who serves in a supervisory, compliance or legal capacity. While the benefits of preventing financial exploitation are significant to both the member and customer, placing a temporary hold on a disbursement is a serious action on the part of a member and may lead to difficult but necessary conversations with customers that could impact the member-customer relationship. Given the seriousness of placing a temporary hold on a disbursement, FINRA believes that it is reasonable to limit authority for placing holds on disbursements to a select group of individuals associated with the member and believes that persons serving in a supervisory, compliance or legal capacity are well positioned to make these determinations on behalf of the member.

The scope of proposed Rule 2165(c)(2) does not cover registered representatives who are not otherwise serving in supervisory, compliance or legal capacities. FINRA recognizes that registered representatives may often be the first persons to notice behavior or conduct indicating financial exploitation. To encourage appropriate escalation of these matters, proposed Rule 2165(c)(1) would require that a member relying on proposed Rule 2165 establish and maintain written supervisory procedures related to the escalation of matters involving the financial exploitation of specified adults. As such, FINRA believes that it is reasonable to expect a registered representative to report any suspicious behavior or conduct to a supervisor or a person serving in a compliance or legal capacity.

Some commenters suggested clarifying or eliminating the requirement in the Notice 15-37 Proposal that the associated person serve in a supervisory, compliance or legal capacity that is "reasonably related to an account."[63] In light of commenters' concerns regarding how to determine whether a person is serving in a supervisory, compliance or legal capacity that is "reasonably related to an account," FINRA has proposed eliminating the "reasonably related to an account" requirement.

To apply the obligations at the member-level, not the individual level, SIFMA suggested replacing "qualified person" with "member" in the provisions in proposed Rule 2165 related to the decision to place a temporary hold. FINRA has revised proposed Rule 2165 to provide that the member may place the hold on a disbursement, provided that the member's written supervisory procedures identify the title of each person authorized to place, terminate or extend a hold on behalf of the member and that each such person be serving in a supervisory, compliance or legal capacity for the member. In addition, proposed Rule 2165 would require that a member's records include the name and title of the associated person who authorized the temporary hold on a disbursement.

Definition of "Account"

The proposed rule change would define "account" to mean any account of a member for which a specified adult has the authority to transact business. FINRA requested comment in the Notice 15-37 Proposal regarding whether the definition of account should be expanded to include accounts for which a specified adult is a named beneficiary.

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[63] See FSR, BDA and SIFMA.

Some commenters supported expanding the definition of account to accounts for which a specified adult is a named beneficiary.[64] Commonwealth did not support expanding the definition to include accounts for which a specified adult is a named beneficiary. FINRA recognizes that members may not have current contact information for each named beneficiary. In addition, members may lack other critical information about beneficiaries that would preclude them from forming a reasonable belief that the beneficiaries are the subject of financial exploitation. Due to the operational challenges for members in applying the proposed rule to beneficiaries, FINRA has not proposed including accounts for which a specified adult is a named beneficiary.

BDA suggested excluding accounts where there is a designated guardian, custodian or power of attorney because such accounts should receive protection under FINRA rules beyond the scope of the safe harbor. If these accounts are included in the scope of the proposal, BDA suggested that members should be provided with a heightened level of protection when they suspect financial exploitation by a designated guardian, custodian or power of attorney "since the account holder themselves would have had to know that this person has transaction capacity for the account, resulting in an enhanced burden to the firm when suspicion arose." It is not clear what heightened protections the commenter suggests for members with respect to accounts where there is a designated guardian, custodian or power of attorney. As discussed above, the proposed rule does not require members to place temporary holds on disbursements of funds or securities, and FINRA does not intend to provide through the proposed rule change

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64 See IJEC, AARP and SIFMA.

additional protections on accounts where there is guardian, custodian or power of attorney.

Disbursements

The proposed rule change would permit members to place temporary holds on disbursements of funds or securities. The proposed rule change would not apply to transactions in securities. Some commenters supported extending the proposed rule change to apply to transactions in securities.[65] While the proposed rule change does not apply to transactions, FINRA may consider extending the safe harbor to transactions in securities in future rulemaking.

PIABA requested that the proposed rule change define "disbursement." PIABA also requested that FINRA clarify that the temporary hold may be placed on particular disbursement(s). FINRA would consider a disbursement to include a movement of cash or securities out of an account. In addition, a temporary hold pursuant to proposed Rule 2165 may be placed on a particular suspicious disbursement(s) but not on other, non-suspicious disbursements (e.g., member may choose to place a hold on a questionable disbursement but not on a contemporaneous regular mortgage or tax payment where there is no reasonable belief of exploitation regarding such payment).

Two commenters requested that FINRA explicitly permit temporary holds on Automated Customer Account Transfer Service ("ACATS") transfers under the proposed rule change.[66] For purposes of proposed Rule 2165, FINRA would consider disbursements to include ACATS transfers but, as with any temporary hold, a member

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65 See IRI, FSR, Lincoln, SIFMA and FSI.

66 See FSR and SIFMA.

would need to have a reasonable belief of financial exploitation in order to place a temporary hold on the processing of an ACATS transfer request pursuant to the Rule. FINRA also reminds members of the application of FINRA Rule 2140 (Interfering With the Transfer of Customer Accounts in the Context of Employment Disputes) to the extent that there is not a reasonable belief of financial exploitation.

FINRA recognizes that, depending on the facts and circumstances, placing a temporary hold on the processing of an ACATS transfer request could also lead the member to place a temporary hold on all assets in an account, for the same reasons. However, if a temporary hold is placed on the processing of an ACATS transfer request, the member must permit disbursements from the account where there is not a reasonable belief of financial exploitation regarding such disbursements (e.g., a customer's regular bill payments). FINRA emphasizes that where a questionable disbursement involves less than all assets in an account, a member may not place a blanket hold on the entire account. Each disbursement must be analyzed separately.

While supporting the proposed rule change, Yaakov requested clarification about how the proposed rule change would apply to certain types of disbursements from a customer's account. Specifically, Yaakov requested that the proposed rule change provide that disbursements would include payments from a customer's account to a customer's bank. Yaakov also requested that FINRA clarify whether a temporary hold may be placed on disbursements related to a customer's checkbook, credit card or debit card associated with a brokerage account at a member. FINRA would consider disbursements to include, among other things, questionable payments to a bank or other financial institution, credit/debit card payments or issued checks associated with a brokerage account at a member. However, members need to consider the recipient of the disbursement when determining whether there is a reasonable belief of financial exploitation. For example, a monthly disbursement to a customer's mortgage lender likely represents a lower risk of financial exploitation than a one-time, sizable disbursement to a non-U.S. person. In addition, the temporary hold is on the disbursement-level not the account-level, so that a member must permit a disbursement where there is not a reasonable belief of financial exploitation (e.g., a regular mortgage payment to a bank), but may place a temporary hold on another disbursement where there is a reasonable belief of financial exploitation.

CAI questioned whether the ability to place temporary holds on disbursements would conform to the requirements of Section 22(e) of the Investment Company Act of 1940 ("1940 Act") for redemptions of a redeemable security. CAI noted that the proposed rule change could be seen as reconcilable with the 1940 Act requirements to the extent that a disbursement request directed to a broker-dealer does not constitute a disbursement request to the issuer of a variable annuity. Section 22(e) of the 1940 Act generally prohibits registered funds from suspending the right of redemption, or postponing the date of payment or satisfaction upon redemption of any redeemable security for more than seven days after tender of such security to the fund or its agent, except for certain periods specified in that section. The safe harbor under proposed Rule 2165 applies to disbursements of proceeds and securities and does not apply to transactions, including redemptions of securities.

Most mutual fund customer accounts are serviced and record kept by intermediaries, such as broker-dealers. FINRA does not believe that a member's ability to place a hold on a disbursement of proceeds from its customer’s account under the proposed rule change creates a conflict with Section 22(e) of the 1940 Act as the mutual fund does not have a role in the disbursement from the customer’s account held by an intermediary.

In certain limited circumstances, the customer’s account may be maintained by a mutual fund’s principal underwriter. In light of the role of the principal underwriter with respect to these accounts, the ability to place a temporary hold on a disbursement of proceeds under the proposed rule change may be viewed as conflicting with Section 22(e) of the 1940 Act.

Period of Temporary Hold

Under the Notice 15-37 Proposal, the temporary hold on disbursements of funds or securities would have expired not later than 15 business days after the date that the hold was initially placed, unless sooner terminated or extended by an order of a court of competent jurisdiction. In addition, provided that the member’s internal review of the facts and circumstances supported the reasonable belief of financial exploitation, the Notice 15-37 Proposal would have permitted the temporary hold to be extended for an additional 15 business days, unless sooner terminated by an order of a court of competent jurisdiction. FINRA requested comment in the Notice 15-37 Proposal on whether the permissible time periods for placing and extending a temporary hold pursuant to proposed Rule 2165 should be modified.

Some commenters supported permitting longer time periods. IRI supported changing the time periods to 45 business days for the initial period and an additional 45 business days for any subsequent period. IRI also supported automatic extensions of the temporary hold upon notification to FINRA until such time that a court of competent jurisdiction or FINRA takes action.

First U.S. Community Credit Union commented that 15 business days may not be sufficient time for a member to obtain a court order or receive input from adult protective services. FIBA commented that the proposed time periods may not be sufficient, particularly for non-U.S. customers and suggested that FINRA create different time periods or establish different processes for non-U.S. customers. CAI suggested changing the time periods to 25 business days for the initial period to recognize the need to have adequate time at the outset and an additional 10 business days for any subsequent period.

FSR supported permitting members to place a temporary hold for any period of time within the reasonable discretion of the member or until a third party (e.g., a court of competent jurisdiction or adult protective services) notified the member that the hold has expired or subsequent events indicate that the threat of financial exploitation no longer exists.

Other commenters supported shorter time periods. AARP suggested that the temporary hold expire no later than 10 business days after the hold is placed. NASAA commented that the proposed time periods were too long. NASAA supported requiring both FINRA and state regulatory review of any extension of a temporary hold by a member.

FINRA has proposed revising the time periods to up to 15 business days in the initial period and up to 10 business days (down from 15 business days) in any subsequent period. These time periods are consistent with the NASAA model and the shortened extension period responds to commenters’ concerns about disbursement delays. The proposed extension period of up to 10 business days provides members with a longer period to address the issue if concerns about financial exploitation exist after the initial period, during which time the member must contact persons authorized to transact business on the account and trusted contact persons, as available, and perform an appropriate investigation.

CFA Institute supported giving a member the ability to extend the temporary hold for an additional period if the member's internal review supported the additional time period. FINRA has tried to strike a reasonable balance in giving members adequate time to investigate and contact the relevant parties, as well as seek input from a state regulator or agency (e.g., state securities regulator or state adult protective services agency) or a court order if needed, but also not permitting an open-ended or overly long hold period in recognition of the seriousness of placing a temporary hold on a disbursement.

SIFMA supported the proposed time periods but suggested including language permitting the expiration or extension of the hold as otherwise permitted by state or federal law, through agreement with the specified adult or their authorized representative, or in accordance with prior written instructions or lawful orders, or sooner terminated or extended by an order of a court of competent jurisdiction. SIFMA also suggested that an investigating state government regulator or agency should be able to terminate or extend a hold on a disbursement. FINRA has revised proposed Rule 2165 to incorporate the concept of a temporary hold being terminated or extended by a state regulator or agency in addition to a court of competent jurisdiction.

FINRA has not revised proposed Rule 2165 to expressly permit lifting the hold "through agreement with the specified adult or their authorized representative, or in accordance with prior written client instructions or lawful orders." While the proposed rule change would not prohibit members from lifting a hold, for example, upon a determination that there is no financial exploitation, FINRA believes that the commenter's suggested language is overly broad (e.g., allowing an authorized representative to lift the hold may enable an abuser to lift the hold and gain access to the customer's funds).

Lincoln requested that FINRA provide guidance on what members should do after the expiration of the temporary hold. Alzheimer's Assoc. requested clarification on the process for lifting or extending a temporary hold. FINRA believes that the proposed time period of up to 25 business days total is sufficient time for a member to resolve an issue. Moreover, the proposed rule change allows the time to be further extended by a court or a state regulator or agency. If a member is unable to resolve an issue due to circumstances beyond its control, there may be circumstances in which a member may hold a disbursement after the period provided under the safe harbor. A member should assess the facts and circumstances to determine whether a disbursement is appropriate after the expiration of the period provided in the safe harbor.

BDA questioned whether the proposed rule change would only permit terminating the temporary hold with an order of a court of competent jurisdiction. The proposed rule change would not prohibit a member from lifting a hold without a court order, provided that the member would have to comply with an order of a court of competent jurisdiction or of a state regulator or agency terminating or extending a temporary hold.

ICI supported limiting the number of temporary holds that a member may place on an account during a calendar year or other specified period. FINRA declines to limit the number of holds that a member may place. However, taking into account a member's size and business, FINRA would closely examine a member that places an outsized number of holds on customer accounts to determine whether there was any wrongdoing on the part of the member.

Potential Harm

Some commenters expressed concern that permitting members to place temporary holds may result in customer harm. NAPSA supported allowing members to place temporary holds where there is a reasonable belief of financial exploitation but suggested that members be required to take measures to ensure that any holds will not cause undue harm to customers (e.g., if a customer's payments are not made in a timely manner).

Some commenters questioned whether the proposed rule change would permit lifting a temporary hold if the customer disagrees with the hold.[67] Rich expressed concern that a temporary hold may result in a customer defaulting on legal or contractual obligations and supported a mechanism other than a court order for lifting the hold (e.g., the trusted contact person's approval to lift the hold). Liberman expressed concern that the proposed rule change could be abused by members in refusing to disburse funds or securities. ICI supported FINRA providing customers with recourse for lifting the temporary hold other than obtaining a court order and indicated that such recourse may limit a member's civil liability.

FINRA recognizes that placing a temporary hold on a disbursement is a serious step for a member and the affected customer. While FINRA recognizes that customers may be affected by temporary holds, the costs of financial exploitation can be significant

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[67] See Stoehr and Hayden.

and devastating to customers, particularly older customers who rely on their savings and investments to pay their living expenses and who may not have the ability to offset a significant loss over time. FINRA believes that the harm to customers of financial exploitation justifies permitting members to place temporary holds.

To minimize the potential harm to customers that may arise from unnecessarily holding customer funds, FINRA believes that members should consider the recipient of the disbursement in determining whether there is a reasonable belief of financial exploitation. As noted above, FINRA believes that members should weigh a customer's objection against other information in determining whether a hold should be placed or lifted. While not dispositive, a customer's objection and explanation may indicate to the member that the hold should be lifted.

FIBA commented that the proposed rule change does not explicitly contemplate the customer disagreeing with the temporary hold and that relying on a trusted contact person to maintain a hold may conflict with the interests of the customer. Although FINRA believes that a member may use its discretion in relying on any information provided by the trusted contact person, a member also must consider a customer's objection and explanation, as well as other pertinent facts and circumstances, in determining whether a hold should be maintained or lifted.

<u>Legal Risks</u>

FINRA requested comment in the <u>Notice</u> 15-37 Proposal regarding members' current practices when they suspect financial exploitation has occurred, is occurring, has been attempted or will be attempted, including whether the proposed rules would change members' current practices. Commenters did not provide any information regarding their current practices when financial exploitation of a customer is suspected.

FINRA also requested comment in the Notice 15-37 Proposal on members' views on any potential legal risks associated with placing or not placing temporary holds on disbursements of funds or securities at present and under the proposal. Some commenters suggested that the proposed rule change creates legal risks for members in placing or not placing a temporary hold.

Christian Financial Services objected to the proposed rule change as making "a broker responsible for the behavior of an incapacitated senior" and that such a rule "invites lawsuits and abuse." GWFS commented that placing a temporary hold under the proposed rule change allows for discretion, which causes members to be more susceptible to litigation for acting or failing to act. GWFS also commented that the proposed rule change does not provide "comprehensive immunity" from liability in a civil action.

Lincoln requested that FINRA expressly state that no private right of action is created by a member's decision to place or not place a temporary hold. Cetera commented that the safe harbor under proposed Rule 2165 may not protect members from liability under state laws. NAIFA requested that the proposed rule change provide protection from liability for reporting financial exploitation to state regulators.

On the other hand, PIABA commented that FINRA should clarify that a private right of action would exist when a member willfully ignores evidence of abuse. Yaakov requested that FINRA state that members would not be "insure[d]" for liabilities that may be created by placing a temporary hold in good faith.

FINRA believes that members today make judgments with regard to making or withholding disbursements and already face litigation risks with respect to these decisions. The proposed rule change is designed to provide regulatory relief to members by providing a safe harbor from FINRA rules for a determination to place a hold. Some states may separately provide immunity to members under state law.

To mitigate any civil claims that a member had a duty to place a temporary hold, ICI suggested that FINRA clarify in proposed Rule 2165 that: (1) no member is required by FINRA to place a temporary hold; and (2) a member's failure to place a temporary hold shall not be deemed an abrogation of the member's duties under FINRA rules. FINRA believes that Supplementary Material .01 stating that proposed Rule 2165 is a safe harbor and that the Rule does not require placing holds clearly indicates that there is not a requirement to place a hold on a disbursement.

Notifying Parties Authorized to Transact Business on the Account

Under the Notice 15-37 Proposal, proposed Rule 2165 would have required a member to provide notification of the hold and the reason for the hold to all parties authorized to transact business on the account no later than two business days after placing the hold.

PIRC supported requiring notification to all parties authorized to transact business on an account. SIFMA commented that the term "authorized to transact business on an account" is vague and can be expansive and burdensome. IRI commented that the requirement to notify all parties authorized to transact business on an account could result in a member being unable to place a temporary hold on a disbursement and suggested instead requiring that a member notify "any" party rather than "all" parties authorized to transact business on an account.

FINRA believes that each person authorized to transact business on an account should be notified that the member has placed a temporary hold on a disbursement from the account.[68] In the case of jointly held accounts, each person authorized to transact business on the account should be notified of the temporary hold on a particular disbursement.

There are a number of reasons why it is important to notify all persons authorized to transact business on the account. By reaching out to all persons authorized to transact business on an account, there is a greater likelihood of someone intervening to assist in thwarting the financial exploitation at an early stage. Moreover, persons authorized to transact business on an account would have a reasonable expectation that they would be contacted when a member places a temporary hold on a disbursement based on a reasonable belief that financial exploitation may be occurring. The notification requirement, moreover, should not impact a member's decision to place a hold as it is a post-hold obligation.

Trusted Contact Person

The proposed rule change would amend Rule 4512 to require members to make reasonable efforts to obtain the name of and contact information for a trusted contact person upon the opening of a non-institutional customer's account. In addition, under the Notice 15-37 Proposal, proposed Rule 2165 would have required the member to provide

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[68] See FINRA Rule 2090 (Know Your Customer) (requiring that members use reasonable diligence, in regard to the opening and maintenance of every account, to know (and retain) the essential facts concerning every customer and concerning the authority of each person acting on behalf of such customer).

notification of the hold and the reason for the hold to the trusted contact person, if available, no later than two business days after placing the hold.

Some commenters supported requiring members to make reasonable efforts to obtain the name and contact information for a trusted contact person, as well as notification to the trusted contact person when a temporary hold is placed pursuant to proposed Rule 2165.[69] First U.S. Community Credit Union commented that the trusted contact person may be useful to members.

Ros and SIFMA suggested that members should have the option of seeking trusted contact person information rather than requiring it under Rule 4512. FINRA is mindful of the efforts that some members may need to undertake in order to comply with a requirement that they make reasonable efforts to obtain trusted contact person information. However, the benefits to both members and investors of having trusted contact person information when serious problems arise will be far greater. And the likelihood of members encountering situations when such information is necessary will continue to increase with the aging of our population. Moreover, trusted persons can assist members in any number of ways beyond the more serious situations of, for example, financial exploitation or diminished capacity. Members may find them helpful in administering accounts (e.g., where a customer has been unresponsive to multiple contact attempts).

CAI suggested that the requirement that members make reasonable efforts to obtain the name and contact information for a trusted contact person apply only when the customer is age 55 or older. Because members may place temporary holds in situations

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69 See NAPSA, ICI, PIRC and FSI.

where financial exploitation is occurring to a customer younger than age 55 who is suffering from an incapacity, it is important that members seek to obtain trusted contact person information for all customers, not simply those age 55 or older.

Some comments related to the ability to have more than one trusted contact person. IJEC suggested revising the proposal to require more than one trusted contact person and that such persons be independent of each other. Cowan suggested the alternative approach of having a “protectors’ committee” consisting of several individuals for each account of a senior investor. SIFMA requested clarification on whether an organization or practice could be a trusted contact person and whether a customer could designate multiple contact persons. While FINRA declines to require more than one trusted contact person, the proposed rule change would not prohibit members from requesting or customers from naming more than one trusted contact person. Given the role of the trusted contact person and that the member is authorized to disclose information about the account to such person, FINRA does not believe that an organization or practice, such as a law firm or an accounting firm, could serve as the trusted contact person in the capacity intended by the proposed rule change. However, a customer could designate an attorney or an accountant as a trusted contact person.

SIFMA commented that the proposed rule change should contemplate situations where a customer orally notifies a member of the name and contact information for a trusted contact person. Rule 4512 requires that the member maintain the trusted contact person’s name and contact information, as well as the written notification to the customer that the member may contact the trusted contact person. The proposed rule change would allow members to rely on oral conversations with customers that members then document, provided that the written notification requirement of proposed Supplementary Material .06 to Rule 4512 is satisfied.

With respect to notifying the trusted contact person that a temporary hold has been placed, SIFMA suggested that FINRA adopt a voluntary reporting process that is separate from the process for placing a temporary hold under proposed Rule 2165. SIFMA's concerns are twofold: (1) potential difficulty in reaching a trusted contact person; and (2) a desire not to embarrass a customer by notifying a trusted contact person if the matter can be resolved through a discussion with the customer. Not all commenters agreed that the notification to the trusted contact person should be voluntary and some believed the requirement should be more stringent. For instance, Rich suggested a "more substantial" requirement than "attempting" to contact the trusted contact person.

Proposed Rule 2165 requires that the member notify the trusted contact person orally or in writing, which may be electronic, within two business days of placing a temporary hold. While FINRA appreciates the desire to ensure that a member actually discusses a hold with a trusted contact person, doing so may not be possible in every situation. As discussed above, FINRA would consider a member's mailing a letter, sending an email, or placing a telephone call and leaving a message with appropriate person(s) within the two-business-day period to constitute notification for purposes of proposed Rule 2165. Moreover, FINRA would consider the inability to contact a trusted contact person (e.g., an email is returned as undeliverable, a telephone number is out of service or a trusted contact person does not respond to a member's notification attempts) to mean that the trusted contact person was not available for purposes of the Rule. With regard to SIFMA's concern over potentially embarrassing a customer by being required to notify a trusted contact person, FINRA notes that a member may attempt to resolve a matter with a customer before placing a temporary hold on a disbursement without having to notify a trusted contact person.[70] However, once a member places a hold on a disbursement, FINRA believes a member should notify a trusted contact person.

Rich further commented that a member should be required to notify both the customer and the trusted contact person when the member has a reasonable belief of financial exploitation. When placing a hold on a disbursement, proposed Rule 2165 would require a member to notify all persons authorized to transact business on an account, including the customer, as well as the trusted contact person, if available. Even where a member has not placed a temporary hold on an account, however, FINRA would expect a member to reach out to a customer as one step in addressing potential financial exploitation of the customer.

FSR requested that FINRA clarify that a member is not liable if it contacts a trusted contact person designated by a customer pursuant to Rule 4512 or proposed Rule 2165, so long as the customer has not directed the member to remove or replace the trusted contact person. FINRA would consider a member contacting the trusted contact person identified by a customer to be consistent with the proposed rule change, provided that the customer had not previously directed the member to remove or replace the trusted contact person.

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70 As discussed above, FINRA's proposed amendments to Rule 4512 would permit a member to contact a trusted contact person to address, among other things, potential financial exploitation. In the context of SIFMA's concern, FINRA emphasizes that Rule 4512, as amended, would permit, but not require, a member to contact a trusted contact person about financial exploitation prior to placing a temporary hold on a disbursement. Thus, a member could resolve a matter with a customer prior to placing a hold on a disbursement without having to contact a trusted contact person.

Some commenters requested that FINRA clarify what would constitute reasonable efforts to obtain a name and contact information for a trusted contact person.[71] For purposes of the proposed rule change, FINRA would consider reasonable efforts to include actions such as incorporating a request for trusted contact person name and contact information on an account opening form or sending a letter, an electronic communication or other similar form of communication to existing customers requesting the name and contact information for a trusted contact person.

SIFMA requested that FINRA provide guidance on the appropriate place on new account forms for customers to designate a trusted contact person. Members may use their discretion in determining the appropriate place on new account forms for customers to designate a trusted contact person. Commonwealth supported the trusted contact person-related provisions and suggested that FINRA provide template language that members can use in account applications or other customer forms. If the SEC approves the proposed rule change, FINRA will make template language available for optional use by members in complying with the trusted contact person-related provisions of Rule 4512.[72]

SIFMA also requested that FINRA provide clarification as to whether the reasonable efforts requirement would apply to accounts opened after the proposed rule

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71 See CAI, FSR, BDA, GWFS and SIFMA.

72 In 2008, FINRA developed a New Account Application Template, available on FINRA's website that firms may use as a model form. See http://www.finra.org/industry/new-account-application-template. This New Account Application Template permits a customer to name a back-up contact who the member may contact. If the SEC approves the proposed rule change, FINRA will update the New Account Application Template to reflect the amendments to Rule 4512.

change becomes effective. The reasonable efforts requirement in Rule 4512 would apply to all accounts. FINRA would consider reasonable efforts for existing accounts to include asking the customer for the information when the member updates the information for the account either in the course of the member's routine and customary business or as otherwise required by applicable laws or rules.

FSR requested clarification on the role of the trusted contact person and the extent to which a member may rely on the information provided by the trusted contact person. BDA expressed concern that members could become responsible for evaluating the mental capabilities of trusted contact persons and that such capabilities could change over time. FINRA intends the trusted contact person to be a resource for a member in administering a customer's account and believes that a member may use its discretion in relying on any information provided by the trusted contact person. The proposed rule change does not make a member responsible for evaluating mental capabilities of trusted contact persons.

Requirement to Notify Trusted Contact Person of Designation

In the Notice 15-37 Proposal, FINRA stated that a member may elect to notify an individual that he or she was named as a trusted contact person; however, the proposal would not require notification. Some commenters supported requiring members to notify an individual that he or she was named as a trusted contact person.[73] Alzheimer's Assoc. supported also requiring a member to notify an individual designated as a trusted contact person if the customer later designates another individual to be his or her trusted contact

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73 See IJEC, GSU and Alzheimer's Assoc.

person. FSR suggested that the trusted contact person should be required to acknowledge his or her role at the time of designation by the customer.

The proposed rule change does not require that a member notify a trusted contact person of his or her designation. FINRA believes that the administrative burdens of requiring notification would outweigh the benefits. However, a member may elect to notify a trusted contact person of his or her designation (e.g., if the member determines that notifying the trusted contact person may be helpful in administering a customer account).

Limitations on Who Can Be a Trusted Contact Person

Under the Notice 15-37 Proposal, the proposed amendments to Rule 4512 would have required that the trusted contact person be age 18 or older and not be authorized to transact business on behalf of the account. Commonwealth supported the age limitation but suggested that FINRA revise the proposed rule to explicitly permit members to rely on the representations of the customer regarding the trusted contact person's age so that members do not have to independently verify the age. While FINRA declines to revise the proposed rule as suggested, FINRA would not expect a member to verify the age of a designated trusted contact person.

SIFMA requested clarification of the meaning of the term "not authorized to transact business on the account." Some commenters did not support the limitation on persons not authorized to transact business on behalf of the account.[74] NAELA commented that the limitation would presumably prohibit persons with powers of attorney from serving as trusted contact persons. FSR and Lincoln supported permitting

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74 See Cowan and NAELA.

individuals with powers of attorney to be trusted contact persons. Lincoln further supported permitting trustees to be trusted contact persons.

In light of the concerns raised by commenters, FINRA has proposed removing the prohibition on those authorized to transact on the account so as to permit joint accountholders, trustees, individuals with powers of attorney and other natural persons authorized to transact business on an account to be designated as trusted contact persons.

Authorization to Contact the Trusted Contact Person

Under the Notice 15-37 Proposal, the proposed amendments to Rule 4512 would have required that, at the time of account opening, a member shall disclose in writing (which may be electronic) to the customer that the member or an associated person is authorized to contact the trusted contact person. In the Notice 15-37 Proposal, FINRA requested comment on whether Rule 4512 should require customer consent to contact the trusted contact person or if customer notice is sufficient.

Some commenters questioned whether customer notice would be sufficient under the Regulation S-P exception for disclosing information to a third party with unrevoked customer consent.[75] Lincoln suggested requiring customer consent to contact the trusted contact person. Commonwealth stated that customer notice should be sufficient and that requiring customer consent could jeopardize a member's ability to protect investors. FINRA believes that disclosures to a trusted contact person pursuant to proposed Rules 2165 or 4512(a)(1)(F) would be consistent with Regulation S-P.

SIFMA requested guidance on how the disclosure requirements in proposed Supplementary Material .06 to Rule 4512 could be met (e.g., in an account agreement,

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75 See CAI, Lincoln and SIFMA.

privacy policy or other form). The proposed rule change does not mandate any particular form of written disclosure. A member has flexibility in choosing which document should include the required disclosure (e.g., in an account application or another customer form) or whether to provide the disclosure in a separate document.

Information That May Be Disclosed to a Trusted Contact Person

Under the Notice 15-37 Proposal, pursuant to proposed Supplementary Material .06 to Rule 4512, a member may disclose to the trusted contact person information about the customer's account to confirm the specifics of the customer's current contact information, health status, and the identity of any legal guardian, executor, trustee or holder of a power of attorney, and as otherwise permitted by proposed Rule 2165. In the Notice 15-37 Proposal, FINRA requested comment on whether the types of information that may be disclosed to the trusted contact person under Rule 4512 should be modified.

Some commenters supported addressing in Rule 4512 the information that may be shared by a member with a trusted contact person.[76] SIFMA further supported removing any restrictions on the information that may be discussed with a trusted contact person. IRI commented that members should have discretion to disclose to and discuss with the trusted contact person any information relevant to an investment under proposed Rule 2165. CAI supported a more general "catch all" category for information that may be disclosed to and discussed with a trusted contact person.

ICI suggested revising the proposed Supplementary Material to Rule 4512 to provide that a member is prohibited from contacting a trusted contact person except as permitted by Rule 2165 to protect the customer's privacy. GWFS commented that a

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76 See FSR, Lincoln, BDA and SIFMA.

member does not request or receive health information from customers and, if the member should have health information, it would be responsible for additional regulatory requirements.

FINRA has proposed retaining the approach in the Notice 15-37 Proposal regarding the types of information that may be disclosed to the trusted contact person under Rule 4512, with the addition of information to address possible financial exploitation. FINRA has sought to identify reasonable categories of information that may be discussed with a trusted contact person, including information that will assist a member in administering the customer's account. Given privacy considerations, FINRA does not propose to give the member absolute latitude to discuss any information with trusted contact persons. With respect to health status, while members generally do not receive health information from customers, FINRA believes it is reasonable to permit members to reach out to the trusted contact person when they are concerned about a customer's health (e.g., when a customer who is known to be frail or ill has not responded to multiple telephone calls over a period of time). FINRA also believes that members should be allowed to contact the trusted contact person to address possible financial exploitation of the customer (e.g., when the member is concerned that the customer is being financially exploited but the member has not yet decided to place a temporary hold on a particular disbursement).

Some commenters suggested including in the list of information that may be disclosed to the trusted contact person the reason for any temporary hold, as well as details about the disbursement request.[77] Proposed Supplementary Material to Rule 4512

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77 See Commonwealth and Alzheimer's Assoc.

contemplates a member contacting the trusted contact person as otherwise permitted by Rule 2165. FINRA would consider discussing the temporary hold, including the rationale for the hold, with the trusted contact person to be covered by Supplementary Material to Rule 4512.

Two commenters stated that FINRA should explicitly permit members to share information concerning an account with the financial institution that is the receiving party in an ACATS transfer.[78] SIFMA also stated that such information sharing should be permitted even if a temporary hold is not placed on a disbursement pursuant to proposed Rule 2165. As noted above, FINRA would consider disbursements to include processing of an ACATS transfer but a member would need to have a reasonable belief of financial exploitation in order to place a temporary hold on an ACATS transfer request pursuant to proposed Rule 2165. Furthermore, FINRA believes that the reasonableness of a member discussing a questionable ACATS transfer with the financial institution that is to receive the transferring assets would depend on the facts and circumstances. Members considering whether to discuss an ACATS transfer with another financial institution may wish to consider the availability of the Regulation S-P exception for allowing sharing of information in order to protect against or prevent actual or potential fraud, unauthorized transactions, claims, or other liability.[79] FINRA would consider providing guidance, as appropriate, if specific questions regarding the application of the proposed rule change to ACATS transfers arise.

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[78] See FSR and SIFMA.

[79] See 17 C.F.R §§ 248.15(a)(2)(ii).

<u>Application of Rule 4512 Requirements to Existing Accounts</u>

Consistent with the current requirements of Rule 4512, a member would not need to attempt to obtain the name of and contact information for a trusted contact person for existing accounts until such time as the member updates the information for the account either in the course of the member's routine and customary business or as otherwise required by applicable laws or rules.

Some commenters stated that members should be required to request the name and contact information for a trusted contact person for existing accounts not later than 12 months after the adoption of the proposed rule change.[80] NASAA supported requiring members to obtain the name and contact information for a trusted contact person from customers and to update the information on a regular basis in the manner in which members collect and maintain suitability information. CFA Institute supported requiring members to update trusted contact person-related information during periodic reviews and when a customer's situation changes. Commonwealth stated that members should be able to rely on existing procedures for updating accounts pursuant to Rule 17a-3 under the Exchange Act. Commonwealth further stated that it should be sufficient to indicate that no trusted contact person-related information has been provided to the member and that the customer should contact the member if he or she would like to provide the name of and contact information for a trusted contact person.

With respect to an account that was opened pursuant to a prior FINRA rule, FINRA Rule 4512(b) requires members to update the information for such an account in compliance with FINRA Rule 4512 whenever they update the account information in the

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80 <u>See</u> Cowan and Alzheimer's Assoc.

course of their routine and customary business, or as required by other applicable laws or rules. With respect to any account that was opened pursuant to a prior FINRA rule, a member shall provide the required disclosure in writing, which may be electronic, when updating the information for the account pursuant to Rule 4512(b) either in the course of the member's routine and customary business or as otherwise required by applicable laws or rules. Such an approach promotes greater uniformity and consistency of account record information, while also minimizing burdens to members with respect to updating information for existing accounts. Applying the same standard to trusted contact person information would ensure that members use reasonable efforts to obtain such information for existing accounts in the course of their routine business, while not imposing undue burdens on firms to immediately contact all existing accountholders.

Immediate Family Member

Under the Notice 15-37 Proposal, if the trusted contact person is not available or the member reasonably believes that the trusted contact person has engaged, is engaged or will engage in the financial exploitation of the specified adult, the member would have been required to contact an immediate family member, unless the member reasonably believes that the immediate family member has engaged, is engaged or will engage in the financial exploitation of the specified adult.

Some commenters raised privacy concerns regarding disclosing information to an immediate family member. GSU commented that an immediate family member who has not been designated as a customer's trusted contact person should be contacted only for the purpose of gathering information about the identity of a guardian, executor, trustee or holder of a power of attorney so as to ensure that the customer's personal and private information is not disclosed to persons that the customer does not wish to receive the information. ICI suggested that contacting an immediate family member or other person about an account without the customer's explicit approval would not be permitted by Regulation S-P. NASAA stated that contacting immediate family members implicates privacy concerns and may exacerbate the problems that the proposed rule change seeks to address. IRI supported giving a member discretion not to contact an immediate family member where the member may have reason to believe that the customer would not want the family member contacted. Some commenters suggested including "immediate family members" in the proposed Supplementary Material .06 to Rule 4512 to make it clear that such persons may be contacted under proposed Rule 2165.[81]

Some commenters expressed operational concerns with contacting an immediate family member. Alzheimer's Assoc. commented that it is unclear how a member would identify an immediate family member to contact in the event that the trusted contact person was unavailable. FSR suggested an alternative approach that where time is of the essence, a member may in its discretion contact an immediate family member in instances where the trusted contact person is not immediately available.

Some commenters supported looking beyond immediate family members to provide members with discretion regarding whom to contact about a customer's account.[82] FSI suggested permitting members to also contact an individual who shares a trusted relationship with a customer (e.g., an attorney or an accountant).

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81 See CAI and Wells Fargo.

82 See Lincoln and Wells Fargo.

Under the Notice 15-37 Proposal, the term "immediate family member" was defined to include a spouse, child, grandchild, parent, brother or sister, mother-in-law or father-in-law, brother-in-law or sister-in-law, and son-in-law or daughter-in-law, each of whom must be age 18 or older. SIFMA suggested revising the definition to include a customer's niece or nephew.

Due to the privacy and operational challenges noted by commenters, FINRA has proposed removing the requirements in the Notice 15-37 Proposal with respect to notifying an immediate family member when a temporary hold is placed. While a customer may name an immediate family member as his or her trusted contact person, the proposed rule change would not require that a member notify an immediate family member who is not authorized to transact business on the customer's account or who has not been named a trusted contact person. However, the proposed rule change would not preclude a member from contacting an immediate family member or any other person if the member has customer consent to do so. Moreover, contacting such persons may be useful to members in administering customer accounts.

Notification Period

Under the Notice 15-37 Proposal, proposed Rule 2165 would have required the member to provide notification of the hold and the reason for the hold to all parties authorized to transact business on the account and, if available, the trusted contact person, no later than two business days after placing the hold. In the Notice 15-37 Proposal, FINRA requested comment on whether the two-business-day period for notifying the appropriate parties under proposed Rule 2165 is appropriate. If not, FINRA requested comment on what circumstances may warrant a shorter or longer period.

Commenters suggested extending the period from two business days to four business days,[83] five business days[84] and seven business days.[85] Commonwealth commented that the two-business-day period may be insufficient. Commonwealth suggested that if a member is unable to reach the trusted contact person or an immediate family member within two business days, then the member should have up to ten business days for notification. Alzheimer's Assoc. suggested reducing the period from two business days to 24 hours.

Other commenters suggested not requiring notification within a specific time period. Wells Fargo suggested requiring notification "promptly" or "as is reasonable under the circumstances." Because the two-business-day period may be insufficient, SIFMA suggested requiring "reasonable efforts" to notify the appropriate parties without imposing a specific time period.

Given the need for urgency in dealing with financial exploitation, FINRA has proposed retaining the requirement to notify all parties authorized to transact business on an account not later than two business days after the hold is placed. To ease members' administrative and operational burdens, FINRA has proposed eliminating the requirement to contact an immediate family member under proposed Rule 2165.

Commenters suggested clarifying when the time period would begin and end.[86] Many FINRA rules require calculating business days. For purposes of calculating the

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83 See CAI.

84 See FSR and FSI.

85 See IRI.

86 See CAI and FSR.

two-business-day period within which a member must provide notification of the temporary hold to parties authorized to transact business on the account, and consistent with the approach taken in FINRA Rule 9138(b) (Computation of Time), the day when the member places the temporary hold should not be included, so the two-business-day period would begin to run on the next business day and would thus run until the end of the second business day thereafter. For example, assuming no intermediate federal holiday, if a member placed a temporary hold on a Monday, the two-business-day period would run until the end of Wednesday. If a member placed a hold on a Friday, then the two-business-day period would run until the end of the following Tuesday, again assuming no intermediate federal holiday. FINRA intends this same approach to be used for the calculation of the period for the temporary hold under proposed Rule 2165.

Internal Review

Under the Notice 15-37 Proposal, if a member places a temporary hold, proposed Rule 2165 would require the member to immediately initiate an internal review of the facts and circumstances that caused the qualified person to reasonably believe that financial exploitation of the specified adult has occurred, is occurring, has been attempted or will be attempted.

PIRC supported requiring members to immediately initiate an internal review. SIFMA commented that the requirement to immediately initiate an internal review is unnecessarily duplicative because the proposed rule change already tacitly requires members to initiate an internal review prior to placing the temporary hold. CAI suggested requiring members to initiate an internal review as soon as reasonably practicable. FINRA intends the requirement to immediately initiate an internal review to signify that a member should not delay in reviewing the appropriateness of the temporary hold and determining appropriate next steps. Moreover, because a member's internal review is part of determining appropriate next steps once a hold has been placed, FINRA does not believe that the requirement is unnecessarily duplicative of any other requirements in the proposed rule change.

FSR requested that FINRA clarify the scope of the internal review requirement, including what factors should be considered and the nature of the inquiry. FINRA believes that the appropriate internal review will depend on the facts and circumstances of the situation. Members have discretion in conducting a reasonable internal review under proposed Rule 2165.

Policies and Procedures

Proposed Rule 2165 would require a member that anticipates using a temporary hold in appropriate circumstances to establish and maintain written supervisory procedures reasonably designed to achieve compliance with the Rule, including, but not limited to, procedures on the identification, escalation and reporting of matters related to financial exploitation of specified adults. In the Notice 15-37 Proposal, FINRA requested comment on whether to mandate specific procedures for escalating matters related to financial exploitation.

Lincoln commented that FINRA should not prescribe or mandate any specific procedures for escalating matters. On the other hand, Miami Investor Rights Clinic supported requiring all members to establish written supervisory procedures for all registered persons related to the identification and escalation of matters involving financial exploitation.

FINRA has proposed retaining the approach in the Notice 15-37 Proposal requiring policies and procedures reasonably designed to achieve compliance with proposed Rule 2165. FINRA is committed to protecting seniors and other vulnerable adults and believes that the proposed rule change would assist members in addressing financial exploitation of such individuals. FINRA recognizes however that placing holds on disbursements, even on a temporary basis, could have negative implications for the customer's financial situation and the member-customer relationship. In light of the complexities surrounding financial exploitation and to help protect against potential misapplication of the proposed rule, FINRA believes that members must have written supervisory procedures reasonably designed to achieve compliance with proposed Rule 2165. Such procedures would help to ensure that members give careful consideration to their responsibilities in identifying and escalating matters related to financial exploitation of specified adults and that there is a consistent approach across the member's organization.

Training

Under the Notice 15-37 Proposal, the proposal would also require members to develop and document training policies or programs reasonably designed to ensure that registered persons comply with the requirements of the Rule. Some commenters supported requiring broad training of the members' staffs regarding the risks of financial exploitation.[87] Miami Investor Rights Clinic supported requiring members to establish training policies and programs for all registered persons.

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[87] See NAELA and AARP.

GSU suggested that FINRA oversee training policies or programs related to proposed Rule 2165, including the creation of continuing education requirements for registered persons and web-based training for all qualified persons. Commonwealth supported FINRA providing guidance on appropriate training of registered persons related to proposed Rule 2165, including FINRA-created training modules.

FINRA has proposed retaining the approach in the Notice 15-37 Proposal to require members to develop and document training policies or programs. FINRA has modified the requirement to mandate training for associated persons – not just registered persons. Because the proposed rule change permits an associated person of the member who serves in a supervisory, compliance or legal capacity for the member to place, terminate or extend a temporary hold on behalf of the member, FINRA believes that it is appropriate to require members to develop and document training policies or programs reasonably designed to ensure that associated persons – not just registered persons – comply with the proposed rule.

FINRA believes that the requirement will further strengthen compliance by members and associated persons that anticipate placing holds on disbursements of funds or securities consistent with the requirements of the Rule. The proposed rule change provides members with reasonable discretion in determining how best to structure such training policies or programs. FINRA has developed material for the Continuing Education Regulatory Element Program that addresses the financial exploitation of senior investors. FINRA will consider whether to develop additional continuing education content specifically addressing financial exploitation of seniors and providing additional guidance to members, as appropriate.

<u>Reporting</u>

Some commenters supported revising the proposal to require members to report financial exploitation to local adult protective services and law enforcement.[88] Some commenters also supported revising the proposal to require members to report financial exploitation to FINRA.[89] SIFMA also supported providing members with explicit permission to share records with local adult protective services and law enforcement.

CAI commented that FINRA needs to provide a more definitive mechanism under which members may refer a matter to the proper agency or governmental body for handling. NAPSA supported requiring members to report financial exploitation to adult protective services under the Regulation S-P exceptions for allowing sharing of information in order to prevent actual or potential fraud and to comply with authorized civil investigations. FSR suggested that the proposed rule change should permit members to petition a government agency for a determination concerning a proposed disbursement, which would allow the applicable jurisdiction's adult protective services to intervene. FSI suggested that requiring the reporting of potential financial exploitation or exposing members to potential civil liability will lead to members reporting even the slightest suspicions to regulators, thereby over-taxing regulatory resources.

The proposed rule change does not require that members report a reasonable belief of financial exploitation to a state or local authority. Some states mandate such reporting by financial institutions, including broker-dealers. Given the varying and evolving reporting requirements under state law, FINRA believes that states are well

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88 <u>See</u> NAELA, PIABA, Miami Investor Rights Clinic, NAIFA, PIRC, Alzheimer's Assoc., AARP, NASAA and SIFMA.

89 <u>See</u> PIRC and NASAA.

positioned to determine whether a broker-dealer or any other entity has satisfied its reporting requirements under state law. FINRA would expect members to comply with all applicable state requirements, including reporting requirements.[90]

Alzheimer's Assoc. supported requiring members to document any referral to an external agency, as well as the final outcome of any holds placed. Because the proposed rule change would not require referring matters to an external agency, proposed Rule 2165 does not require members to document any such referrals. However, FINRA would expect members to comply with all applicable state recordkeeping requirements.

Costs

In the Notice 15-37 Proposal, FINRA requested comment on the costs that may result from the proposed rules. Commonwealth stated that it will need to make changes to existing account profile systems that will require development time, at an estimated cost of approximately $40,000. Wells Fargo stated that it will need to incorporate the trusted contact person into the account opening process and make other necessary system updates, at an estimated cost of approximately $1.25 million.

Other commenters indicated that the proposed rule change will result in costs to members but did not attempt to quantify such costs. GWFS commented that in order to capture, retain and periodically update trusted contact person information, systems changes will be required resulting in additional costs to the member. FSR suggested that the proposed recordkeeping requirement will result in significant costs for members.

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90 See Interagency Guidance clarifying that reporting suspected financial abuse to appropriate local, state, or federal agencies does not, in general, violate the privacy provisions of the Gramm-Leach-Bliley Act or its implementing regulations, including Regulation S-P.

FSR suggested that FINRA’s economic impact assessment present findings that show evidence that a customer designating a trusted contact person is, or is likely to be, an effective mitigant against the financial exploitation the proposed rule change is designed to address.

PIRC suggested that FINRA seek more information on the logistics and costs of expanding the proposed rule change to apply to all investors or to otherwise expand the definition of “specified adults.”

As discussed in greater detail in Item 4 of this filing, FINRA does not believe that the proposed rule change will impose undue operational costs on members. While FINRA recognizes that there will be some operational costs to members in complying with the proposed trusted contact person requirement, FINRA has lessened the cost of compliance by not requiring members to notify the trusted contact person of his or her designation as such. Furthermore, the proposed rule change would permit a member to deliver the disclosure and notification required by Rule 4512 or Rule 2165 to trusted contact persons in paper or electronic form thereby giving the member alternative methods of complying with the requirements.

FIBA suggested that the reasonable costs associated with due diligence and investigatory processes, including responding to inquiries from the trusted contact person, immediate family members and other parties, should be borne by the customer and chargeable against the relevant account(s). FINRA would closely examine the reasonableness of a member charging a customer for costs associated with placing a temporary hold on the customer’s account.

Additional Privacy Considerations

FIBA commented that the disclosure of confidential information pursuant to the proposed rule change may run afoul of U.S. and foreign privacy laws. The proposed rule change addresses Regulation S-P requirements. Members will need to separately consider any applicable non-U.S. privacy requirements in determining whether to place temporary holds consistent with the requirements of proposed Rule 2165.

CAI questioned whether the Regulation S-P exception for disclosure of information pursuant to a law or rule would be available if proposed Rule 2165 permits, but does not require, a temporary hold. FINRA believes that a member disclosing information pursuant to proposed Rule 2165 would be consistent with the Regulation S-P exception for disclosures to comply with federal, state, or local laws, rules and other applicable legal requirements.

Additional Suggestions for Clarification or Guidance

CAI requested guidance on the status of funds during the time of the temporary hold and, in particular, on the obligations of different parties related to the temporary hold on disbursements of funds related to a variable annuity contract withdrawal or surrender, or how to address such funds when the member is not authorized to hold customer funds. Proposed Rule 2165 applies to disbursements of funds or securities out of a customer account and does not apply to redemptions of securities or other transactions. As such, FINRA does not anticipate a member that is not authorized to hold funds being required to hold funds under the proposed rule change. Rather, while the temporary hold on a disbursement is in effect, the funds or securities would remain in a customer's account and would not be released.

GWFS requested clarification as to the application of the proposed rule to members primarily involved with the retirement plan business, such as where a retirement plan sponsor's relationship is with a financial intermediary unaffiliated with the member but the member provides recordkeeping services. GWFS questioned which broker-dealer is "responsible for rule compliance."

More than one financial institution may be providing services in some arrangements and business models (e.g., retirement plans or introducing and clearing firm arrangements). In such arrangements, the financial institution that has a reasonable belief that financial exploitation is occurring may not hold the assets that are subject to the disbursement request. For example, with respect to introducing and clearing firm arrangements, an introducing firm may make the determination that placing a temporary hold pursuant to the proposed rule change is appropriate. The clearing firm may then place the temporary hold at the direction of and in reasonable reliance on the information provided by the introducing firm. FINRA recognizes that members making a determination or recommendation to place a hold on a disbursement may not be in the position to place the actual hold on the funds or securities.

Coordination with Other Regulators

As noted above, NASAA has separately proposed model legislation relating to financial exploitation of seniors and other vulnerable adults. NASAA stated that it hopes that the final outcomes of the FINRA proposal and the NASAA model are complementary. Some commenters recommended consistency between the FINRA proposal and NASAA model as being in the best interests of both investors and financial institutions.[91] Other commenters stated that FINRA should coordinate with NASAA and state regulators to develop a cohesive framework.[92]

While the proposed rule change and NASAA model are not identical, FINRA and NASAA have worked together to achieve consistency where possible and appropriate. Both the proposed rule change and NASAA model would apply to accounts of natural persons age 65 and older and would permit temporary holds of up to 25 business days, including the initial and subsequent periods. Proposed Rule 2165 also would incorporate the concept of a temporary hold being terminated or extended by a state regulator or agency or court of competent jurisdiction.

Implementation Period

Some commenters requested that if the proposed rule change is approved, FINRA allow at least 12 months for members to implement the requirements so as to provide adequate time to make updates to members' systems and written supervisory procedures.[93] If the proposed rule change is approved, FINRA will consider the need for members to make necessary changes to their systems, forms, and supervisory procedures in establishing an implementation date for the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date

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91 See ICI, Lincoln, AARP and FSI.

92 See FSR, IRI, BDA and SIFMA.

93 See Commonwealth, CAI and Wells Fargo.

if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/sro.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-FINRA-2016-XXX on the subject line.

Paper Comments:

- Send paper comments in triplicate to Robert W. Errett, Deputy Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-FINRA-2016-039. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (http://www.sec.gov/rules/sro.shtml). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-FINRA-2016-039 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[94]

Robert W. Errett
Deputy Secretary

[94] 17 CFR 200.30-3(a)(12).

Exhibit 2a

Regulatory Notice 15-37

October 2015

Financial Exploitation of Seniors and Other Vulnerable Adults

FINRA Requests Comment on Rules Relating to Financial Exploitation of Seniors and Other Vulnerable Adults

Comment Period Expires: November 30, 2015

Executive Summary

FINRA seeks comment on proposed rules addressing the financial exploitation of seniors and other vulnerable adults. FINRA is proposing: (1) amendments to FINRA Rule 4512 (Customer Account Information) to require firms to make reasonable efforts to obtain the name of and contact information for a trusted contact person for a customer's account; and (2) the adoption of new FINRA Rule 2165 (Financial Exploitation of Specified Adults) to permit qualified persons of firms to place temporary holds on disbursements of funds or securities from the accounts of specified customers where there is a reasonable belief of financial exploitation of these customers.

The proposed rule text is available in Attachment A.

Questions regarding this *Notice* should be directed to:

- James S. Wrona, Vice President and Associate General Counsel, Office of General Counsel (OGC), at (202) 728-8270;
- Ann-Marie Mason, Director and Counsel, Shared Services, at (202) 728-8231; or
- Jeanette Wingler, Assistant General Counsel, OGC, at (202) 728-8013.

Notice Type
- Request for Comment

Suggested Routing
- Compliance
- Legal
- Operations
- Registered Representatives
- Senior Management

Key Topics
- Customer Accounts
- Financial Exploitation
- Senior and Vulnerable Adult Investors
- Temporary Holds on Disbursements
- Trusted Contact Persons

Referenced Rules
- FINRA Rule 4512
- Proposed FINRA Rule 2165
- SEA Rule 17a-3

Financial Industry Regulatory Authority

Action Requested

FINRA encourages all interested parties to comment on the proposal. Comments must be received by November 30, 2015.

Comments must be submitted through one of the following methods:

- Emailing comments to *pubcom@finra.org*; or
- Mailing comments in hard copy to:

  Marcia E. Asquith
  Office of the Corporate Secretary
  FINRA
  1735 K Street, NW
  Washington, DC 20006-1506

To help FINRA process comments more efficiently, persons should use only one method to comment on the proposal.

Important Notes: All comments received in response to this *Notice* will be made available to the public on the FINRA website. In general, FINRA will post comments as they are received.[1]

Before becoming effective, a proposed rule change must be authorized for filing with the Securities and Exchange Commission (SEC) by the FINRA Board of Governors, and then must be filed with the SEC pursuant to Section 19(b) of the Securities Exchange Act of 1934 (SEA).[2]

Background & Discussion

FINRA's experience with its Securities Helpline for Seniors™ has highlighted issues relating to financial exploitation of this group of investors.[3] Among these issues is a firm's ability to quickly and effectively address suspected financial exploitation of seniors and other vulnerable adults consistent with FINRA rules. Currently, FINRA rules do not explicitly permit firms to contact a non-account holder or to place a temporary hold on disbursements of funds or securities where there is a reasonable belief of financial exploitation of a senior or other vulnerable adult.

To address these issues, FINRA is proposing rules to provide firms with a way to respond to situations in which they have a reasonable basis to believe that financial exploitation of vulnerable adults has occurred, is occurring, has been attempted or will be attempted.[4] FINRA believes that a firm can better protect its customers from financial exploitation if the firm can: (1) place a temporary hold on a disbursement of funds or securities from a customer's account; and (2) notify a customer's trusted contact (or, if unavailable, immediate family member) of the firm's decision to place the temporary hold on a disbursement from the customer's account.

Proposed Rules

Trusted Contact Person—Proposed Amendments to Rule 4512

FINRA is proposing to amend Rule 4512 to require firms to make reasonable efforts to obtain the name of and contact information for a trusted contact person upon the opening of a non-institutional customer's account.[5] The proposal does not prohibit firms from opening and maintaining an account if a customer fails to identify a trusted contact as long as the firm made reasonable efforts to obtain it. FINRA believes that asking a customer to provide the name and contact information for a trusted contact person ordinarily would constitute reasonable efforts to obtain the information and would satisfy the proposed rule's requirements.

Consistent with the current requirements of Rule 4512, a firm would not need to attempt to obtain the name of and contact information for a trusted contact person for currently existing accounts until such time as the firm updates the information for the account either in the course of the firm's routine and customary business or as otherwise required by applicable laws or rules. With regard to updating the contact information once provided, FINRA believes that firms should consider asking the customer to review and update the name of and contact information for a trusted contact person periodically, such as when updating account information pursuant to SEA Rule 17a-3, or when there is a reason to believe that there has been a change in the customer's situation.[6]

FINRA intends the trusted contact person to be a resource for the firm in administering the customer's account and in responding to possible financial exploitation. The proposed rule would require that the trusted contact person be age 18 or older and not be authorized to transact business on behalf of the account. A firm may elect to notify an individual that he or she was named as a trusted contact person; however, the proposed rule would not require notification.

The proposed rule would also require that, at the time of account opening, a firm shall disclose in writing (which may be electronic) to the customer that the firm or an associated person is authorized to contact the trusted contact person and disclose information about the customer's account to confirm the specifics of the customer's current contact information, health status, and the identity of any legal guardian, executor, trustee or holder of a power of attorney, and as otherwise permitted by proposed Rule 2165. In addition, a firm would be required to provide this disclosure when it attempts to obtain the name of and contact information for a trusted contact person when updating information for currently existing accounts either in the course of the firm's routine and customary business or as otherwise required by applicable laws or rules. Firms would be required to provide this disclosure at account opening or when updating information for currently existing accounts, even if a customer fails to identify a trusted contact. As noted below, pursuant to proposed Rule 2165, when information about a trusted contact person is available, a firm must attempt to notify the trusted contact person that the firm has placed a temporary hold on a disbursement of funds or securities from a customer's account, unless the firm reasonably believes that the trusted contact person is engaged in the financial exploitation.[7]

Temporary Hold on Disbursement of Funds or Securities—Proposed New Rule 2165

FINRA is also proposing to permit "qualified persons" who reasonably believe that financial exploitation is occurring to place temporary holds on disbursements of funds or securities from the accounts of "specified adult" customers. Proposed Rule 2165 creates no obligation to withhold disbursement of funds or securities where financial exploitation may be occurring. Accordingly, Supplementary Material to proposed Rule 2165 would expressly state that the rule provides firms with a safe harbor when they exercise discretion in placing temporary holds on disbursements of funds or securities from the account of a specified adult under the circumstances denoted in the rule. It would further state that the rule does not require firms to place temporary holds on disbursements of funds or securities from the account of a specified adult.[8]

FINRA believes that "specified adults" may be particularly susceptible to financial exploitation.[9] Proposed Rule 2165 would define "specified adult" as: (A) a natural person age 65 and older;[10] or (B) a natural person age 18 and older who the firm reasonably believes has a mental or physical impairment that renders the individual unable to protect his or her own interests. Supplementary Material to proposed Rule 2165 would provide that a firm's reasonable belief that a natural person age 18 and older has a mental or physical impairment that renders the individual unable to protect his or her own interests may be based on the facts and circumstances observed in the firm's business relationship with the person.[11]

The proposed rule would denote the persons who can place a temporary hold on a disbursement as "qualified persons," which would mean associated persons of a firm who serve in supervisory, compliance or legal capacities that are reasonably related to the account of the specified adult. The proposed rule would define the term "account" to include any account of a firm for which a specified adult has the authority to transact business.

FINRA has proposed a broad definition of "financial exploitation." Specifically, financial exploitation would include: (A) the wrongful or unauthorized taking, withholding, appropriation, or use of a specified adult's funds or securities; or (B) any act or omission taken by a person, including through the use of a power of attorney, guardianship, or any other authority, regarding a specified adult, to: (i) obtain control, through deception, intimidation or undue influence, over the specified adult's money, assets or property; or (ii) convert the specified adult's money, assets or property.

Proposed Rule 2165 would permit a qualified person to place a temporary hold on a disbursement of funds or securities from the account of a specified adult if the qualified person reasonably believes that financial exploitation of the specified adult has occurred, is occurring, has been attempted or will be attempted.[12] If a firm places such a hold, the proposed rule would require the firm to immediately initiate an internal review of the facts and circumstances that caused the qualified person to reasonably believe that financial exploitation of the specified adult has occurred, is occurring, has been attempted or will be attempted. In addition, the proposed rule would require the firm to provide notification of the hold and the reason for the hold to all parties authorized to transact business on the account and, if available, the trusted contact person, no later than two business days after placing the hold. While oral or written (including electronic) notification would be permitted under the proposed rule, a firm would be required to retain records evidencing the notification.

If the trusted contact person is not available or the firm reasonably believes that the trusted contact person has engaged, is engaged or will engage in the financial exploitation of the specified adult, the proposal states that the firm shall attempt to contact an immediate family member,[13] unless the firm reasonably believes that the immediate family member has engaged, is engaged or will engage in the financial exploitation of the specified adult. For purposes of proposed Rule 2165, FINRA would consider the lack of an identified trusted contact person, the inability to contact the trusted contact person or a person's refusal to act as a trusted contact person to mean that the trusted contact person was not available. The same is true of an immediate family member. A firm may use the temporary-hold provision under proposed Rule 2165 when a trusted contact or an immediate family member is not available.

While the proposed rule does not require notifying the customer's registered representative of suspected financial exploitation, a customer's registered representative may be the first person to detect potential financial exploitation. If the detection occurs in another way, a firm may choose to notify and discuss the suspected financial exploitation with the customer's registered representative, unless the firm suspects that the registered representative is involved in the financial exploitation.

The temporary hold authorized by proposed Rule 2165 would expire not later than 15 business days after the date that the qualified person first placed the temporary hold on the disbursement of funds or securities, unless sooner terminated or extended by an order of a court of competent jurisdiction. In addition, provided that the firm's internal review of the facts and circumstances supports its reasonable belief that the financial exploitation of the specified adult has occurred, is occurring, has been attempted or will be attempted, the proposed rule permits the temporary hold to be extended by a qualified person for an additional 15 business days, unless sooner terminated by an order of a court of competent jurisdiction.

Proposed Rule 2165 would require firms to retain records related to compliance with the rule, which shall be readily available to FINRA, upon request. The retained records shall include records of: (1) requests for disbursement that may constitute financial exploitation of a specified adult and the resulting temporary hold; (2) the finding of a reasonable belief that financial exploitation has occurred, is occurring, has been attempted or will be attempted underlying the decision to place a temporary hold on a disbursement; (3) notification(s) to the relevant parties pursuant to the rule; and (4) the internal review of the facts and circumstances supporting the qualified person's reasonable belief that the financial exploitation of the specified adult has occurred, is occurring, has been attempted or will be attempted.

The proposed rule would require a firm that anticipates using a temporary hold in appropriate circumstances to establish and maintain specific written supervisory procedures reasonably designed to achieve compliance with the rule, including, but not limited to, procedures on the identification, escalation and reporting of matters related to financial exploitation of specified adults. The proposed rule would also require firms to develop and document specific training policies or programs reasonably designed to ensure that registered persons comply with the requirements of the rule.

Economic Impact Assessment

FINRA's experience with its Securities Helpline for Seniors has reaffirmed its understanding of the risks to customers of financial exploitation. The proposed rules are intended to further the protection of potentially at-risk customers by relieving firms from those FINRA rules that might otherwise discourage firms from exercising discretion to protect customers through placing a temporary hold on disbursements of funds or securities. Such a hold, combined with contact with a trusted person, also may permit these customers to stop unwanted disbursements and better protect themselves from financial exploitation.

The proposed rules not only better safeguard customers, to the extent that firms today do not provide protections for specified adults, but also better protect those firms that are already doing so.

The proposed amendments to Rule 4512 would require firms to attempt to collect information about a trusted person at the time of account opening or in the course of updating information for the account. Firms also would incur additional responsibilities to provide disclosure about the firm's right to share certain private information with the customer's trusted contact.

In addition, there may be significant impacts with respect to legal risks and attendant costs to firms that choose to rely on the proposed rule in placing temporary holds on disbursements; although the direction of the impact is ambiguous. The proposed rules may provide some legal protection to firms if they are sued for withholding disbursements where there is a reasonable belief of financial exploitation. At the same time, while proposed Rule 2165 creates no obligation to withhold disbursement where financial exploitation may be occurring or to refrain from opening or maintaining an account where no trusted contact is identified, this proposed rule might serve as a rationale for a private action against firms that do not withhold disbursements when there is a reasonable belief of financial exploitation. To reduce the latter risk, proposed Rule 2165 would explicitly state that it provides firms with a safe harbor when they exercise discretion in placing temporary holds on disbursements of funds or securities, but would not require firms to place such holds.

To the extent that firms today have reasons to suspect financial exploitation of their customers, they may make judgments with regard to making or withholding disbursements of funds or securities. As such, these firms may already face litigation risk with regard to their actions, whether or not they choose to disburse funds or securities.

Request for Comment

In addition to generally requesting comments, FINRA specifically requests comment on the following questions:

1. Should the scope of the proposed rules be expanded to encompass other requirements?
2. Are there approaches other than the proposed rulemaking that FINRA should consider?
3. Should Rule 4512 require customer consent to contact the trusted contact or is customer notice sufficient? Should the types of information that may be disclosed to the trusted contact under Rule 4512 be modified?
4. What are firms' current practices when they suspect financial exploitation has occurred, is occurring, has been attempted or will be attempted? Would the proposed rules change firms' current practices?
5. What are firms' views on any potential legal risks associated with placing or not placing temporary holds on disbursements of funds or securities at present and under the proposal?
6. Should the ages used in the definition of "specified adult" in proposed Rule 2165 be modified or eliminated?
7. Should the definition of "account" be expanded to include accounts for which a specified adult is a named beneficiary?
8. Should the scope of the persons included in the definition of "qualified person" in proposed Rule 2165 be modified?

9. Is the two business day period for notifying the appropriate parties under proposed Rule 2165 appropriate? If not, what circumstances may warrant a shorter or longer period?
10. Should the permissible time periods for placing and extending a temporary hold pursuant to proposed Rule 2165 be modified?
11. Should FINRA mandate specific procedures for escalating matters related to financial exploitation?

FINRA also specifically requests comments on the economic impact and expected beneficial results of the proposed rules.

12. What direct costs for the firm will result from the proposed rules?
13. What indirect costs will arise for the firm from the proposed rules?
14. Will the proposed rules impose different costs on firms of different sizes or with different business models?
15. What benefits will result for customers from the proposed rules? How extensive are these benefits?
16. What costs for customers will result from the proposed rules?
17. Are the costs imposed by the rules warranted by the potential benefit to customers arising from the proposed rules?
18. How will the proposed rules change business practices and competition among firms? Will these impacts differently affect small or specialized broker-dealers?
19. Are there other means or mechanisms to efficiently and effectively provide customers with suitable protections as contemplated by the SEA?

We request quantified comments where possible.

Endnotes

1. FINRA will not edit personal identifying information, such as names or email addresses, from submissions. Persons should submit only information that they wish to make publicly available. *See Notice to Members 03-73* (November 2003) (Online Availability of Comments) for more information.

2. *See* SEA Section 19 and rules thereunder. After a proposed rule change is filed with the SEC, the proposed rule change generally is published for public comment in the *Federal Register*. Certain limited types of proposed rule changes take effect upon filing with the SEC. *See* SEA Section 19(b)(3) and SEA Rule 19b-4.

3. *See* FINRA Launches Toll-Free FINRA Securities Helpline for Seniors (Apr. 20, 2015).

4. FINRA notes that Delaware, Missouri and Washington have enacted statutes that permit financial institutions, including broker-dealers, to place temporary holds on "disbursements" or "transactions" if financial exploitation of covered persons is suspected. *See* Del. Code Ann. tit. 31, § 3910 (2015); Mo. Rev. Stat. §§ 409.600-.630 (2015); and Wash. Rev. Code §§ 74.34.215, 220 (2015). Due to the small number of state statutes currently in effect and the lack of a uniform state or federal standard in this area, FINRA believes that the proposed rules would aid in the creation of a uniform national standard for the benefit of firms and their customers.

5. While the proposed amendments do not specify what contact information should be obtained, FINRA believes that a mailing address, phone number and email address for the trusted contact person may be the most useful to firms.

6. FINRA also notes that a customer's request to change his or her trusted contact person may be a possible red flag of financial exploitation (*e.g.*, a senior customer changing his trusted contact person from an immediate family member to a previously unknown third party).

7. With respect to disclosing information to the trusted contact person, FINRA notes that Regulation S-P excepts from the Regulation's notice and opt-out requirements disclosures made: (A) to comply with federal, state, or local laws, rules and other applicable legal requirements; or (B) made with client consent, provided such consent has not been revoked. *See* 17 C.F.R §§ 248.15(a)(1) and (a)(7)(i). FINRA believes that disclosures to a trusted contact person pursuant to proposed Rules 2165 or 4512 or with unrevoked customer consent would be consistent with Regulation S-P.

8. FINRA understands that some firms, pursuant to state law or their own policies, may already place temporary holds on disbursements from customers' accounts where financial exploitation is suspected.

9. *See* National Senior Investor Initiative: A Coordinated Series of Examinations, SEC's Office of Compliance Inspections and Examinations and FINRA (Apr. 15, 2015) (noting the increase in persons aged 65 and older living in the United States and the concentration of wealth in those persons during a time of downward yield pressure on conservative income-producing investments) (hereinafter Senior Investor Initiative). *See also* The MetLife Study of Elder Financial Abuse: Crimes of Occasion, Desperation, and Predation Against America's Elders (June 2011) (noting the many forms of

vulnerability that "make elders more susceptible to [financial]abuse," including, among others, poor physical or mental health, lack of mobility, and isolation); Protecting Elderly Investors from Financial Exploitation: Questions to Consider (Feb. 11, 2015) (noting that one of the greatest risk factors for diminished capacity is age).

10. *See, e.g.*, Aging Statistics, U.S. Department of Health and Human Services Administration on Aging (referring to the "older population" as persons "65 years or older"); Senior Investor Initiative (noting the examinations underlying the report "focused on investors aged 65 years old or older").

11. FINRA notes that a firm may not ignore contrary evidence in making a determination based on the facts and circumstances observed in the firm's business relationship with the natural person (*e.g.*, a court order finding a customer to be legally incompetent).

12. Proposed Rule 2165 would apply only to disbursements of funds or securities from the account of a specified adult and would not apply to transactions in securities.

13. For purposes of proposed Rule 2165, the term "immediate family member" shall include a spouse, child, grandchild, parent, brother or sister, mother-in-law or father-in-law, brother-in-law or sister-in-law, and son-in-law or daughter-in-law, each of whom must be age 18 or older.

ATTACHMENT A

Below is the text of the proposed rule change. Proposed new language is underlined; proposed deletions are in brackets.

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Text of Proposed Changes to FINRA Rule 4512

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4000. FINANCIAL AND OPERATIONAL RULES

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4500. BOOKS, RECORDS AND REPORTS

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4512. Customer Account Information

(a) Each member shall maintain the following information:

(1) for each account:

(A) customer's name and residence;

(B) whether customer is of legal age;

(C) name(s) of the associated person(s), if any, responsible for the account, and if multiple individuals are assigned responsibility for the account, a record indicating the scope of their responsibilities with respect to the account, provided, however, that this requirement shall not apply to an institutional account;

(D) signature of the partner, officer or manager denoting that the account has been accepted in accordance with the member's policies and procedures for acceptance of accounts; [and]

(E) if the customer is a corporation, partnership or other legal entity, the names of any persons authorized to transact business on behalf of the entity; and

(F) subject to Supplementary Material .06, name of and contact information for a trusted contact person who may be contacted about the customer's account, is age 18 or older and not authorized to transact business on behalf of the account; provided, however, that this requirement shall not apply to an institutional account.

(2) through (3) No Change.

(b) A member need not meet the requirements of this Rule with respect to any account that was opened pursuant to a prior FINRA rule until such time as the member updates the information for the account either in the course of the member's routine and customary business or as otherwise required by applicable laws or rules.

(c) No Change.

• • • Supplementary Material: --------------

.01 through .05 No Change.

.06 Trusted Contact Person

(a) With respect to paragraph (a)(1)(F) of this Rule, at the time of account opening, a member shall disclose in writing, which may be electronic, to the customer that the member or an associated person of the member is authorized to contact the trusted contact person and disclose information about the customer's account to confirm the specifics of the customer's current contact information, health status, and the identity of any legal guardian, executor, trustee or holder of a power of attorney, and as otherwise permitted by Rule 2165.

(b) The absence of the name of or contact information for a trusted contact person shall not prevent a member from opening or maintaining an account for a customer, provided that the member makes reasonable efforts to obtain the name of and contact information for a trusted contact person.

Text of Proposed New FINRA Rule

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2000. DUTIES AND CONFLICTS

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2100. TRANSACTIONS WITH CUSTOMERS

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2165. Financial Exploitation of Specified Adults

(a) Definitions

(1) For purposes of this Rule, the term "Specified Adult" shall mean: (A) a natural person age 65 and older; or (B) a natural person age 18 and older who the member reasonably believes has a mental or physical impairment that renders the individual unable to protect his or her own interests.

(2) For purposes of this Rule, the term "Account" shall include any account of a member for which a Specified Adult has the authority to transact business.

(3) For purposes of this Rule, the term "Qualified Person" shall mean an associated person of a member who serves in a supervisory, compliance or legal capacity that is reasonably related to the Account of the Specified Adult.

(4) For purposes of this Rule, the term "Trusted Contact Person" shall mean the person who may be contacted about the Specified Adult's Account in accordance with Rule 4512.

(5) For purposes of this Rule, the term "immediate family member" shall include a spouse, child, grandchild, parent, brother or sister, mother-in-law or father-in-law, brother-in-law or sister-in-law, and son-in-law or daughter-in-law, each of whom must be age 18 or older.

(6) For purposes of this Rule, the term "financial exploitation" shall include:

(A) the wrongful or unauthorized taking, withholding, appropriation, or use of a Specified Adult's funds or securities; or

(B) any act or omission taken by a person, including through the use of a power of attorney, guardianship, or any other authority regarding a Specified Adult, to:

(i) obtain control, through deception, intimidation or undue influence, over the Specified Adult's money, assets or property; or

(ii) convert the Specified Adult's money, assets or property.

(b) Temporary Hold on Disbursements

(1) A Qualified Person may place a temporary hold on a disbursement of funds or securities from the Account of a Specified Adult if:

(A) The Qualified Person reasonably believes that financial exploitation of the Specified Adult has occurred, is occurring, has been attempted, or will be attempted; and

(B) The member not later than two business days provides notification of the temporary hold and the reason for the temporary hold to:

(i) all parties authorized to transact business on the Account; and

(ii) the Trusted Contact Person, unless the Trusted Contact Person is unavailable or the member reasonably believes that the Trusted Contact Person has engaged, is engaged, or will engage in the financial exploitation of the Specified Adult, in which case the member shall attempt to contact an immediate family member of the Specified Adult, if available, unless the member reasonably believes that the immediate family member has engaged, is engaged, or will engage in the financial exploitation of the Specified Adult; and

(C) The member immediately initiates an internal review of the facts and circumstances that caused the Qualified Person to reasonably believe that the financial exploitation of the Specified Adult has occurred, is occurring, has been attempted, or will be attempted.

(2) The temporary hold authorized by this Rule will expire not later than 15 business days after the date that the Qualified Person first placed the temporary hold on the disbursement of funds or securities, unless sooner terminated by an order of a court of competent jurisdiction or extended either by an order of a court of competent jurisdiction or pursuant to paragraph (b)(3) of this Rule.

(3) Provided that the member's internal review of the facts and circumstances under paragraph (b)(1)(C) of this Rule supports the Qualified Person's reasonable belief that the financial exploitation of the Specified Adult has occurred, is occurring, has been attempted, or will be attempted, the temporary hold authorized by this Rule may be extended by a Qualified Person for no longer than 15 business days following the date authorized by paragraph (b)(2) of this Rule, unless sooner terminated by an order of a court of competent jurisdiction.

(c) Record Retention

Members shall retain records related to compliance with this Rule, which shall be readily available to FINRA, upon request. The retained records shall include, but shall not be limited to, records of: (1) request(s) for disbursement that may constitute financial exploitation of a Specified Adult and the resulting temporary hold; (2) the finding of a reasonable belief that financial exploitation has occurred, is occurring, has been attempted, or will be attempted underlying the decision to place a temporary hold on a disbursement; (3) notification(s) to the relevant parties pursuant to paragraph (b)(1)(B) of this Rule; and (4) the internal review of the facts and circumstances pursuant to paragraph (b)(1)(C) of this Rule.

• • • Supplementary Material: --------------

.01 Applicability of Rule. This Rule provides members with a safe harbor when they exercise discretion in placing temporary holds on disbursements of funds or securities from the Account of a Specified Adult under the specified circumstances denoted in the Rule. This Rule does not require members to place temporary holds on disbursements of funds or securities from the Account of a Specified Adult.

.02 Supervision. In addition to the general supervisory and recordkeeping requirements of Rules 3110, 3120, 3130, 3150, and Rule 4510 Series, a member relying on this Rule must establish and maintain specific written supervisory procedures reasonably designed to achieve compliance with this Rule, including, but not limited to, procedures related to the identification, escalation and reporting of matters related to financial exploitation of Specified Adults.

.03 Training. A member relying on this Rule must develop and document specific training policies or programs reasonably designed to ensure that registered persons comply with the requirements of this Rule.

.04 Reasonable Belief of Mental or Physical Impairment. A member's reasonable belief that a natural person age 18 and older has a mental or physical impairment that renders the individual unable to protect his or her own interests may be based on the facts and circumstances observed in the member's business relationship with the natural person.

Exhibit 2b

List of Written Comments

1. Julie Ainsworth, First U.S. Community Credit Union (December 2, 2015) ("First U.S. Community Credit Union")

2. Carolyn Anderson, (October 2, 2015) ("Anderson")

3. Eric Arnold, Cliff Kirsch and Mary Jane Wilson-Bilik, Sutherland Asbill & Brennan LLP on behalf of Committee of Annuity Insurers (November 30, 2015) ("CAI")

4. David Bellaire, Financial Services Institute (December 4, 2015) ("FSI")

5. Hugh Berkson, Public Investors Arbitration Bar Association (November 30, 2015) ("PIABA")

6. Lisa Bleier, Securities Industry and Financial Markets Association (December 2, 2015) ("SIFMA")

7. Doug Brode, Christian Financial Services LLC (November 11, 2015) ("Christian Financial Services")

8. Beverly Byrne, GWFS Equities, Inc. (November 30, 2015) ("GWFS")

9. David Certner, American Association of Retired Persons (November 30, 2015) ("AARP")

10. Donald Chambers, (October 25, 2015) ("Chambers")

11. Carrie L. Chelko, Lincoln Financial Network (November 30, 2015) ("Lincoln")

12. Bill Coughlin, (October 24, 2015) ("Coughlin")

13. Martin B. Cowan, (November 27, 2015) ("Cowan")

14. Brendan Daly, Commonwealth Financial Network (November 25, 2015) ("Commonwealth")

15. Robert Egge, The Alzheimer's Association (November 30, 2015) ("Alzheimer's Assoc.")

16. Richard Foster, Financial Services Roundtable (November 30, 2015) ("FSR")

17. Robert Foster and Elissa Germaine and Jill Gross, Pace Law School Investor Rights Clinic (November 30, 2015) ("PIRC")

18. Georgia State University College of Law, (November 25, 2015) ("GSU")

19. Neda Ghomeshi, Teresa J. Verges, University of Miami School of Law (November 30, 2015) ("Miami Investor Rights Clinic")

20. Joan Girdler, (November 13, 2015) ("Girdler")

21. Leroy Hayden, Jr, (October 23, 2015) ("Hayden")

22. Howard University School of Law, (November 23, 2015) ("IJEC")

23. Gail Liberman, (October 28, 2015) ("Liberman")

24. Deidre Link, Cetera Financial Group (November 30, 2015) ("Cetera")

25. Robert McCarthy, Wells Fargo Advisors (November 30, 2015) ("Wells Fargo")

26. Michael Nicholas, Bond Dealers of America (November 30, 2015) ("BDA")

27. Dan Pisenti, (November 24, 2015) ("Pisenti")

28. Kathleen M. Quinn, National Adult Protective Services Association (November 25, 2015) ("NAPSA")

29. Harry Rich, (October 23, 2015) ("Rich")

30. Ed Ros, (October 22, 2015) ("Ros")

31. Tamara Salmon, Investment Company Institute (November 25, 2015) ("ICI")

32. Gary Sanders, National Association of Insurance and Financial Advisors (November 30, 2015) ("NAIFA")

33. Kurt Schacht, Chartered Financial Analyst Institute (November 24, 2015) ("CFA Institute")

34. David Schwartz, Florida International Bankers Association (November 30, 2015) ("FIBA")

35. Judith Shaw, North American Securities Administrators Association, Inc. (November 30, 2015) ("NASAA")

36. Peter Stoehr, (October 23, 2015) (“Stoehr”)

37. Peter Thomson, (November 18, 2015) (“Thomson”)

38. Catherine J. Weatherford, Insured Retirement Institute (November 30, 2015) (“IRI”)

39. Shirley B. Whitenack and Wendy Cappelletto, National Academy of Elder Law Attorneys (November 24, 2015) (“NAELA”)

40. Simcha Ben Yaakov, (November 30, 2015) (“Yaakov”)

I know the comment period has ended but I wanted to pass along our thoughts. We think it could help in certain situations if we had a trusted contact. Our only real concern is, if the hold is only good for 15 days and then we have to release it, will it really do any good? It takes longer than that for a court order or for APS to get involved.

Hope this is helpful.

Thanks,

Julie Ainsworth
VP Operations
First U.S. Community Credit Union
(916) 576-5676

AS a person over 65 I would strongly suggest something other than a hold on accounts that could occur for up to 6 weeks if the 15 business days is used in suspected financial fraud for senior citizen accounts- I have no better idea other than something like a lifelock which could be implemented for all accounts at the time of their origin which could at least oversee a possible ponzi scam or other transactions to defraud seniors. I would be interested in the questions proposed by FINRA on this subject... thanks C Anderson

SUTHERLAND

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www.sutherland.com

November 30, 2015

VIA ELECTRONIC MAIL

Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street
Washington, DC 20006

Re: FINRA Regulatory Notice 15-37
Financial Exploitation of Seniors and Other Vulnerable Adults

Dear Ms. Asquith:

We are submitting this letter on behalf of our client, the Committee of Annuity Insurers (the "Committee"),[1] in response to Regulatory Notice 15-37, *Financial Exploitation of Seniors and Other Vulnerable Adults* (the "Notice," or "RN 15-37") issued by the Financial Industry Regulatory Authority, Inc. ("FINRA").[2] The Notice requests comments on a proposed amendment to FINRA Rule 4512 (Customer Account Information) ("Rule 4512") and adoption of new FINRA Rule 2165 (Financial Exploitation of Specified Adults) ("Rule 2165," sometimes referred to together with Rule 4512 as the "Proposed Rules").

THE PROPOSED RULES

The Notice indicates that the Proposed Rules are intended to address the financial exploitation of seniors and other vulnerable adults. Rule 4512 would be amended to impose a duty on firms to make a reasonable effort to obtain the name and contact information of a "trusted contact person" for any non-institutional account. Under Rule 2165, FINRA would permit, *but not require*, "qualified persons" of a firm to place a temporary hold on disbursements of funds or securities from the accounts of certain "specified adults" where there is a reasonable belief of "financial exploitation" of those adults. The Notice indicates that the Proposed Rules

[1] The Committee was formed in 1982 to address legislative and regulatory issues relevant to the annuity industry and to participate in the development of securities, banking, and tax policies regarding annuities. For three decades, the Committee has played a prominent role in shaping government and regulatory policies with respect to annuities, working with and advocating before the SEC, CFTC, FINRA, IRS, Treasury, Department of Labor, as well as the NAIC and relevant Congressional committees. Today the Committee is a coalition of many of the largest and most prominent issuers of annuity contracts. The Committee's member companies represent more than 80% of the annuity business in the United States. A list of the Committee's member companies is attached as Appendix A.

[2] RN 15-37 is available at http://www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory-Notice-15-37.pdf.

will now explicitly permit firms to reach out to a trusted contact person or put a temporary hold on the disbursement of funds under certain circumstances.

Rule 4512. Rule 4512 would be amended to require that each firm make reasonable efforts to obtain the name and contact information of a "trusted contact person who may be contacted about the customer's account." Under newly proposed Supplementary Material .06 ("SM.06"), firms would be required to disclose to the customer, in writing, that the firm or an associated person is authorized to contact the trusted contact and disclose account information in order to confirm: (1) the customer's current account information; (2) the customer's health status; and (3) the identity of any legal guardian, executor, trustee, or holder of a power of attorney. In addition, the proposed amendments to Rule 4512 would permit the firm or an associated person to reach out to the trusted contact as permitted under Rule 2165.

RN 15-37 makes clear that firms would have no obligation under Rule 4512 to reach out to currently existing account owners to identify a trusted contact person, and that a firm should undertake reasonable efforts to obtain the identity of a trusted contact person "as the firm updates the information for the account either in the course of the firm's routine and customary business or as otherwise required by applicable laws or rules." In addition, RN 15-37 indicates that Rule 4512 would not require that the trusted contact person be notified by the firm of his or her status as a trusted contact person, but would leave that determination to the firm.

Rule 2165. Proposed Rule 2165 would permit a "qualified person" to place a temporary hold on a disbursement of funds or securities from the account of a "specified adult" if the qualified person reasonably believes that "financial exploitation" of the specified adult has occurred, is occurring, has been attempted or will be attempted. Rule 2165 includes the following critical definitions:

> *Qualified Person*: an associated person of a member who serves in a supervisory, compliance or legal capacity that is reasonably related to the Account of the Specified Adult;
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> *Specified Adult*: (A) a natural person age 65 and older; or (B) a natural person age 18 and older who the member reasonably believes has a mental or physical impairment that renders the individual unable to protect his or her own interests; and
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> *Financial Exploitation*: (A) the wrongful or unauthorized taking, withholding, appropriation, or use of a Specified Adult's funds or securities; or (B) any act or omission taken by a person, including through the use of a power of attorney, guardianship, or any other authority regarding a Specified Adult, to: (i) obtain control, through deception, intimidation or undue influence, over the Specified Adult's money, assets or property; or (ii) convert the Specified Adult's money, assets or property.

Once a firm places a hold on the disbursement, Rule 2165 would require that the firm: (1) immediately initiate an internal review of the facts and circumstances that created the concern that financial exploitation was at issue; and (2) provide notice of the hold and the reason for the hold to all parties authorized to transact business on the account and the trusted contact person (if available) no later than two business days after placing the hold. The temporary hold would be permitted for 15 business days, but if the firm's internal review indicates the existence of financial exploitation, then the hold may be extended for an additional 15 days.

Supplementary Material .01 to Rule 2165 ("SM.01") provides firms with a "safe harbor when they exercise discretion in placing temporary holds on disbursements of funds or securities from the account of a specified adult."

Rule 2165 and the related Supplementary Material would also impose recordkeeping and training duties on firms, and require firms to adopt written supervisory procedures related to financial exploitation of seniors and vulnerable customers.

COMMITTEE COMMENTS

The Committee appreciates the opportunity to comment on the Proposed Rules. The Committee supports FINRA's efforts to create a rule that provides guidance to its member firms with respect to the difficult task of determining the appropriate steps to take in dealing with potentially suspect transaction requests from seniors and vulnerable adults. As indicated below, the Committee has identified a number of concerns related to the Proposed Rules, as well as some requests for additional interpretation and clarification. Given the numerous important issues raised by the Proposed Rules, the Committee recommends that FINRA proceed on moving any such rules forward in an appropriately deliberative manner.

The Committee further notes that the Proposed Rules put members in a very challenging position with respect to their customer relationships. Members will need to collect information from their customer, trusted contact persons, and immediate family members about the capacity of the customer, while at the same time attempting to preserve the trust of, and business relationship with, the customer. In addition, members will need to conduct this internal review without any leverage related to the review other than the good faith of the individuals to whom they direct questions. Any of these interactions required under the Proposed Rules has the capacity to permanently strain, and fundamentally change, the relationship between the firm and the customer.

Issues with Section 22(e) of the Investment Company Act of 1940. The Committee believes that the Proposed Rules permitting a firm to place a temporary hold on the disbursement of funds to a customer for up to 15 business days (and possibly for a successive 15 day period pending the firm's internal review) does not conform with the requirements under Section 22(e) of the Investment Company Act of 1940 ("1940 Act") that are imposed on registered investment companies. Section 22(e) of the 1940 Act states:

> *No registered investment company shall suspend the right of redemption, or postpone the date of payment or satisfaction upon redemption of any redeemable security in accordance with its terms for more than seven days* after the tender of

> such security to the company or its agent designated for that purpose for redemption, except
>
> > (1) for any period (A) during which the New York Stock Exchange is closed other than customary week-end and holiday closings or (B) during which trading on the New York Stock Exchange is restricted;
> >
> > (2) for any period during which an emergency exists as a result of which (A) disposal by the company of securities owned by it is not reasonably practicable or (B) it is not reasonably practicable for such company fairly to determine the value of its net assets; or
> >
> > (3) for such other periods as the Commission may by order permit for the protection of security holders of the company.
>
> The Commission shall by rules and regulations determine the conditions under which (i) trading shall be deemed to be restricted and (ii) an emergency shall be deemed to exist within the meaning of this subsection. (Emphasis added.)

Section 22(e) applies to the disbursement of funds from a variable annuity contract (as well as mutual funds). The Committee notes that the Proposed Rules *could* be read as reconcilable with the 1940 Act requirements to the extent that a disbursement request directed to a broker-dealer does not constitute a disbursement request to an issuer of a variable annuity. Nonetheless, given the important issues raised, the Committee believes that FINRA staff and staff of the Securities and Exchange Commission ("SEC") should work together to provide comprehensive analysis and potential relief so that the Proposed Rules would clearly allow for the same timeframes available to review suspect transactions that involve disbursements of funds from investment company transactions as are available to funds derived from other securities transactions.[3] The Committee notes that an industry-wide no-action letter or an SEC order under Section 22(e)(3) of the 1940 Act may be useful in attempting to resolve these issues.

Status of the Funds Subject to a Temporary Hold. Under the Proposed Rules, firms are permitted to place a temporary hold on the disbursement of funds or securities when they suspect financial exploitation may be present. The Proposed Rules do not provide any significant guidance on the status of those funds during the time of the temporary hold (the "suspense period"). The Committee would ask that FINRA staff be mindful of the fact that many firms may lack the authority to hold customer funds under their respective membership agreements with FINRA and the rules of the Securities Exchange Act of 1934.

We further note that with respect to products like variable annuities, there will be additional complexity added to the manner in which funds should be held during the suspense period. Such complexity results from the presence of several different potential stakeholders,

[3] The Committee notes that similar issues may exist with respect to the delay in disbursing the funds under Rule 15c6-1 under the Securities Exchange Act of 1934.

including: (i) the broker-dealer that serves as the principal underwriter of the variable annuity contract; (ii) the retail selling broker-dealer ("selling firm"); and (3) the insurer issuing the variable annuity. The Proposed Rules fail to clarify the obligations of the different parties that are related to the temporary hold on the disbursements of the funds related to a variable annuity contract withdrawal or surrender, or to address how (and by which entity) such funds should be held when the member is not authorized to hold customer funds.

The Committee believes that additional clear guidance should be provided under the Proposed Rules to clarify:

- Where multiple broker-dealers are involved in the distribution chain, which broker-dealer is responsible for determining that the temporary hold should be placed on the disbursement of funds? The Committee believes that the selling firm is the more appropriate choice but there is, in any case, a lack of clarity on this issue.
- Where should the funds be held (e.g., with the insurance company, with the selling firm) and how should they be titled, during the suspense period? If they are held in the insurance company's general account, the customer funds would not be insulated from the claims of the insurance company's creditors. If the funds remain in the variable annuity separate account, the customer's funds would appear to be subject to market fluctuations during the period for which the disbursement is suspended.
- If the selling firm is not authorized to hold customer funds, what arrangements must be made for the funds during the suspense period?
- If the investigation shows that the requested transaction was not authorized by the customer and should not have taken place, how will the funds be restored to the customer account? Will the customer be credited with gains or charged with losses that occurred during the suspense period?

Compliance with Regulation S-P. Under the Proposed Rules, when a firm reasonably believes that financial exploitation may or does exist, the firm is authorized to contact the trusted contact person "and disclose information about the customer's account to confirm the specifics of the customer's current contact information, health status, and the identity of any legal guardian, executor, trustee or holder of a power of attorney."[4] In addition, if the firm places a hold on the disbursement of funds, the firm is required to notify the following parties of the temporary hold placed on the funds:

- all parties authorized to transact business on the account; and
- the Trusted Contact Person unless the Trusted Contact Person is unavailable or the member reasonably believes that the Trusted Contact Person has engaged, is engaged, or will engage in the financial exploitation of the Specified Adult, in which case the member shall attempt to contact an immediate family member of the Specified Adult, if available, unless the member reasonably believes that the immediate family

[4] SM.06.

> member has engaged, is engaged, or will engage in the financial exploitation of the Specified Adult.[5]

The Proposed Rules therefore expressly contemplate that information about the account owner that is "nonpublic personal information" ("NPI") protected under Regulation S-P could be shared with the trusted contact person, and in some cases, an immediate family member. RN 15-37 briefly addresses the privacy issues created by the Proposed Rules in Endnote 7 by stating that:

> FINRA notes that Regulation S-P excepts from the Regulation's notice and opt-out requirements disclosures made: (A) to comply with federal, state, or local laws, rules and other applicable legal requirements; or (B) made with client consent, provided such consent has not been revoked. . . . FINRA believes that disclosures to a trusted contact person pursuant to proposed Rules 2165 or 4512 or with unrevoked customer consent would be consistent with Regulation S-P.

The Committee believes that additional consideration should be given to several aspects of the privacy analysis related to the Proposed Rules.

1. Given that "immediate family members" may be provided information in some circumstances under Rule 2165, the disclosure required under SM.06 may need to be revised to acknowledge the possibility that contacting an immediate family member may occur if the trusted contact person cannot be reached.

2. While the Notice suggests that compliance with Regulation S-P can be achieved through an unrevoked client consent, the Proposed Rules do not even require *consent* from the customer to disclose NPI. The proposal is instead to require simply a *disclosure* to the customer under SM.06 that NPI might be disclosed.

3. A narrow reading of the Regulation S-P exception for compliance with law may not clearly provide sufficient coverage with respect to the disclosure of the NPI. Under 17 CFR §248.15(a)(7)(i), the restrictions under Regulation S-P "do not apply when you disclose nonpublic personal information . . . *to comply with* federal, State, or local laws, rules and other applicable legal requirements." While the Committee believes that disclosures called for under the Proposed Rules would be "*in compliance with*" applicable laws, it is not completely clear that the disclosures are being made "*to comply with*" applicable laws. Given that the Proposed Rules provide firms with permission, but do not require them, to place a temporary hold on the disbursement of funds (and thus disclose NPI), it is possible that the language of the Regulation S-P exception for compliance with law may not necessarily be viewed as applicable by the SEC, a court, or a customer.

In order to avoid potential conflicts and confusion, the Committee requests that FINRA provide firms with a more definitive analysis of whether disclosures made to a trusted contact

[5] Rule 2165(b).

person or immediate family member under the Proposed Rules create any issues for firms under Regulation S-P.

The Information Exchange with the Trusted Contact Person Should Allow for a Broader Dialogue. Under SM.06, the firm is authorized to contact the trusted contact person and disclose account information in order to confirm: (1) the customer's current account information; (2) the customer's health status; and (3) the identity of any legal guardian, executor, trustee, or holder of a power of attorney. The Committee believes that the Proposed Rules should include a provision that anticipates that a broader conversation might occur between the firm and the trusted contact person. Given the potentially complex nature of financial exploitation cases, and the many different types of relationships that might exist between the Specified Adult and the trusted contact person, the Committee believes that the interaction between the firm and the trusted contact person could take a variety of forms. The Committee believes that the Proposed Rules should be revised to allow a more general "catch all" category of information that may be disclosed to the trusted contact person.

The Definition of "Specified Adult." A Specified Adult is defined under Rule 2165 as: (a) a natural person age 65 and older (referred to below as "seniors"); or (b) a natural person age 18 and older who the member reasonably believes has a mental or physical impairment that renders the individual unable to protect his or her own interests (referred to below as "vulnerable adults"). The Committee believes that FINRA should work with any and all applicable state securities regulatory authorities in an effort to ensure that firms are only subject to one "age" requirement for rules related to placing a hold on funds for seniors. The Committee notes that the current proposed model rule from the North American Securities Administrators Association on seniors and vulnerable adults uses 60 as the triggering age for protection under their proposed rules.

The Committee also believes that implementing the Proposed Rules with respect to vulnerable adults potentially creates significant and additional challenges. For example, it is likely that individuals may transition into and out of the categorization of vulnerable adult over time. The Proposed Rules would impose on firms a continuing duty to determine whether or not such account owners should remain or become subject to the Proposed Rules. For example, a customer classified as a vulnerable adult at the outset of the account relationship may improve to the point where classification as a vulnerable adult may no longer be appropriate. In any case, it seems clear that the administration of the vulnerable adults provisions under the Proposed Rules would be much more difficult than administering the rules for senior investors. The Committee also is concerned that firms may be subject to spurious claims that they are using classification of customers as vulnerable adults as a pretext to routinely delay disbursement. For these reasons, the Committee recommends that FINRA omit references to vulnerable adults from the definition of "specified adult."

The Trusted Contact Person Information Should Only Be Collected for Account Owners Who Are Over 55. The Committee believes that identifying a trusted contact person for customers may prove beneficial to the protection of seniors and eliminating financial exploitation. From a practical perspective, however, the Committee believes that requiring the collection of that information from every account owner may create unwarranted administrative burdens that outweigh the benefits. For example, the Committee wonders what the likelihood is that a client in their 30s or 40s will remain a firm client at the age of 65? The Committee believes that the Proposed Rules should focus on those investors who will require the protections of the rules in the short or medium term, and not in the long term, and recommends that Rule 4512 be revised to require that information on a trusted contact person only be collected for account owners who are 55 or over.

Timing Issues Created Under the Proposed Rules. The Proposed Rules impose a number of different timing obligations on firms. We note that firms: (1) must initiate an internal review of the suspected financial exploitation *immediately*; (2) can suspend the disbursement of funds for *15 business days* (followed by another 15 days depending on the results of the internal review); and (3) must notify the trusted contact person and the account owners of the determination to hold the disbursement within *2 business days*.

The Proposed Rules would benefit from additional detail indicating when that period begins and when it terminates. For example, if a member firm decides to place a temporary hold on Monday, May 3rd, at 2:15 p.m., does the firm have until 2:15 p.m. on May 5th to make the required notifications, or until the close of business on May 5th? What form of notice would be deemed to meet the requirements of Rule 2165? Would leaving a voice message be acceptable? Sending an email? If the notification takes place by regular U.S. mail, what is deemed within the 2 business days time period - placing the notification into the outgoing mail or delivery of the notification within the required number of business days? The Committee requests clarification so that member firms can be confident that they are designing their notification procedures in a manner that complies with the deadlines.

Internal Review. The Committee believes that requiring the internal review to begin "immediately" may prove to be an unnecessarily strict standard. Under a literal reading, the Qualified Person may be required to begin the review the moment after deciding to place a temporary hold on the funds. Given practical considerations and the extensive demands on firm personnel's time, the Committee believes a more appropriate standard would be to begin the internal review "as soon as reasonably practicable" following the determination to place a temporary hold on the funds.

Expiration of the Temporary Hold in 15 Business Days. Given the likely difficulty in investigating alleged financial exploitation and discussing the situation with the relevant parties (e.g., the trusted contact person, registered representative(s) assigned to the account and their supervisors) and assessing the potential financial exploitation, the Committee believes that it may prove impractical for firms to conduct a comprehensive review and reach a well-reasoned conclusion within 15 business days. The Committee recommends that Rule 2165 be revised to provide for an initial period of 25 business days to conduct the internal review, followed by the possibility of granting an additional 10 business days, depending on the results of the review. The change in this manner only extends the total number of days by 5 but addresses the difficulty that firms might face in making quick progress on the review at the outset.

Notification of the Account Owners and Trusted Contact Persons in 2 Business Days. The Committee believes that in many circumstances it will be difficult for the firm to make all of the required notifications in 2 business days. For example, a situation involving multiple account owners may quickly grow complicated and make it difficult to contact all relevant parties on a timely basis.[6] In addition, if a firm determines to notify immediate family members due to concerns about the trusted contact person, that process and notification is bound to require additional time. The Committee recommends that the notification period be extended to 4 business days.

The Substance of the Notice of the Temporary Hold. Rule 2165(b)(1)(B) requires that firms provide notification about the hold to all persons authorized to transact business on the account and the trusted contact person and "the reason for the temporary hold." The Committee believes that Rule 2165 should be drafted in a manner that lets firms determine how much information, if any, to provide as to the reasons for the hold. In some situations, firms may determine that providing explicit information about concerns of financial exploitation may be appropriate. In other situations, a firm may determine that the less information that is provided the more likely the firm would be to resolve the situation. The Committee also believes that firms may be at risk for baseless complaints or claims of defamation to the extent they are required to indicate that the hold is in place due to concerns about financial exploitation.

Proposed Expansion of the Safe Harbor Under the Proposed Rules. SM.01 of Rule 2165 proposes a "safe harbor" with respect to the determination to place funds on hold. The Committee notes that there is no express reference in the Proposed Rules, the Supplementary Material, or RN 15-37 to the anticipated impact for an account that is: (1) not subject to the obligation under the Proposed Rules to collect information on a trusted contact person and disclose the potential use of that information to the customer because it was opened prior to the effective date and no trusted contact person information was collected; or (2) opened after the effective date of the Proposed Rules but for which the firm was not able to collect information on a trusted contact person. The Committee recommends that SM.01 be revised and expanded to explicitly indicate that the safe harbor will extend to firms under each of the situations indicated above.

The Committee also notes that SM.01 declares the "safe harbor," but does not expressly indicate from what claims the FINRA safe harbor provides protection. If FINRA's intention is to provide a safe harbor from regulatory actions against firms and their associated persons, SM.01 should state that more explicitly.

Clarify "Reasonable Efforts" to Identify a Trusted Contact Person. The Committee requests clarification regarding what activities constitute "reasonable efforts" when a member firm is trying to obtain the identity of the trusted contact person. For new accounts, would including a request to name a trusted contact person in the new account documents constitute "reasonable efforts?" For currently existing account owners, would including a disclosure or

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[6] The Committee believes that FINRA should consider whether Rule 2165(b)(1)(B)(i) should also allow firms to determine to refrain from notifying a party authorized to transact business on the account about the temporary hold if they are suspected of being involved in the financial exploitation.

questionnaire in account update requests that are mailed out to clients at least once every three years meet the "reasonable efforts" standard? This clarification would allow member firms to operationalize the standard required under the Proposed Rules.

The Proposed Rules Do Not Provide a Solution for Firms if Financial Exploitation Exists. The Committee is concerned that the Proposed Rules do not provide clear instruction to firms in the situation where those engaging in financial exploitation simply wait out the temporary hold. If the firm conducts its internal review and determines that financial exploitation is occurring, and then determines as a result to hold the funds for an additional 15 days, it has no authority at the end of the second 15 day period to continue the hold, nor do the Proposed Rules suggest steps the firm should take if it reasonably believes that financial exploitation exists. The Committee believes that FINRA, in addition to providing guidance on funds handling as discussed above, needs to provide a more definitive mechanism under which the firms may refer the financial exploitation issue to the proper agency or other governmental body for handling.

Implementation Period Prior To Compliance Date. The Proposed Rules create a number of operational and other challenges as described in more detail above. The Committee feels strongly that the Proposed Rules, once finalized, should have at least a one-year period to allow firms to coordinate with their distribution and issuing partners, implement the use of the new forms and systems that must be developed to collect the information on the trusted contact person, and develop and roll-out the new procedures, recordkeeping and training requirements under the Proposed Rules.

CONCLUSION

The Committee appreciates the opportunity to comment on the Proposed Rules. The Committee would be pleased to meet with FINRA staff to discuss the comments in this letter and provide additional feedback to FINRA on the implications of moving forward with the Proposed Rules. Please do not hesitate to contact Eric Arnold (202.383.0741), Cliff Kirsch (212.389.5052) or Mary Jane Wilson-Bilik (202.383.0660) if you have any questions regarding this letter.

Respectfully submitted,

SUTHERLAND ASBILL & BRENNAN LLP

BY: Eric Arnold
Eric Arnold

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Cliff Kirsch

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Mary Jane Wilson-Bilik

FOR THE COMMITTEE OF ANNUITY INSURERS

Appendix A

THE COMMITTEE OF ANNUITY INSURERS

AIG Life & Retirement
Allianz Life
Allstate Financial
Ameriprise Financial
Athene USA
AXA Equitable Life Insurance Company
Fidelity Investments Life Insurance Company
Genworth Financial
Global Atlantic Life and Annuity Companies
Great American Life Insurance Co.
Guardian Insurance & Annuity Co., Inc.
Jackson National Life Insurance Company
John Hancock Life Insurance Company
Life Insurance Company of the Southwest
Lincoln Financial Group
MassMutual Financial Group
Metropolitan Life Insurance Company
Nationwide Life Insurance Companies
New York Life Insurance Company
Northwestern Mutual Life Insurance Company
Ohio National Financial Services
Pacific Life Insurance Company
Protective Life Insurance Company
Prudential Insurance Company of America
Symetra Financial Corporation
The Transamerica companies
TIAA-CREF
USAA Life Insurance Company
Voya Financial, Inc.

FINANCIAL SERVICES INSTITUTE

VOICE OF INDEPENDENT FINANCIAL SERVICES FIRMS
AND INDEPENDENT FINANCIAL ADVISORS

VIA ELECTRONIC MAIL

December 4, 2015

Marcia Asquith
Secretary
Financial Industry Regulatory Authority
1735 K Street N.W.
Washington, D.C. 20006

Re: Notice of Request for Comment on Rules Relating to Financial Exploitation
FINRA Regulatory Notice 15-37

Dear Ms. Asquith:

On October 14, 2015, FINRA released Regulatory Notice 15-37 (Proposal) requesting public comment on a proposal to address abuse of senior investors and those with diminished capacity. The notice would amend an existing rule and create a new related rule. First, FINRA is proposing to amend Rule 4512 to require firms to make reasonable efforts to obtain the name of and contact information for a trusted contact person upon the opening of a non-institutional customer account. Second, the proposal creates FINRA Rule 2165, which would allow a "qualified employee" to place a temporary hold on a client's account if there is a reasonable suspicion of abuse. The proposal would require the firm to contact the previously designated trusted contact within two business days and for the firm to undertake an internal review of the facts. If the trusted contact person is the one who is suspected of committing the abuse, a firm may contact an immediate family member.

The Financial Services Institute[1] (FSI) appreciates the opportunity to comment on this important proposal. FSI's members are strongly committed to working with regulators to eliminate elder abuse. FSI applauds FINRA for proposing a workable solution that provides firms with tools to combat and prevent elder abuse. FSI believes that FINRA's intentions are well-placed and makes suggestions to address potential unintended consequences of the proposal as currently written. FSI offers several recommendations to improve the investor protection goals of the proposal.

Background on FSI Members

The independent financial services community has been an important and active part of the lives of American investors for more than 40 years. In the U.S., there are approximately 167,000 independent financial advisors, which account for approximately 64.5% producing

[1] The Financial Services Institute (FSI) is an advocacy association comprised of members from the independent financial services industry, and is the only organization advocating solely on behalf of independent financial advisors and independent financial services firms. Since 2004, through advocacy, education and public awareness, FSI has been working to create a healthier regulatory environment for these members so they can provide affordable, objective financial advice to hard-working Main Street Americans.

registered representatives. These financial advisors are self-employed independent contractors, rather than employees of Independent Broker-Dealers (IBD).

FSI member firms provide business support to financial advisors in addition to supervising their business practices and arranging for the execution and clearing of customer transactions. Independent financial advisors are small-business owners who typically have strong ties to their communities and know their clients personally. These financial advisors provide comprehensive and affordable financial services that help millions of individuals, families, small businesses, associations, organizations and retirement plans with financial education, planning, implementation, and investment monitoring. Due to their unique business model, FSI member firms and their affiliated financial advisors are especially well positioned to provide middle-class Americans with the financial advice, products, and services necessary to achieve their investment goals.

Discussion

A. Introduction

FINRA's proposal provides the securities industry and regulators with tools to protect senior investors. FSI is committed to the prevention of elder abuse and has worked to create tools for its members to use to combat it.[2] FSI was included on NASAA's Advisory Council to its Committee on Senior Issues and Diminished Capacity and submitted a comment letter on NASAA's proposal.[3] FSI applauds FINRA for its proposal and believes that with some adjustments, it can be adopted by the securities industry for the benefit of investors and firms alike. We elaborate on our comments below.

B. FSI recommends additional considerations regarding the inclusion of a trusted contact

Through its proposal, FINRA would enable firms to make reasonable efforts to obtain the name of a "trusted contact person" who may be contacted when financial exploitation is suspected. As stated in the proposal, the trusted contact person is intended to be a resource for firms in "administering customer's account and in responding to possible financial exploitation."[4] A trusted contact person must be 18 years or older and cannot be authorized to do business on behalf of the account. In instances where the trusted contact is suspected of being responsible for the abuse or is unavailable, the proposal allows for a firm to contact an immediate family member. FINRA defines an immediate family member as a spouse, child, grandchild, parent, brother or sister, mother-in-law, father-in-law, brother-in-law, sister-in-law, and son-in-law or-daughter-in-law."[5]

FSI's members strongly support the idea of including a trusted contact person that they may work with to protect senior investors and strongly endorse this portion of FINRA's provision. By requesting that the investor provides this information, firms and FINRA can know that the trusted

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[2] FSI's Elder Abuse Prevention Resource Center, *available at*, www.financialservices.org/elderabuse
[3] FSI's Comment Letter on NASAA's Elder Abuse Prevention Model Regulation or Legislation, available at, http://nasaa.cdn.s3.amazonaws.com/wp-content/uploads/2015/10/Bellaire103015.pdf
[4] FINRA Regulatory Notice 15-37, *available at*, https://www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory-Notice-15-37.pdf
[5] *Id.*

contact will have the best interests in mind for the senior investor. FSI welcomes the inclusion of a trusted contact person to help administer a senior investor's account and to help prevent abuse.

While FSI strongly supports the provision, FSI believes that FINRA should elaborate on several issues to improve the proposal. FSI requests that FINRA consider broadening the scope of the person who may be contacted under the proposal beyond just a family member when the trusted contact person is suspected of the exploitation or unavailable. In many instances, a senior investor may not have a family member or may not have a family member who could be readily contacted. Reasons may vary for the unavailability of a family member. For example, a family member may have lost touch with the senior investor or may simply have changed their contact information. Under these circumstances, a firm would be limited in their efforts to contact an individual who can assist the firm in administering the account. To overcome this issue, FSI recommends that FINRA add language that states that in instances where the trusted contact is unavailable or suspected of abuse, that in addition to a family member, a firm may contact an individual who shares a trusted relationship with a client. Examples include attorneys and accountants, who commonly serve as trusted individuals for clients. Expanding the scope of who is notified would provide maximum protection to vulnerable investors while maintaining that those individuals who are contacted have the senior investor's best interest in mind.

C. FSI endorses the Proposed Rule 2165, and applauds FINRA for adopting a Permissive Reporting Standard.

FINRA's proposal creates Rule 2165, which permits "qualified persons" who reasonably believe that financial exploitation is occurring to place temporary holds on disbursements of funds or securities from the accounts of "specified adult" customers.[6] The proposed rule would also create a safe harbor provision from liability for firms and qualified employees when they exercise discretion in freezing an account.[7] In addition, the proposed rule does not create a mandatory duty for firms, qualified employees, or financial advisors to report possible abuse.

FSI strongly endorses this provision and believes that it will prevent instances of exploitation against senior investors. FINRA provides firms with the opportunity to make a determination on whether or not to freeze an account without fearing legal liability in instances where they decide not to report possible abuse. Mandating that qualified persons of broker-dealers report any suspicion of abuse or face civil liability will in turn lead to these individuals reporting even the slightest suspicion of elder abuse to regulators. While this, on its face, appears to be in the best interest for senior investors, it is likely to over-tax regulatory resources by flooding them with mere suspicions, making it more difficult to investigate urgent and legitimate claims. The permissive reporting standard enables qualified employees to undertake a reasonable inquiry into suspected elder abuse without considering their own liability. This will ensure that resources are utilized to inquire into the most urgent and egregious claims of abuse. FSI strongly believes that this provision will help prevent instances of abuse against vulnerable adults and applauds FINRA for its inclusion.

[6] FINRA RN 15-37, available at, https://www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory-Notice-15-37.pdf

[7] *Id*

D. FSI Requests FINRA allow firms to freeze transactions in addition to disbursements and extend the notification requirement to five days

As stated above, FINRA's proposal would enable firms to freeze disbursements if they "reasonably believe" that financial exploitation has occurred, is occurring, has been attempted, or will be attempted.[8] In addition, the proposal requires that a broker-dealer notify within two business days all individuals authorized to conduct business on the account and to the trusted contact person.

FSI strongly endorses this provision of the proposal. However, FSI requests that FINRA include a provision enabling firms to freeze a transaction if there are reasonable suspicions that financial exploitation has occurred, is occurring, has been attempted, or will be attempted. FSI believes a freeze on disbursements will be a strong deterrent against those perpetrating financial exploitation. However, a transaction freeze can be another tool that broker-dealers can use when they reasonably believe abuse is occurring. If a qualified employee reasonably suspects abuse before processing a transaction or shortly thereafter, a freeze on the transaction could greatly benefit investors. A freeze on transactions may prevent the liquidation of securities that could have serious financial consequences for a client, such as a liquidation of an annuity with high early termination fees and significant tax implications. Those perpetrating financial exploitation will not consider these consequences when attempting to gain access to the funds. FSI believes providing firms the option to freeze either a transaction or a disbursement would provide maximum protection to senior investors.

FINRA's proposal also requires the broker-dealers notify all those involved on the account and the trusted contact within two business days in the event of a disbursement hold. While FSI agrees that notifying clients of a possible freeze in their account is in the best interest of senior investors, FSI requests a longer timeline to notify those individuals. FSI believes that the two day time period may be insufficient in some circumstances and requests a slight change to the proposal to extend the notification period from two days to five days. Notifying each person who is authorized to conduct business on an account may take several days, especially in instances where there are multiple individuals who may need to be contacted. FSI believes extending the period to 5 days balances the logistical challenges involved with contacting several individuals on an account and investor protection. Further, FSI believes that five days can be the maximum allowed time, and believes that firms will still immediately attempt to notify all parties. FSI believes that extending this time period an additional three days would greatly assist broker-dealers when dealing with logistical challenges.

E. FSI Requests that FINRA work with other regulatory bodies to provide consistent regulation to the industry.

FSI has always advocated for clear and consistent regulation so that our member firms can be confident they are following all requirements and meeting all the regulators' expectations. Recently, NASAA released a Model Rule which provides broker-dealers and financial advisors the ability to freeze transactions and would require that firms undertake an internal investigation of suspected elder abuse and to present its findings to the state agencies within seven business

[8] FINRA Regulatory Notice, *available at*, https://www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory-Notice-15-37.pdf

days.[9] NASAA's Model Rule would further create a mandatory duty on broker-dealers, financial advisors, and qualified employees to disclose suspicions of elder abuse to state securities regulators and state Adult Protective Services.

FSI lauds both FINRA and NASAA for undertaking essential steps to prevent abuse to vulnerable adults. However, we note that if each rule is finalized as proposed, there will be significant differences in the requirements placed on firms with regard to suspected elder abuse. For example, while NASAA's model rule allows for a freeze on disbursements of 10 days with a possible extension to an additional 10 days. Conversely, FINRA allows for a freeze of 15 days with the possibly of an extension of an additional 15 days. FSI believes a time limit on disbursement delays is appropriate; however inconsistencies in this space can lead firms to unintentionally violate a state requirement while complying with a FINRA requirement. Further, NASAA's model rule requires firms to report suspected instances of abuse while FINRA's proposal expressly provides for permissive reporting. This could once again lead to an instance where a firm or employee is confused about their obligations and complies with one regulation while unintentionally running afoul of another.

FSI therefore requests that FINRA work specifically with NASAA and other stakeholders to ensure that all of the elder abuse obligations of firms are consistent. Doing so will enable firms to concentrate fully on protecting vulnerable clients and furthers this essential investor protection goal.

Conclusion

We are committed to constructive engagement in the regulatory process and welcome the opportunity to work with FINRA on this and other important regulatory efforts.

Thank you for considering FSI's comments. Should you have any questions, please contact me at (202) 803-6061.

Respectfully submitted,

David T. Bellaire, Esq.
Executive Vice President & General Counsel

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9 Notice of Request for Comments Regarding NASAA's Proposed Model Legislation or Regulation To Protect Vulnerable Adults From Financial Exploitation, *available at*, http://nasaa.cdn.s3.amazonaws.com/wp-content/uploads/2015/09/Request-for-Comments-Model-Seniors-Legislation-Final-2.pdf

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Via Email to pubcom@finra.org

Ms. Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

Re: Regulatory Notice 15-37 – Proposed Rules Relating to Financial Exploitation of Seniors and Other Vulnerable Adults; Proposed FINRA Rule 2165

Dear Ms. Asquith:

I write on behalf of the Public Investors Arbitration Bar Association ("PIABA"), an international bar association comprised of attorneys who represent investors in securities arbitrations. Since its formation in 1990, PIABA has promoted the interests of the public investor in all securities and commodities arbitration forums, while also advocating for public education regarding investment fraud and industry misconduct. Our members and their clients have a strong interest in rules promulgated by the Financial Industry Regulatory Authority ("FINRA") relating to investor protection. In particular, our members and their clients have a strong interest in rules relating to the protection of elderly and retired investors and the supervision of associated persons who serve these investors.

Regulatory Notice 15-37 seeks comments on proposed rules to address the financial exploitation of seniors and other vulnerable adults.[1] New FINRA Rule 2165 (Financial Exploitation of Specified Adults) would permit "qualified persons"[2] of firms to place temporary holds on disbursements of funds or securities from the accounts of specified customers where there is a reasonable belief of financial exploitation of those customers. The rule creates no obligation to place a hold on funds or securities were financial exploitation may be occurring, but provides a safe harbor to firms who exercise discretion to place the temporary hold in such circumstances.

PIABA is generally supportive of proposed Rule 2165 because, among other things, it recognizes that registered persons are often in the best position to learn of, and prevent or mitigate, the financial exploitation of

[1] Regulatory Notice 15-37 also proposed amendments to Rule 4512 (Customer Account Information) that would require firms to obtain the name of and contact information for a trusted contact person for a customer's account. PIABA supports these proposed amendments because they will provide an outlet to immediately report suspicious activity to a trusted individual.

[2] A "qualified person" is defined as "an associated person of a member who serves in a supervisory, compliance or legal capacity" that is reasonably related to the account of the specified adult. Rule 2165(a)(3). Subsection (a)(1) of the rule defines "specified adult" as a natural person who is age 65 or older, or a natural person age 18 and older "who the member reasonably believes has a mental or physical impairment that renders the individual unable to protect his or her own interests."

their clients. However, PIABA believes that the proposed rule does not go far enough to reach its aim of protecting senior investors and other vulnerable adults because it does not obligate a firm to report financial exploitation to appropriate authorities or place a temporary hold on disbursements even when it has a reasonable suspicion of financial exploitation or abuse, and it does not create a penalty for willfully ignoring evidence of abuse. Therefore, PIABA proposes several important changes to the proposed rule that would better protect senior investors and vulnerable adults from financial exploitation.

A. Rule 2165 Does Not Obligate Firms to Report to Relevant Authorities Financial Exploitation and Abuse

There is a need for strong protection of the elderly investing population. With roughly one out of every five Americans 65 years and older being the victim of financial abuse,[3] the elderly are estimated to lose up to $2.9 billion per year from scams.[4] These figures are likely lower than the true figures since they only account for frauds that are reported, and seniors are "less likely" to report being scammed.[5] Moreover, financial exploitation of seniors is expected to significantly increase as the U.S. population ages.

Registered persons are in the perfect position to recognize signs and symptoms of diminished capacity and dementia with respect to their clients' ability to handle their finances and prevent elder financial abuse.[6] Financial advisors frequently become aware of suspicious activity before family and friends.[7] As such, when there are reasonable grounds to believe its client is being financially exploited, the member firm should be obligated to report potential exploitation to proper authorities.

A mandatory reporting obligation is a central component of the proposed Model Legislation or Regulation to Protect Vulnerable Adults from Financial Exploitation ("Model Act"),[8] recently proposed The North American Securities Administrators Association, Inc. ("NASAA"). The purpose of the Model Act is to protect senior-aged investors from financial exploitation, ideally with uniform parameters that all states will adopt for investor clarity.

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[3] *See* E.S. Browning, *Financial Scammers Increasingly Target Elderly Americans*, WALL ST. J. (Dec. 23, 2013), http://www.wsj.com/articles/SB10001424052702303330204579248292834035108. This is the equivalent of more than seven million Americans. *See* INVESTOR PROTECTION TRUST, *Preventing Elder Investment Fraud*, http://www.investorprotection.org/protect-yourself/?fa=protect-seniors (last visited July 29, 2015).

[4] Mason Braswell, *Unraveling Minds*, INVESTMENTNEWS, (Nov. 3, 2014).

[5] FEDERAL BUREAU OF INVESTIGATION, *Fraud Target: Senior Citizens*, https://www.fbi.gov/scams-safety/fraud/seniors (last visited July 29, 2015).

[6] *See* Naomi Karp & Ryan Wilson, Protecting Older Investors: The Challenge of Diminished Capacity, AARP PUBLIC POLICY INSTITUTE 17 (Nov. 2011), http://www.aarp.org/content/dam/aarp/research/public_policy_institute/cons_prot/2011/rr2011-04.pdf.

[7] *Id.*

[8] NASAA's Board of Directors issued a notice seeking comments on the proposed Model Act on September 29, 2015; the comment period closed on October 2, 2015.

Ms. Marcia E. Asquith
November 30, 2015, 2015
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The Model Act requires a "qualified employee"[9] to notify Adult Protective Services and the commissioner of securities if the employee reasonably believes that financial exploitation of an "eligible adult"[10] "may have occurred, may have been attempted, or is being attempted."[11]

NASAA's Model Act implicitly recognizes that requiring member firms to report suspected financial abuse to the appropriate authorities is a necessary step towards the goal of preventing incidents of financial abuse. Even if NASAA's final version of the Model Act retains the mandatory reporting obligation, however, not every state will adopt the Model Act, and those that do choose to implement a reporting requirement may not make it mandatory. This will invariably lead to uneven protection for vulnerable adults, which is apparent today in the emerging patchwork of inconsistent approaches among the states that have addressed this issue.

According to the 2013 Nationwide Survey of Mandatory Reporting Requirements for Elderly and/or Vulnerable Persons ("2013 Survey"),[12] while all states have passed statutes requiring certain professionals (i.e., attorneys, accountants, doctors, nurses and other health care workers, nursing homes and care providers) only twenty-one (21) states and the District of Columbia require financial institutions to report adhere to reporting requirements.[13] Three states - Iowa, Virginia and Washington - include "financial institutions" among the group of professionals who may report instances of financial abuse, but reporting is permissive, not mandatory. Finally, Washington State has a mandatory reporting requirement, but only in special circumstances, specifically, *if* the institution places a hold on a disbursement of funds due to suspected financial exploitation, it then *must* report the suspected abuse to authorities.[14]

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[9] NASAA's Model Act defines "qualified employee" as any agent, investment adviser, representative or person who serves in a supervisory, compliance, or legal capacity for a broker-dealer or investment adviser. Section 2 (7), Definitions.

[10] Subsection 2(3) of the Model Act defines "eligible adult" as "(a) a person sixty years of age or older; or (b) a person subject to [insert APS (Adult Protective Services) statute]."

[11] NASAA Model Act, Section 3, Governmental Disclosures.

[12] The 2013 Survey was published by New York District Attorney's Office and NAPSA Elder Financial Exploitation Advisory Board.

[13] Fifteen (15) states require "any person" or "any individual" to report suspected financial exploitation to the relevant authorities, including: Delaware, Florida, Indiana, Kentucky, Louisiana, Mississippi, New Hampshire, New Mexico, North Carolina, Oklahoma, Rhode Island, South Carolina, Tennessee, Texas, Utah and Wyoming. The remaining six (6) states, Arizona, Arkansas, California, Georgia, Kansas and Maryland, and the District of Columbia, have specific references to "financial institutions" or persons having custody or control of the vulnerable adult's property. *See* 2013 Survey.

[14] Effective since June, 2010, Washington has a permissive statutory scheme that allows (but does not require) financial institutions to refuse a transaction requiring disbursal of funds in the account of a "vulnerable adult" if it reasonably believes financial exploitation occurred, was attempted, or is being attempted. Wash. Rev. Code Ann. § 74.34.215. For purposes of Chapter 74.34 only, "financial institution" is defined to also include broker-dealers and investment advisers. §74.34.020(8). *If* the financial institution chooses to halt the disbursal of funds under the statute, then it "shall" make a reasonable effort to notify all parties authorized to transact on the account and "shall" report the incident to adult protective services and local law enforcement. *Id.* at § 74.34.215(4). Absent a court order extending the time period, the ability for the institution to refuse to disburse funds expires after either 5 days or 10 days (if involving the sale or offer to sell a security). *Id.* at § 74.34.215(5), (6). So long as the refusal was made in good faith, the financial institution or its employee following the

Even among the states that include employees of financial institutions within the category of persons either required or permitted to report suspected abuse to authorities, the definition of a "financial institution" may not include a broker-dealer or investment adviser. For example, in California, since January 1, 2007, officers and employees of financial institutions have been mandatory reporters of suspected financial abuse of an elder or dependent adult, with "elder" defined simply as a California resident age 65 or older. Cal. Welf. & Inst. Code §§ 15610.27, 15630.1.[15] However, the California law is limited because, among other things, "financial institutions" are specifically defined to include national banks, savings and loans, state banks and trust companies whose deposits are not limited solely to funds held in a fiduciary capacity, and federal or state credit unions. *Id*. at § 15630.1(b). Thus, while the California provisions appear to give parallel required reporting requirements as the Model Act, they exclude broker-dealers and investment advisors not otherwise falling under the definition of "financial institutions."

Adding a mandatory reporting obligation to proposed FINRA Rule 2165 would provide uniform protection for a particularly vulnerable portion of the nation's investors. Such a requirement would prompt member firms to provide training to its registered persons on recognizing signs of potential financial exploitation.. As FINRA recognizes in Regulatory Notice 15-37, "a customer's registered representative may be the first person to detect potential financial exploitation." Simply put, brokers and investment advisers should have the same mandatory reporting requirements as other professionals.

B. A Firm Should Have an Obligation to Place a Temporary Hold on Disbursement of Funds or Securities When It Has Reasonable Suspicion of Financial Exploitation or Abuse

As currently proposed, Rule 2165 would permit, but not require, member firms to place a temporary hold on disbursement of funds or securities from the account of a specified adult if the qualified person "reasonably believes that financial exploitation of the Specified Adult has occurred, is occurring, has been attempted, or will be attempted." Rule 2165(b)(1)(A). Within two days after placing the hold, the firm must notify the person(s) authorized to transact business on the account and the "Trusted Contact Person" or, if the firm believes that person is involved in the financial exploitation, an immediate family member, and must also conduct an internal review. 2165(b)(2)(b). The temporary hold expires after 15 days, unless extended under certain defined circumstances. 2165 (b)(1)(C). The rule provides a safe harbor for those firms that choose to exercise discretion and temporarily hold disbursements. 2165.01.

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statutory scheme is immune from criminal, civil, or administrative liability. *Id.* at § 74.34.215(7). Thus, while Washington's law is permissive, once a firm elects to halt a disbursement it must notify all persons on the account in addition to APS and law enforcement.

[15] If an incident known or observed by the mandatory reporter reasonably appears to be financial abuse, or triggers reasonable suspicion of abuse, he or she must report "the known or suspected instance of financial abuse by telephone or through a confidential Internet reporting tool, as authorized pursuant to Section 15658, immediately, or as soon as practicably possible. If reported by telephone, a written report shall be sent, or an Internet report shall be made through the confidential Internet reporting tool established in Section 15658, within two working days to the local adult protective services agency or the local law enforcement agency." *Id.* at § 15630.1(d)(1). Reports of suspected financial abuse of the elder or dependent adult qualify as a "privileged publication or broadcast" under Cal. Civ. Code § 47(b). The mandated reporter is protected from civil and criminal liability with respect to the report. Cal. Welf. & Inst. Code § 15634. Interestingly, *nonmandated* reporters who report the abuse in the same manner as the mandated are also protected from liability, unless it can be proven that the report was knowingly false. Cal. Welf. & Inst. Code §§ 15631, 15634.

Importantly, should the member firm *choose* to exercise its discretion to place a temporary hold, the firm is then *required* to:

(1) Establish and maintain records related to the compliance with the rule, including evidence the request for disbursement, the finding of a reasonable belief of that financial exploitation has occurred, is occurring, has been attempted, or will be attempted, and records relating to the required notice and internal investigation. 2165 (b)(2)(C);

(2) Establish and maintain specific written supervisory procedures reasonably designed to achieve compliance with the rule, including, but not limited to, procedures related to the identification, escalation and reporting of matters involving the financial exploitation of Specified Adults, 2165.02; and

(3) Develop and document specific training policies or programs reasonably designed to ensure that registered persons comply with the requirements of this Rule. 2165.03.

The proposed rule would allow a broker-dealer to *ignore* evidence financial exploitation of a vulnerable adult because it is permissive. Indeed, as written, if a broker-dealer or registered person becomes aware of information sufficient to establish a reasonable belief of financial exploitation of a vulnerable adult, it does not have to place a temporary hold on the disbursement of funds or securities. Given the need for strong protection of the elderly investing population, the member firm should be *required* to place a temporary hold in order to prevent or mitigate the dissipation of its client's assets.

Moreover, in the context of a permissive rule, the requirements imposed on those firms that do exercise discretion under the rule create a disincentive for firms to provide this important protection to its clients. The easier, less expensive choice for firms would be to simply do nothing. Requiring *all* member firms to establish and maintain written supervisory procedures and training programs for its registered persons related to the identification, escalation and reporting of matters involving the financial exploitation of its elderly clients would promote the interest of investor protection.

We recognize that NASAA's proposed Model Act includes a similar provision allowing, but not requiring, broker-dealers and investment advisers to delay disbursement of assets when there is a reasonable belief of financial exploitation. Model Act § 7. PIABA submitted a comment letter urging NASAA to obligate firms to act, and hopes that the final version of the Model Act will require firms to do so. However, even if the Model Act would require firms to delay disbursements under circumstances of suspected financial abuse, States are not obligated to adopt the Model Act. By making Rule 2165 mandatory, FINRA would set a uniform standard of protection to investors nationwide.

C. The Model Act Does Not Institute a Penalty for Willfully Ignoring Evidence of Abuse

In order to enforce the obligations that should be created by Rule 2165, there should be inclusion of a penalty. Broker-dealers are already provided with a safe harbor if they act under the rule. 2165.01. Conversely, if a broker-dealer fails to comply with its affirmative obligations and willfully ignores information sufficient to establish a reasonable belief that financial exploitation has occurred, is occurring or is about to occur, the firm should be subject to a penalty. Should FINRA amend the rule to impose mandatory obligations in order to enhance investor protection, it should also make clear that a private right of action would exist.

D. Amending Definitions Section to Include Definition of "Disbursement" and Adding Associated Persons to the Definition of "Qualified Person"

PIABA also proposes that FINRA amend the definitions section in the rule in two important respects. First, the rule currently does not define the term "disbursement." The rule should include a definition to ensure that the temporary hold is only placed on the particular disbursement(s) that raises the reasonable suspicion of financial exploitation, rather than the entire account(s) of the Specified Adult. Many elderly clients pay their monthly bills and expenses from their brokerage accounts; some payments to providers are automatic. As such, it is particularly important to define "disbursement" in a manner that will limit the temporary hold only to individual suspicious attempted disbursements.

Second, the rule currently defines "qualified person" to include persons who serve in a supervisory, compliance or legal capacity relative to the account at issue. The definition should be expanded to include registered representatives because they are usually the associated persons at the broker-dealer with the most contact with investors and, therefore, are in the best position to first identify any suspicious behavior or conduct. At minimum, the rule should require that the registered representative *report* any suspicious behavior or conduct to his or her supervisor or other legal or compliance personnel at the firm.

E. Conclusion

In summary, PIABA asks that FINRA amend proposed Rule 2165 to address the foregoing serious shortcomings in its current form. PIABA thanks you for the opportunity to comment on this important topic.

Very truly yours,

Hugh D. Berkson,
PIABA President

Invested in America

December 1, 2015

To: Marcia E. Asquith
Office of the Corporate Secretary
Financial Industry Regulatory Authority
1735 K Street NW
Washington, DC 20006

RE: FINRA Regulatory Notice 15-37, Financial Exploitation of Seniors and Other Vulnerable Adults

Dear Ms. Asquith,

Thank you for the opportunity to submit these comments on the proposed amendments to Financial Industry Regulatory Authority ("FINRA") Rule 4512 and new Proposed Rule 2165 (the "Proposed Rules")[1] on behalf of the Securities Industry and Financial Markets Association[2] ("SIFMA"). SIFMA joins our member firms in appreciation of the important work FINRA is doing to help the securities industry protect its clients – especially senior and vulnerable investors.

Senior financial exploitation is a problem that costs senior investors an estimated $2.9 billion annually[3] – funds that many were relying on to support them in retirement. Moreover, with 10,000 Americans turning 65 every day and an estimated 1 in 5 Americans aged 65 or older being victimized by financial fraud, this problem will continue to grow. Complicating these protection efforts is the fact that only an estimated 1 in 44 cases of financial elder abuse is reported and the fact that 55% of financial abuse in the United States is committed by family members, caregivers and friends.

Through FINRA's launch of its toll-free securities helpline for seniors and the release of Regulatory Notice 15-37, FINRA has made clear its commitment to bringing its frontline investor protection expertise to bear on the unique challenges facing aging and vulnerable investors. SIFMA is delighted to be able to work with FINRA on this initiative and looks forward to the final implementation of an effective and efficient senior investor protection framework.

For our part, SIFMA and our member firms have also been actively working on senior investor protection issues. We have a Senior Issues committee made up of 32 distinct member firms, have worked with 3 states to enact state-specific senior investor protection laws, and have instituted an annual Senior Investors Forum bringing together scientific experts, regulators (state, federal and self-regulatory organization) and the financial services industry to discuss policies, innovative practices,

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[1] FINRA Regulatory Notice 15-37.
[2] SIFMA is the voice of the U.S. securities industry, representing the broker-dealers, banks and asset managers whose 889,000 employees provide access to the capital markets, raising over $2.4 trillion for businesses and municipalities in the U.S., serving clients with over $16 trillion in assets and managing more than $62 trillion in assets for individual and institutional clients including mutual funds and retirement plans. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit http://www.sifma.org.
[3] "Broken Trust: Elders, Family, and Finances," MetLife, March 2009.

ongoing training, compliance, and stakeholder coordination, as well as the science and demographics of cognitive decline. We are also working to increase funding for the investigation of financial abuse and advocating for more efficient and effective Adult Protective Services ("APS") reporting.

Additionally, many of our member firms have been establishing proven track records as innovators in the senior investor protection space by developing alternative methods to prevent financial exploitation and protect their customers under existing law. For instance, it was SIFMA member firms that first began collecting 'trusted contact' information from clients and securing advanced-permission to reach out to and enlist the support of these individuals in order to address concerns that the firm may have regarding their client. The use of trusted contact forms continues to grow as more firms whose business model allow for meaningful use of such information adopt a trusted contact policy.

Other firms have integrated robust senior investor protection arrangements into client agreements, in which the client provides the firm with permission to execute a variety of specified actions (including refusing to process a transaction) when the firm believes there is a risk of fraud or exploitation. Such initiatives (and others) have already been proven to help protect the assets of a large number of senior investors. In fact, the collection of trusted contact information has been so successful that FINRA has chosen to address that very initiative in its proposed rules.[4]

As noted above, three states have enacted laws designed to provide securities firms with stronger tools to protect their senior clients: Washington State, Delaware and Missouri. Moreover, the North American Securities Administrators Association ("NASAA") released for comment Model legislation/regulation to provide states with a template and encourage the development of senior investor protection laws in more states. Now, with the release of FINRA Regulatory Notice 15-37 – which addresses many of the same issues as these state laws from a nationwide perspective – we have reached an important juncture in the protection of senior and vulnerable investors throughout the United States. For this reason, SIFMA urges FINRA to strengthen its collaborative efforts with organizations interested in promulgating senior investor protection laws, particularly NASAA.

As NASAA reviews the comments to its Model proposal, FINRA has an important opportunity to collaborate with state regulators to promote an integrated, nationwide senior investor protection framework. For example, in its comment letter to NASAA, SIFMA advocated for NASAA to change its base hold period to conform to the potential 30 business day hold present in FINRA's proposed rules. Integrated and consistent laws at the state and national level can only serve to strengthen senior investor protection efforts and provide the most efficient and effective support possible to the securities industry's most vulnerable clients.

With the that in mind, SIFMA respectfully submits our comments on the proposed rules below – comments which we believe will serve to strengthen the senior investor protection framework proposed in Regulatory Notice 15-37. For ease of reading, we have divided our comments into two sections: (1) comments on Proposed Rule 2165; and (2) comments on the proposed amendments to Rule 4512.

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[4] The flexible collection of 'trusted contact' information based upon each FINRA member firm's business model has been particularly successful.

A. Proposed Rule 2165 (Financial Exploitation of Specified Adults)

1. The Reporting Process

i. It is Important to Include Government Agencies and other Financial Institutions as Part of the Permissible Reporting Structure to Ensure the Highest Possible Level of Investor Protections

In each of the states where similar proposals were enacted into law (Washington State, Delaware and Missouri), the senior investor protection initiative grew out of an organic partnership between regulators, industry members and APS organizations, and a common goal to better protect the industry's senior and vulnerable clients. Through these partnerships, the desire of both state securities regulators and APS organizations to investigate reported instances of exploitation and provide (possibly informal) guidance to member firms was made abundantly clear.

APS organizations and state securities regulators, as well as traditional law enforcement agencies, have served an important and robust role in protecting seniors from exploitation, have greater tools to investigate instances of exploitation (state securities regulators are particularly effective at investigating securities fraud and financial exploitation), and have often expressed a clear desire to investigate reported cases of suspected exploitation.

However, in order for the agencies to investigate suspected financial exploitation, they must first be aware of the suspected financial exploitation. Across the United States, FINRA member firms regularly reach out to both state securities regulators and APS organizations to provide them with as much information as they are legally able to further investigations into cases of suspected financial exploitation. SIFMA believes that it is important for Proposed Rule 2165 to reflect these efforts in order to ensure the highest possible level of investor protections; therefore, SIFMA urges FINRA to include language in the proposed rules explicitly recognizing these situations by expressly allowing FINRA member firms to voluntarily report suspected cases of financial exploitation to state securities regulators, APS organizations, or other law enforcement officers in cases of suspected financial exploitation.

Further, to ensure that Proposed Rule 2165 provides for the most effective protections possible, it should clearly allow member firms to provide the agencies with all information, documentation, and account histories necessary to promote a full, robust investigation. This is a permission that is expressly included in every state senior investor protection law to date,[5] as well as NASAA's proposed Model. It is also important to ensure that the provision of these records falls within Proposed Rule 2165.01's safe harbor.

SIFMA respectfully requests that FINRA also consider recognizing a FINRA member firm's ability to contact other financial institutions which are receiving counter-parties of an account transfer when fraud or exploitation is suspected. Generally, FINRA member firms currently make such disclosures under anti-money laundering laws, but recognizing this authority within Proposed Rule 2165 or in the proposed amendments to Rule 4512 would streamline and significantly promote outreach to Automated Customer Account Transfer Service ("ACATS") counter-parties.

[5] Washington State, Delaware and Missouri.

As discussed above, senior financial exploitation costs senior investors nearly $3 billion per year, and many of the individuals seeking to exploit senior and vulnerable investors are quite savvy. Moreover, as an estimated 55% of financial abuse in the United States is committed by family members, caregivers and friends, many of these bad actors have intimate knowledge of an investor's dealings and relationship with their financial advisor. Many times, when a bad actor is seeking to gain control or exploit a senior or vulnerable investor, the bad actor will process an ACATS request in order to avoid an advisor that the senior or vulnerable investor has a familiar and trusted relationship with, and move the investor's assets to an institution where the investor is unknown to the firm's personnel.

Other times, due to the nature of the ACATS system, a member firm may have concerns about an account, and after raising those concerns with the client, the bad actor may hear of those concerns, allowing the bad actor to process an ACATS transfer with an intent to move funds before the member firm is able to take other remedial action.

In both of these cases, the receiving counter-party would have little to no background knowledge of the client and would be unaware of the concerns of the sending member firm. By allowing the sender to notify the receiver of concerns on the account (before or after the transfer takes place), FINRA would remove an effective tool from the bad actor's toolbox. Notably, this permission should be provided even if a hold is never placed on an account – a transfer can often occur before a firm is able to place a hold, especially in cases where the transfer itself is the final action that provides a member firm with a reasonable belief of suspected financial exploitation and the financial advisor or qualified person is not notified of the transfer until after it is executed.

ii. **Reporting to a Trusted Contact or an Immediate Family Member Should be Voluntary and Separate from the Placement of a Hold**

SIFMA supports FINRA's proposal to permit member firms to contact third parties in cases of suspected financial exploitation. However, under proposed Rule 2165(b)(1)(B), member firms are required to notify a trusted contact or an immediate family member within two business days of a hold being placed on an account. This is an unnecessary mandate that does not reflect the realities of many cases of suspected financial exploitation (especially situations which are immediately resolved by initial contact with the client as discussed below), could serve to create more harm than good, and may deter investors from providing trusted contact information. As such, SIFMA respectfully requests FINRA consider adopting a voluntary reporting process for trusted contacts and immediate family members that is separate from the process of placing a hold.

In both the Missouri law and the NASAA proposal, the ability to contact a third-party is separate from the temporary hold process. This is an important development in senior investor protection laws because of the isolation faced by many victims of financial exploitation. According to the National Council on Aging, social isolation is one of the leading factors in the abuse of vulnerable adults[6] (though it is important to note that, generally, social isolation does not mean a complete lack of social relationships, but merely the existence of minimal social contacts which shields perpetrators from scrutiny).[7]

[6] "Elder Abuse Facts," National Council on Aging, available at: https://www.ncoa.org/public-policy-action/elder-justice/elder-abuse-facts/.
[7] *See* "Social isolation in older adults: an evolutionary concept analysis," Nicholson NR, Jr, available at: http://www.ncbi.nlm.nih.gov/pubmed/19291185/; *See Also* "Elder Mistreatment: Abuse, Neglect, and Exploitation in an Aging America," Hafemeister, Thomas L., available at: http://www.ncbi.nlm.nih.gov/books/NBK98784/.

Often times, the exploitation of seniors and vulnerable investors can be directly prevented by reaching out to one of these trusted individuals in a timely fashion, even before a hold is placed on a transaction. By providing member firms with the ability to contact a trusted third party or immediate family member outside of the hold process, FINRA would provide its members with an additional, effective tool to combat financial exploitation while simultaneously avoiding a possibly detrimental mandate.

One example of this is when the events that provide a member firm with a reasonable belief that there may be ongoing financial exploitation of a client occur in-between transactions.[8] In these cases, the current proposed rules would require the member firm to wait until the next suspect disbursement before reaching out to an immediate family member when no trusted contact is given or the trusted contact is suspected of participating in the exploitation. In these cases, often notifying a client's immediate family member of the suspected exploitation (long before a hold is placed) is the most efficient and effective way to protect the investor. For this reason, it is important that the contact provisions exist separate from Proposed Rule 2165(b)(1)(B)'s hold provisions.

It is also important that any contact of either the trusted contact or an immediate family member be voluntary. Often, a FINRA member firm will identify a suspect transaction, place a hold on the transaction and notify the client. Upon finding out that the person to whom they attempted to transfer assets was not, in fact, their grandson in trouble overseas, the client is pleased with the result and does not pursue the transaction further. There is absolutely no need for the trusted contact to be notified as well, which may cause unnecessary embarrassment for the client or cause the client to revoke the trusted contact designation.

Moreover, requiring a member firm to reach out to an immediate family member under the circumstances outlined in Proposed Rule 2165(b)(1)(B) will likely lead to awkward, potentially harmful situations. In many cases, a senior client's only living immediate family member[9] may be an individual that has little or no role in the client's life.[10] In this case, the immediate family member would be unlikely to provide any assistance in the resolution of the situation, and that contact may actually be harmful. In the most extreme cases, it is a possibility that FINRA would be requiring a member firm to notify an unknown, potential bad actor – who has nothing to do with the current situation – of a client's vulnerability.

Moreover, taking into account the above scenarios, the existence of the mandate in Proposed Rule 2165(b)(1)(B) may actually serve as a deterrent for a client to provide a trusted contact. Knowing that, whenever financial exploitation is suspected and a hold is placed on an account, the trusted contact <u>must</u> be notified within the <u>same time frame</u> as the client, could cause individuals to think twice before providing a contact in writing, especially considering the relatively commonplace scenario where a simple client contact resolves the issue.

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[8] For instance, consider the case of a caregiver who exerts undue influence on a specified individual to make large disbursements every four months, and the member firm receives knowledge of the undue influence days after the latest disbursement is processed. Under the current proposal, the member firm would be required to wait nearly 4 months before reaching out to an immediate family member if no trusted contact was provided (or when the trusted contact is the suspected individual).

[9] As defined in Proposed Rule 2165(a)(5).

[10] An example of this situation would be when the only living immediate family member of a client is an estranged in-law. The FINRA member firm may have no knowledge of the in-law, other than their existence, and would still be required to contact them in certain instances. Worse still, the member firm would still be required to contact the individual under the currently proposed rules even if they are aware of a strained relationship, unless sufficient evidence existed to support a reasonable belief that the in-law would engage in financial exploitation of the senior client.

Alternatively, clients would likely be more willing to provide the information for a trusted contact person if notifying that individual of a potential problem was within the trusted discretion of the member firm; clients generally trust the judgment of their financial advisor (after all, clients regularly entrust their advisor with their wealth, retirement and personal information).

One of the rationales provided by FINRA is that the contact must be mandatory in order to relieve Regulation S-P concerns, as Regulation S-P includes an exemption for legally required contacts.[11] However, because the trusted contact is an individual that is designated for contact by the client, any outreach falls within the Regulation S-P client consent exception,[12] and therefore the act of reaching out to the trusted contact does not need to be mandatory to alleviate such concerns.

Further, as discussed in the introduction section of this letter, FINRA member firms may enter into agreements with their clients detailing in which situations they may reach out to specified individuals. In this instance, the proposed rules could unintentionally supersede a negotiated agreement with a client, even though any contact would be permissive and within the client consent exception of Regulation S-P.

It is for these reasons that we believe the notification of a trusted contact or immediate family member should be both voluntary and separate from the hold provision in Proposed Rule 2165(b)(1)(B).

iii. **The Third Party Contact Provisions Should be Inclusive and All Contact Options Should be Available Once there is a Reasonable Belief of Financial Exploitation**

Currently, the proposed rules contemplate a client providing the name and contact information for a single trusted contact person to the FINRA member. However, the nature of the information delivery and the nature of the contact person are unclear. Member firms serve a vast array of clients across the United States, with varying needs, contact preferences, and circumstances. For this reason, member firms have designed and adopted open and flexible trusted contact policies. The final language of the proposed rules, (particularly the language in Proposed Rule 2165(b)(1)(B)(ii), as well as the proposed amendments to Rule 4512 (discussed later in this letter)) should allow for clients who wish to provide multiple contact persons, or a contact organization (such as the family's law firm or a trusted service organization). The latter part is particularly important because, as discussed above, the most vulnerable investors are also the most socially isolated.

Additionally, each client may have a different comfort level with providing information in a certain way. For this reason, the proposed rules should contemplate situations where a client orally notifies a member firm of a trusted contact, particularly in a case of trusted professionals who owe a higher level of care to the client – such as lawyers, certified public accountants, or health professionals – so long as the client is the one that designates the contact as trusted and the communication is appropriately documented by the member firm. Such flexibility is necessary to ensure that the provision of trusted contacts to member firms is as simple as possible for the greatest number of clients.

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[11] 17 C.F.R §§ 248.15(a)(7)(i).
[12] 17 C.F.R §§ 248.15(a)(1).

Moreover, once a party is identified as one that the member firm may contact once a reasonable belief of financial exploitation exists, all contact options should be immediately available to the member firm. Currently, Proposed Rule 2165(b)(1)(B)(ii) requires a member firm to notify the Trusted Contact, and if that contact is unavailable or the member reasonably believes that contact to be a part of the exploitation, then (and only then) the member firm is required to attempt to contact an immediate family member.

However, a client's personal situation can often change quite quickly, and the trusted contact person may not be the best individual (or entity) to reach out to. For example, it is not uncommon for seniors to move in with their children or other close relatives at some point during their lives, while designated trusted contacts may move away. Consider a situation where a client provides one of two children as the designated trusted contact person because that child is geographically closest. Within the next several years, and without the client formally updating the trusted contact information, the senior moves in with the non-designated child, and the other takes a new job in another state. All of a sudden, under the proposed rules, the member firm must spend time (possibly days) attempting to contact the distant child before being able to reach out to the child caretaker. In some situations, this could mean two more days that the client is vulnerable to the influence of a bad actor, and while the specific securities transaction may be held, the client could face additional harm nonetheless.

The opposite problem was already discussed in §A(1)(ii) above, where a designated trusted contact is not provided or cannot be reached within the two business day timeframe and the member firm is then required to attempt to notify an immediate family member that has little or no role in the client's life.

Often, it is a member firm that regularly deals directly with the client that is in the best situation to determine which third party they should contact (if any) to bring about the most efficient, effective and beneficial resolution for their client.

For these reasons, SIFMA believes that any trusted contact provision in the proposed rules should ensure the necessary flexibility in who can serve as a trusted contact person (including multiple individuals or an organization), how the client can designate trusted contacts, and which third parties the member firm may contact first (if any).

iv. **The Immediate Internal Review Required by the Proposed Reporting Process is Unnecessarily Duplicative and Confusing**

The requirement for FINRA member firms to "immediately [initiate] an internal review"[13] is unnecessarily duplicative, because the proposed rules already tacitly require firms to initiate an internal review **prior** to the placement of any hold. Once a possibly suspect transaction is identified, firms must initiate an internal review in order to determine if the transaction is in fact suspicious, as well as whether the facts surrounding the transaction rise to the level sufficient to support the placement of a hold or the submission of a report under a given jurisdiction's abuse laws. Specifically, by providing for the placement of a hold when a "Qualified Person reasonably believes that financial exploitation has occurred, is occurring, has been attempted, or will be attempted," the proposed rules already require an internal review to exist to determine whether the facts and circumstances constitute a "reasonable belief."

[13] Proposed Rule 2165(b)(1)(C).

By explicitly requiring an investigation in Proposed Rule 2165(b)(1)(C), the proposed rules create unnecessary duplication and confusion. In some cases, clear situations of financial exploitation exist and a firm will complete a full investigation prior to placing a hold; no further investigation would be necessary in this instance.

2. The Safe Harbor Provisions

i. The Safe Harbor Provision Should Provide Explicit Relief from FINRA Rules

Proposed Rule 2165.01 provides a "safe harbor when they exercise discretion in placing temporary holds on disbursements of funds or securities" for FINRA member firms. SIFMA commends FINRA for including this provision in the proposed rules, strongly supports FINRA efforts in this space, and, for the sake of clarity, respectfully requests that FINRA provide examples of specific rules from which members would receive safe harbor. Specifically, SIFMA suggests that FINRA consider directly referencing, but not limiting the safe harbor to, FINRA Rule 5310.01[14,15] and FINRA Rule 11870.[16]

ii. In Order to Ensure that Senior Investors are Fully Protected, the Safe Harbor Provisions Should be Extended to Member Firms When an Investigation (Governmental or Internal) Reveals Financial Exploitation

As discussed in §A(1)(i) of this letter, the ability for state securities regulators, APS organizations, and law enforcement agencies to investigate cases of suspected financial exploitation is a vital component of an effective senior investor provision. However, many of these organizations routinely face resource challenges, while others (specifically APS organizations in certain states) may not have the authority to investigate suspected financial exploitation. In these cases, it is important that seniors and other vulnerable investors remain protected.

Unfortunately, the only remedy (beyond the hold itself) currently provided in the proposed rules[17] for situations where financial exploitation of an eligible adult is discovered is the receipt of a court order.[18] This means that, under the proposed rules, firms would be required to seek a court order every time financial exploitation is discovered and persists after the time limits provided (for example, when a client continues to insist on making advance-tax payments on their "winnings" from a foreign lottery that she or he never entered). As noted above, senior financial exploitation is a nearly $3 billion industry and this mechanism could add tens of thousands of cases to already overburdened civil courts nationwide.

As discussed in §A(1)(i) above, FINRA member firms routinely identify, investigate and report cases of suspected financial exploitation to the government. However, the proposed rules do not account for a governmental order advising a FINRA member firm to permanently refuse the transaction

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14 FINRA Rule 5310.01 states that, "[a] member must make every effort to execute a marketable customer order that it receives fully and promptly."
15 Especially if FINRA amends the proposed rules to focus on 'transactions' instead of 'disbursements' as requested in §A(4)(i) below.
16 FINRA Rule 11870 concerns "Customer Account Transfers."
17 And the only remedy to which the proposed rules' safe harbor provision applies.
18 Proposed Rule 2165(b)(3).

(discussed in §A(3)(i) below), nor do they account for a situation where the agencies are unable to investigate or provide guidance to the firm (for whatever reason). When the agencies are not able to investigate, the member firm becomes the default protector of its senior clients, and the next steps (whatever those may be) must be taken by the firm. While some firms may provide for this situation in their individual account agreements (and it is vitally important that the proposed rules reflect an investor's ability to contract for their own protection), it is important that no firm should feel obligated to execute an exploitative transaction.

Currently, should the potentially exploitative transaction persist after the time periods provided for in Proposed Rule 2165, and an investigation has revealed the situation to be exploitative, firms are not specifically covered by the Proposed Rule 2165.01 safe harbor regardless of whether they act in accordance with existing law (in the case of a finding by an agency), in accordance with a customer agreement, or in accordance with a general obligation to protect their clients to the best of their ability.

Further, while it is true that firms that continue a hold beyond the specified time period may later be found by a court, arbitrator or regulator to have acted appropriately in protecting their customer, one of the purposes of the proposed rules appears to be providing firms with some certainty during the period when the customer is most vulnerable, in order to encourage firms to act. However, as proposed, this purpose would be frustrated by requiring firms to seek a court order upon the expiration of the specified time limits in order to obtain said certainty.

If these rules are to have a meaningful effect in protecting senior investors beyond the existing law, and ensure that those investors are sufficiently protected regardless of whether a governmental investigation was conducted, the safe harbor provisions should be extended to cover the final decision of a firm when financial exploitation of an eligible adult is found. It is also important to note that any concerns related to providing member firms with this authority would be easily addressed by allowing the hold to be terminated at any time by the order of an investigating state agency, in addition to a court order in Proposed Rule 2165(b)(1)(2).

iii. Other Necessary Extensions of the Proposed Rule 2165.01 Safe Harbor

It is also important to note that, should FINRA choose to separate the contact provisions from the hold provisions or explicitly include allowing for the disclosure of records to regulators, APS organizations or law enforcement agencies as suggested in §§ A(1)(ii) and A(1)(i) above respectively, the Proposed Rule 2165.01 safe harbor should be extended to include those activities as well.

Additionally, as discussed in §§A(1)(ii) and A(2)(ii) above, §§A(3)(i), B(1) and B(2) below, and the introduction section of this letter, many firms regularly enter into agreements with their clients regarding who they may be able to reach out to, under what circumstances they may be able to reach out to the designated parties, and what information the member firm is allowed to share, as well as what additional actions the firm is permitted or required to take when financial exploitation or fraud is suspected. It is important that any FINRA rule be cognizant of firm's capabilities under existing law – so as not to unintentionally weaken alternative investor protections – and reference those capabilities explicitly. For these reasons, SIFMA urges FINRA to consider recognizing, within the Proposed Rule 2165.01 safe harbor, member firms' ability to develop and implement alternative investor protection structures under existing law (specifically including a client's right to voluntarily enter into an alternative protection structure through agreement with the FINRA member firm).

3. Timeframes

i. The Length of the Hold Should be Extendable in Accordance with Other State or Federal Laws or by Agreement

SIFMA strongly supports the base time frame for the hold provided in Proposed Rule 2165.[19] SIFMA believes that this time frame is of sufficient length to complete most (though not all) investigations into cases of suspected financial exploitation and to account for the different court procedures in jurisdictions across the United States. In fact, in SIFMA's comment letter to NASAA on their proposed Model Act to Protect Vulnerable Adults from Financial Exploitation, SIFMA encouraged NASAA to adopt the base time frames used by FINRA in Proposed Rule 2165(b)(2)-(3).

That being said, SIFMA believes it is important that any final rule does not unnecessarily limit the authority of other securities regulators or government agencies (in accordance with existing laws), or the ability of member firms to enter into agreements with their customers.

As FINRA knows all too well, there is no "one size fits all" solution to investigating fraud and financial exploitation – especially in the complex situations that tend to arise in the financial exploitation of a close relative. Each of these cases is unique and all of them must be approached on a case-by-case basis. While some cases may only require a 2 or 3 day extension, other particularly complex cases may require extensions beyond the timeframe provided in Proposed Rule 2165(b). For this reason, investigating government agencies should be able to provide, and determine the length thereof, an extension beyond the specific time limits set forth in Proposed Rule 2165(b).

Additionally, as the frontline investigators of state securities matters, many state securities regulators are granted broad discretion in the performance of their duties, and the time limits provided in Proposed Rule 2165(b) may serve to effectively curtail the existing authority of the regulator, as member firms seek to comply with FINRA-established time limits.

Moreover, as states begin to implement their own senior investor protection laws, it is important that FINRA member firms receive the safe harbor provided for in Proposed Rule 2165.01 when they act in accordance with an applicable state law. For example, the Delaware senior protection law provides for holds that could last up to 40 business days – 10 business days longer than the time limits provided for in the proposed rules.

FINRA member firms also form agreements with their clients regarding actions that the firm may take in the face of a potentially fraudulent or exploitative transaction, and SIFMA believes that it is important that the proposed rules do not limit an investor's ability to enter into an agreement with a member firm which may provide more robust protections to the investor.

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[19] Proposed Rule 2165(b)(2) states that, "(2) The temporary hold authorized by this Rule will expire not later than 15 business days after the date that the Qualified Person first placed the temporary hold on the disbursement of funds or securities, unless […] extended […] pursuant to paragraph (b)(3) of this Rule."

As such, SIFMA respectfully requests that FINRA add the following language to Proposed Rule 2165(b)(2):

> "(2) The temporary hold authorized by this Rule will expire not later than 15 business days after the date that the **member** ~~Qualified Person~~ first placed the temporary hold on the disbursement of funds or securities, **unless otherwise permitted by state or federal law, through agreement with the specified adult or their authorized representative, or in accordance with prior written client instructions or lawful orders, or** sooner terminated ~~by an order of a court of competent jurisdiction,~~ or extended either by an order of a court of competent jurisdiction or pursuant to paragraph (b)(3) of this Rule."

Accordingly, SIFMA also respectfully requests that parallel language be included in Proposed Rule 2165.01.

ii. The Two Business Day Limit to Contact All Parties Authorized to Transact Business on an Account is Too Short

Under the currently proposed rules, member firms would have two business days to actively "[provide] notification to"[20] all parties authorized to transact business on the account, as well as the trusted contact person. Moreover, if the trusted contact person is unavailable, the member firm would be required to attempt to contact an immediate family member in that same time period. In addition to the difficulties that this arrangement creates discussed in §§A(1)(ii) and A(1)(iii) above, the two business day limit for contacting all parties authorized to transact business on the account is simply too short. Individual parties can be difficult to reach; the member firm may not have the most up to date mailing address, and some individuals will often fail to return calls. It is not uncommon for it to take more than a week for a member firm to be able to definitively reach a specific individual.

Further, the relatively vague language "all parties authorized to transact business on the account" can be expansive and burdensome. In many cases, senior clients may authorize their many children to transact some limited business, and being required to notify each and every one of them magnifies the difficulty of complying with the proposed time frame. Additionally, should several people be authorized to transact business on an account, it may not be necessary to notify all individuals. For instance, consider a situation where there are five children authorized to transact business on an account in addition to the senior client and the senior client requests a clearly fraudulent disbursement (i.e., making payments to a known scam). Similar to the situations described in §A(1)(ii) above, a short hold and notification of the client (the individual requesting the disbursement) will often resolve the situation almost immediately, defeating the need to contact "all parties."

[20] Proposed Rule 2165(b)(1)(B).

As such, SIFMA urges FINRA to consider a notification provision akin to the one found in the Washington State law, which requires firms to make "reasonable efforts" to notify the necessary parties, without placing a specific time limit. As noted above, such flexibility of law is important to allow for the wide variety of potentially exploitative situations which arise. By utilizing similar language, FINRA would change Proposed Rule 2165(b)(1)(B) into a process-based test (of which member firms can control the outcome) from an outcome-based test (of which member firms often cannot control the outcome).

4. The Scope of the Proposed Rules

i. A Focus on Transactions Would Provide Significantly Greater Investor Protections

SIFMA believes that focusing on "disbursements" unnecessarily limits the protections provided by the proposed rules; instead, SIFMA encourages FINRA to consider addressing "transactions" (as in the Delaware law), which would provide significantly more robust protections for senior investors and vulnerable adults. For example, under the current language in proposed rules, should an exploitative liquidation of investments occur, the member firm would only be protected by the proposed rules when they refuse to disburse the fruits of the exploitative sale, but would receive no protections for refusing the initial sale of the investment – an action that can be almost as damaging to an investor as the disbursement, and can trigger significant tax consequences (due to a liquidation of securities or an individual retirement account ("IRA"), for example), fees or other negative financial implications for the senior or vulnerable investor because the transaction may not be suitable or may be inconsistent with a client's risk tolerance, exposing the senior or vulnerable investor to financial losses (such as new investments in options or penny stocks).

Other examples of exploitative, non-disbursement transactions include: the buying of an investment product for the benefit of the wrong-doer, a change in ownership of an account, a change in the beneficiary of an account, and the incursion of penalties due to another change in the account (such as annuity-related surrender charges).

For the reasons discussed in this subsection, as well as in §A(1)(i) above, and for the sake of clarity, SIFMA also requests that FINRA consider explicitly extending the hold process to ACATS transfers.

ii. The Obligations and Safe Harbor of the Proposed Rules Should Apply at the Firm-level, Not the Individual Level

The proposed rules define a "Qualified Person" as "an associated person of a member who serves in a supervisory, compliance or legal capacity that is reasonably related to the Account of the Specified Adult."[21] Under Proposed Rule 2165(b)(1), the "Qualified Person" would be the one that places a temporary hold, however it is the FINRA member firm that is protected by the Proposed Rule 2165.01 safe harbor provision.

[21] Proposed Rule 2165(a)(3).

Most firms have a pre-determined escalation process for cases of suspected financial exploitation, which involves financial advisors escalating suspicious transactions to supervisory, compliance or legal staff (a "Qualified Person"). However, it is generally considered to be the member firm that places a hold on the account when a Qualified Person has a reasonable belief regarding the financial exploitation of a specified adult, and it is the member firm that FINRA recognizes as having the duty to notify the relevant parties when the hold is placed. On the other hand, it is only the member firm – and not the Qualified Person – that would receive safe harbor for their actions under the proposed rules. As such, and in order to maintain consistency between the permissive action and the safe harbor provision, SIFMA suggests replacing "Qualified Person" with "member" in Proposed Rule 2165(b)(1) and 2165(b)(2), as well as the second mention of "Qualified Person" in Proposed Rule 2165(b)(3).

Additionally, should FINRA choose to separate the ability to notify third-parties from the ability to place a temporary hold, as discussed in §A(1)(ii) above, FINRA should ensure that any such language applies at the member firm-level (as it currently does in Proposed Rule 2165(b)(1)(B)).

5. Definitions

i. "Account" Should be Expanded to Include Accounts for which a Specified Adult is a Named Beneficiary

SIFMA supports the expansion of "account[s]" in Proposed Rule 2165(a)(2) to include accounts where a specified adult is a named beneficiary. There are a number of situations that can occur where a specified adult, as a named beneficiary, is harmed due to fraudulent or exploitative actions by bad actors. Often, a specified adult will develop their retirement plan in equal reliance on both beneficiary and directly-owned assets, and the injury to a senior or vulnerable beneficiary can be just as harmful as an injury to a senior or vulnerable account owner. As such, and in the interest of strong investor protections, SIFMA supports including accounts for which a specified adult is a named beneficiary under the aegis of the proposed rules.

ii. The Definition of "Immediate Family Member" Should be Expanded

SIFMA believes that the definition of "immediate family member" in Proposed Rule 2165(a)(5) should be expanded to include nieces and nephews when used as part of a firm's voluntary outreach. As discussed in §A(1)(ii) above, senior clients often face growing social isolation as they age and FINRA member firms often encounter the "Maiden Aunt" or "Bachelor Uncle" that has outlived their siblings. Often, the only family members these clients have are their nieces and nephews and, given the commonality of this occurrence, SIFMA respectfully requests their inclusion in the definition of "immediate family member." While the mandated contact of nieces and nephews when a hold is placed on a suspect disbursement would place significant burdens on firms, the ability to reach out to nieces and nephews on a voluntary basis would be a strong and effective senior investor protection tool to include in Proposed Rule 2165(a)(5).

iii. The Age Utilized in the Definition of Specified Adult Should be Changed to 60

In order to promote regulatory coordination, SIFMA respectfully requests that FINRA consider adjusting the minimum age for a specified adult to 60. The Elder Justice Act,[22] the Social Security Act,[23] and the Older Americans Act,[24] as well as the Washington State[25] and Missouri[26] senior investor protection laws and the NASAA Model proposal[27] each use the age of 60 as their qualifying age for inclusion under the respective laws. As the Elder Justice Act and the Older Americans Act are two of the more prominent laws in the senior protection space, and each of the state senior investor protection laws similar to the proposed rules that utilize age limits use the age of 60, SIFMA believes that utilizing 60 as the minimum age to be included in the proposed protections would serve to advance a more clear, consistent and integrated national protection framework.

iv. Clarification is Needed in the Definition of "Qualified Person"

As discussed in §A(4)(ii) above, SIFMA has suggested that FINRA utilize the term "Qualified Person" in limited situations. However, even should FINRA choose to limit the use of this term as suggested, there has been some concern and confusion expressed amongst FINRA member firms regarding the "reasonably associated with the account" clause in the proposed definition of "Qualified Person."

In particular, there is concern that this language may not be applicable across business models. For example, are Qualified Persons that work in a centralized vulnerable-client department considered to be reasonably associated with an account? What about Qualified Persons on escalation teams that are spread out regionally? Or a Qualified Person who works as the designated senior protection contact for all accounts with no previous relationship to the account?

Any individual that works in a supervisory, compliance, or legal capacity, and is employed by the member firm which holds the Specified Adult's account should be considered "reasonably associated with the account" in order to capture the differing escalation and reporting models across member firms and ensure that any trained and designated supervisor, compliance officer or legal report is authorized to review a possible exploitation situation and take action on behalf of the member firm. If that is the case, the "reasonably associated with the account" language is superfluous and creates unnecessary confusion.

To this end, SIFMA brings your attention to the definition of "Qualified Individual" in the Missouri senior investor protection law: "a person associated with a broker-dealer who serves in a supervisory, compliance, or legal capacity as part of his or her job."

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22 42 U.S.C. §1397j(5).
23 Ibid.
24 42 U.S.C. §3002(40).
25 Washington State, Ch. 133, Laws of 2010.
26 Missouri SB 244, 2015.
27 NASAA, Notice of Request for Comments Regarding NASAA's Proposed Model Legislation or Regulation to Protect Vulnerable Adults from Financial Exploitation, §2(3).

v. Clarification is Requested in the Definition of "Specified Adult"

In addition to the clarifications requested in the definition of "Qualified Person," SIFMA asks that FINRA provide clarification on the proposed definition of "Specified Adult." Specifically, SIFMA would like FINRA to provide greater guidance regarding what it would consider as a "mental or physical impairment" under Proposed Rule 2165(a)(1). For instance, it is unclear as to whether this would include temporary, as well as permanent or chronic impairments.

B. Proposed Amendments to Rule 4512 (Customer Account Information)

1. FINRA Should Provide Guidance on the Collection of a Trusted Contact, as Opposed to Mandating its Collection

Historically, the Trusted Contact form has been one of the more recent innovations in industry efforts to better protect their senior and vulnerable clients. From the beginning, this has been an industry-driven endeavor and has spread quickly throughout many broker-dealers. The form provides the FINRA member firm the ability to reach out to an individual when the firm has concerns about their client under existing law. Already, this has been an excellent and successful tool in the fight against senior financial exploitation. However, the adoption of the Trusted Contact form has not been universal, and for the reasons discussed below, SIFMA believes that the collection of trusted contact information should be voluntary, and that FINRA should provide guidance to help member firms whose business model is conducive to the use of trusted contact information and that do not yet collect that information.

One of the reasons that the Trusted Contact form has not been adopted by all broker-dealers is that the form is not necessarily suitable for all business models. For instance, there are a number of firms that specialize in low-cost self-directed investing, which relies heavily on technology and provides little to no face-to-face interactions with clients and no dedicated employee that serves a particular client. As such, the knowledge that these member firms have of their client remains strictly at the transactional level. In these situations, collecting a trusted contact from a client would be unreasonable.

Moreover, mandating member attempts to collect trusted contact information on all accounts can be costly and burdensome, with sometimes little beneficial return. Even "just" adding a trusted contact box to client onboarding and upkeep forms requires the development of oversight, tracking and implementation procedures which must then be integrated into existing processes and training modules. Further, Proposed Rule 4512.06 requires an additional disclosure, in writing, that will have to be made to every new and existing client. However, the burden of the disclosure is not limited to the simple production of the document and outreach to the client – it also involves new books and records requirements to ensure that the disclosure is made and to track a client's receipt of that disclosure. For small firms, this can be a time consuming process, while for larger firms it is an extensive requirement that would generate hundreds of thousands of records.

Moreover, depending on a firm's specific business model, there may be little they can do with such information – particularly firms which rely primarily on technology, have little to no regular interaction with their clients, or offer automated advice and investment services.

These issues are further underscored by the awkward mechanism currently in place in the proposed rules. As currently written, the proposed rules require the mandatory collection of information that is only used as part of a voluntary investor protection framework. SIFMA applauds FINRA for recognizing the benefits and necessity of a voluntary reporting and hold process and the different roles played by the different business models among FINRA member firms, and urges FINRA to extend this consideration to the collection of trusted contact information.

For example, the technology-based or technology-centered member firms discussed above may have little ability to use the trusted contact information on the vast majority of accounts, as the information they are able to receive may never be sufficient to give rise to a reasonable belief of financial exploitation. This is particularly true for member firms whose business model primarily relies on providing low-cost self-directed IRAs or automated advice.

For the vast majority of accounts held by such member firms, the only information they regularly receive is the age of the investor and their pattern of trades, which is rarely sufficient to give rise to a reasonable belief – particularly in retirement accounts, which are often characterized by long periods of inactivity punctuated by large transactions when retirement, unemployment, or emergencies occur. In these instances, the mandatory collection of trusted contact information in Proposed Rule 4512(a)(1)(F) places a significant burden on certain member firms, requiring the attempted collection of information on hundreds of thousands of accounts for which they could never use such information.

However, while the collection of trusted contact information may not be conducive to all business models, SIFMA believes that FINRA has a role in this space. The FINRA rulemaking process is an excellent vehicle to help guide its member firms who wish to implement trusted contact collection on how best to implement these procedures. For instance, some member firms may not realize the benefits of ensuring that the trusted contact be an individual with a close relationship with the client, but with no relationship to the account.

For these reasons, SIFMA urges FINRA to consider changing the proposed amendments to Rule 4512 from active requirements on firms to guidance to help those who do not currently collect trusted contact information set up a process to do so. Further, by ensuring flexibility in the collection of trusted contact information (i.e., the collection of what information, from whom and at what time), FINRA would allow firms with different business models and client bases to develop efficient and effective mechanisms specifically tailored to a firm's structure and their client's needs.

Alternatively, it is important to note that even the firms that have already developed a Trusted Contact form and regularly seek this information from clients have taken years to fully implement the form and the practice of seeking trusted contact information. If Proposed Rule 4512(a)(1)(F) is enacted as currently written, firms will have little to no lead time at all. For this reason, should FINRA maintain the mandatory collection of trusted contact information in Proposed Rule 4512(a)(1)(F), FINRA should be sure to provide firms with sufficient lead time (an estimated 24 months) to fully develop the necessary structures around the collection of trusted contact information.

2. There is No Need to Limit the Information that Could be Shared with a Designated Trusted Contact

Proposed Rule 4512.06 expounds on what information a FINRA member firm can seek to confirm, and does not provide for any information that can be shared with the trusted contact. As discussed in §A(1)(2) above, one of the most effective ways to combat suspected exploitation is to notify the trusted contact of the concerns of the member firm, as opposed to using the trusted contact as a means to confirm information, such as health status, that the member firm may or may not be able to otherwise act on.

The primary purpose of the Trusted Contact – as developed by FINRA member firms and adopted by firms across the industry – is to have the client designate an individual or individuals that the client feels comfortable allowing the member firm to reach out to when warranted by various circumstances. Importantly, this does not always concern a financial exploitation situation – trusted contact permissions can be used to notify trusted designees about capacity-related concerns, to track down an absentee client when a client's holdings are in danger of being escheated to the state, or to request assistance on a client's behalf for more mundane issues (such as transportation).

As such, it is vital that FINRA not limit the specific information which could be discussed with a designated trusted contact as it may unintentionally restrict a FINRA member firm's ability to best serve their unique and varying clients. Moreover, as the trusted contact is, as its name implies, a designated contact that is inherently trusted by the individual (and has no authority to transact business on a client's account), there is little to no danger that any reasonable disclosure would violate a client's trust or give rise to any material issue.

For this reason, SIFMA requests that FINRA remove the restrictions on information that can be discussed with a trusted contact in Proposed Rule 4512.06.

3. Alternatively, FINRA Should Clarify Proposed Rule 4512(a)(1)(F) and 4512.06

Should FINRA choose to keep the proposed amendments to Rule 4512 as active requirements on FINRA member firms, we assume that this would only apply to accounts prospectively. Further, SIFMA respectfully requests that FINRA take sufficient steps to clarify the requirements of Proposed Rule 4512(a)(1)(F) and 4512.06. Questions raised by FINRA member firms include:

- What specifically does "not authorized to transact business on the account" mean?
- As discussed in §A(1)(iii) above, does the trusted contact have to be a particular person? What about an organization or practice? Could there be multiple trusted contacts?
- Also discussed above in §A(1)(iii), is there a particular format in which the contact information needs to be supplied? Would verbal confirmation that an individual is a trusted person be sufficient for a member firm to document the individual as a trusted contact?
- In what ways could the disclosure requirement in Proposed Rule 4512.06 be met? SIFMA suggests FINRA consider adding language that the required disclosure could be met by including the disclosure within the account agreement, within the firm's privacy policy, or within the form by which the client may designate a trusted contact person.

- What would constitute "reasonable efforts" under Proposed Rule 4512.06? SIFMA suggests FINRA consider providing examples, including providing a place to designate a trusted contact person within new account forms (paper or electronic).
- Would the "reasonable efforts" requirement from Proposed Rule 4512.06 apply to accounts opened after the proposed rules become effective?

Thank you again for the opportunity to comment on the proposed rules, which is a testament to FINRA's steadfast commitment to protecting senior and vulnerable investors. SIFMA looks forward to working together on this and future senior investor protection efforts, and would be happy to answer any questions, provide any additional information you seek or otherwise discuss our comments with you; please do not hesitate to contact either the undersigned or Kyle Innes at kinnes@sifma.org or 212-313-1211.

Sincerely,

Lisa A Bleier

Lisa Bleier
Managing Director and Associate General Counsel
SIFMA
lbleier@sifma.org | 202-962-7329

To: FINRA

RE: Comments on Regulatory Notice 15-37: "FINRA Requests Comment on Rules Relating to Financial Exploitation of Seniors and Other Vulnerable Adults"

From: Doug Brode, CEO Christian Financial Services LLC

I see no benefit and a tremendous increase in potential liabilities from the proposed new rule. Family members and legal guardians are responsible for protecting the interests of seniors who are incapable of dealing with financial matters themselves. Creating a rule that makes a broker responsible for the behavior of an incapacitated senior is just inviting lawsuits and abuse. Please do not do it.

November 30, 2015

SENT VIA EMAIL to *pubcom@finra.org*

Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

Re: Regulatory Notice 15-37
Proposed Rule: Financial Exploitation of Seniors and Other Vulnerable Adults

Dear Madam or Sir:

GWFS Equities, Inc. ("GWFS") sincerely appreciates the concerns FINRA is attempting to address in minimizing financial exploitation of seniors and other vulnerable adults and appreciate the opportunity to provide comments.

As a broker/dealer that is primarily involved with the retirement plan business; i.e., 401(a)/(k), 403(b) and governmental 457(b) plans, we note the proposed rule seems to be addressed generally to broker/dealers in the retail sector. Typically, the plan sponsor's relationship is with a financial intermediary unaffiliated with GWFS; however, an affiliate of GWFS provides recordkeeping services. We know of many other firms that are similarly situated and ask that FINRA consider providing guidance in this regard; for example, which broker/dealer is responsible for rule compliance?; what if the financial intermediary is a registered investment adviser and not a broker/dealer subject to FINRA rules?

In discussing the proposed rule with all of our business units, the following issues and questions arose that we believe FINRA should consider and address more fully in proposed rule:

- What are the specific criteria for determining whether a customer has impairments rendering them "vulnerable"?
- If a person does not provide a trusted contact person, what would constitute reasonable efforts to obtain this information?
- Generally, broker/dealers do not request nor receive health information. By having this information, additional regulatory requirements; e.g., HIPPA, may need to be implemented within the firm, resulting in additional costs.
- In order to capture, retain and periodically update trusted contact information, systems changes will be required resulting in additional costs to the firm.
- The definition of "qualified person" is very narrow. We suggest a revised definition to include individuals "designated as qualified by the firm".
- Temporary holds are "permitted" but not required, which we believe raises the additional following concerns:
    - Implementing a hold allows for discretion, causing firms to be more susceptible to litigation for acting and/or failing to act;
    - The safe harbor does not provide comprehensive immunity for liability in a civil suit.

- The provision of an extension beyond a 30 day hold by court of competent jurisdiction we believe presents issues not addressed in the proposed rule:
    - Full and complete investigation must be completed with time to present material to the legal department and the legal department must have time to submit filings to a court, is 30 days sufficient for all these processes to be completed?
    - Does the court system have in place sufficient resources to act quickly in these situations?
- For individuals in retirement accounts, certain distributions should be permitted even if the account is subject to a temporary hold. For example, required minimum distributions should be permitted; otherwise there are adverse tax consequences to the individual for not receiving an RMD.

GWFS' comments to certain FINRA requests for comment are as follows:

Q2. *Are there other approaches than the proposed rulemaking that FINRA should consider?*

A2. GWFS believes it would be better for FINRA to issue a "best practices" report would be in lieu of a codified rule so that firms could best manage based on what makes sense for their business.

Q3. *Should Rule 4512 require customer consent to contact the trusted contact or is customer notice sufficient? Should the types of information that may be disclosed to the trusted contact under Rule 4512 be modified?*

A3. Either contacting or forwarding a notice to the trusted contact is likely to raise issue with the customer and trusted contact. A requirement to contact the customer would be most transparent; however this would result in extra costs to firms.

Simply because an individual may be trusted for financial purposes, does not mean that the same individual would be trusted with information concerning the customer's health. Health status is one of the items that may be shared by the proposed rule, but which is the most controversial and should not be included in the types of information to be shared.

Q12. *What direct costs for the firm will result from the proposed rules?*

A12. Firms will incur direct costs for: updating forms, additional mailings, system builds, additional resources to specifically handle these matters including instances where court intervention is appropriate.

Thank you for the opportunity to provide input on this proposed rule. If additional information related to any of our comments or questions are required, please do not hesitate to contact me at 303-737-3817 or beverly.byrne@greatwest.com.

Sincerely,

Beverly A. Byrne

Beverly A. Byrne
Deputy General Counsel and Chief Compliance Officer

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November 30, 2015

Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

RE: FINRA Regulatory Notice 15-37, October 2015
Due: November 30, 2015

Dear Ms. Asquith:

AARP[1] appreciates the opportunity to comment on the proposed rules in FINRA Notice 15-37. The Notice includes a change to Rule 4512, regarding obtaining and maintaining information on a trusted contact for the account. The proposed Rule 2165 authorizes a broker, through a "qualified person," to place a temporary hold on transactions that involve disbursements from the client's account if the qualified person has a reasonable belief that the client is being financially exploited and the broker provides notification about the temporary hold as required under the rule.[2]

Elder financial exploitation is a serious and growing problem. By allowing a broker to temporarily hold a transaction under this rule, the broker will have time to involve the client's trusted contact person, family member, or the authorities who may be able to prevent the permanent loss of the person's assets. As outlined below, AARP supports the changes to Rule 4512 and the concept of the transaction hold and safe harbor as described under proposed Rule 2165. However, we do suggest several ways to improve proposed Rule 2165 and strengthen its consumer protections.

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[1] AARP is a nonprofit, nonpartisan organization, with a membership of nearly 38 million that helps people turn their goals and dreams into real possibilities, strengthens communities and fights for the issues that matter most to families such as healthcare, employment and income security, retirement planning, affordable utilities and protection from financial abuse.

[2] As used in this letter, the term "broker" refers to a FINRA member firm.

Proposed Changes to Rule 4512 – Trusted Contact Person

FINRA has proposed changing Rule 4512 to require firms to make a reasonable effort to obtain contact information for a "trusted contact person" as part of the account information. A trusted contact person is a third-party who is not authorized to transact business on the account. Firms can use this information to protect their clients. For example, if a firm later suspects its client has diminished financial capacity or is being financially exploited, the firm may contact the trusted contact person to help protect the client.

Under the proposed rule, a broker is required to disclose in writing to the customer that the broker or a person associated with the broker is authorized to contact the trusted contact person and disclose information about the account to confirm specifics about the customer's current contact information, health status, and the identity of any legal guardian, executor, trustee or holder of a power of attorney. The firm would also be required to disclose that it could contact the trusted contact person as permitted under proposed Rule 2165.

Proposed Rule 2165 – Authorization to Hold a Transaction

Placing a temporary hold on a transaction is an important, immediate step for stopping suspected fraud or financial exploitation before monetary loss occurs. It is easier to keep the money in the account than it is to recover money after it leaves the account. In many cases, authorities never recover money after it leaves the account.

The Standard of Care Should Be Strengthened

The proposed regulation has important protections to prevent brokers from abusing the authorization to hold a transaction. Brokers must have a reasonable belief that financial exploitation is involved in the transaction and must initiate an internal review of the suspected financial exploitation. Brokers must also establish and maintain specific written supervisory procedures reasonably designed to achieve compliance with the rule. Firm supervision procedures are critical to holding the firm accountable under the rule. Brokers must make records about holds available to FINRA upon request. FINRA should consider following the leads of Missouri and the North American Securities Administrators Association (NASAA) and adding a layer of consumer protection by requiring the broker and qualified individual to act with "reasonable care." Requiring reasonable care in determining that financial exploitation appears to be occurring, to be likely to occur or has occurred would regulate how the broker and qualified individual treat their client during the period of the hold.

The Appropriate Scope of the Rule Should Be Expanded

Rule 2165 applies to accounts for which a "Specified Adult" has the authority to transact business. The rule, however, does not apply if the specified adult is a beneficiary or beneficial owner. Laws in the states of Washington and Missouri, as well as NASAA's proposed model law allow firms to hold transactions on accounts where beneficial ownership is used on behalf of an older person or someone who is vulnerable because of impairment. People whose accounts are managed for them are more vulnerable to financial exploitation because they are not capable of overseeing their own financial affairs. The proposed rule should also cover accounts in which the Specified Adult is a beneficiary or beneficial owner.

FINRA's Hold Mechanism Should Be More Flexible and Should Require Notification of State Agencies

FINRA has proposed an initial hold period of up to 15 business days, unless shortened or lengthened by a court. After the initial hold, the proposed rule allows a broker to extend the hold for an additional 15 business days. The laws in the states of Washington, Delaware, and Missouri, as well as NASAA's draft model law all have 10-day initial hold periods for transactions involving securities. FINRA should authorize an initial temporary hold of no more than 10 days.

Proposed Rule 2165 does not require notice to any government agency. The laws in the states of Washington, Delaware, and Missouri, as well as NASAA's draft model law require notice to a government agency after placing the initial hold and require either permission from a court or oversight by adult protective services, law enforcement, or a regulatory agency. FINRA should require that the broker prepare a careful detailed justification for the hold and notify the appropriate adult protective services agency, other state agency, or law enforcement when the broker places a temporary hold. The broker should also provide a notice to FINRA. If a second hold period is requested, the broker should again notify parties, prepare a justification for why the hold is needed, and list what steps have been taken so far.

Undoubtedly, legislators from other states will introduce legislation in 2016. Many will use either the NASAA model or one of the other state laws as a basis from which to draft. FINRA's rule should be sufficiently flexible to be consistent with what the states require and to accommodate compliance with multiple state laws.

Required Training Is Important

FINRA's proposed rule includes a requirement that brokers relying on the rule's safe harbor develop and document specific training policies or programs reasonably designed to ensure that their registered persons comply with the rule's requirements. It is important to have a training regimen that prepares people who will work within the rule to be aware of the rule's requirements and the broker's compliance policies and procedures. AARP supports required training for registered persons relating to this rule and covering elder exploitation and fraud generally.

AARP appreciates the opportunity to provide our input on rules designed to protect older people and other vulnerable adults from financial exploitation. We urge you to make changes to proposed Rule 2165 as outlined above.

Please contact Mary Wallace of our Government Affairs staff at (202) 434-3954 or mwallace@aarp.org if you have questions or need additional information.

Sincerely,

David Certner

David Certner
Legislative Counsel and Legislative Policy Director
Government Affairs

I AM MUCH IN FAVOR OF THE FINRA PROPOSALS BEING PROPOSED FOR THE PURPOSE OF AVOIDING FRAUD IN INVESTMENT ACCOUNTS.

I AM NOW 86 YEARS OLD AND AM VERY CONCERNED ABOUT FRAUDULENT WITHDRAWALS FROM MY INVESTMENT ACCOUNTS. I STILL

HANDLE MY OWN FINANCES BUT I MAY NOT BE VERY FAR OFF FROM A TIME WHEN I WILL HAVE TO DELEGATE TO MY DAUGHTER OR MY LAWYER

ETC., AND IN MY ADVANCING YEARS I AM NOT AS CAREFUL AS I ONCE WAS ABOUT KEEPING CLOSE WATCH ON MY ACCOUNTS.

SO, I NEED AS MUCH HELP AS I CAN GET IN THESE MATTERS AND WOULD BE VERY MUCH IN FAVOR OF THE EXISTING FINRA PROPOSALS.

DONALD E. CHAMBERS
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November 30, 2015

By Electronic Mail (*pubcom@finra.org*)
Marcia E. Asquith
Senior Vice President and Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

Re: Regulatory Notice 15-37 (Financial Exploitation of Seniors and Other Vulnerable Adults)

Dear Ms. Asquith:

Lincoln Financial Network ("LFN" or "Lincoln") appreciates the opportunity to submit this comment letter in response to the Financial Industry Regulatory Authority's ("FINRA") rule proposal to amend FINRA Rule 4512 (Customer Account Information) and implement a new rule FINRA Proposed Rule 2165 (Financial Exploitation of Specified Adults). Lincoln Financial Network is the marketing name for Lincoln Financial Advisors Corp. ("LFA") and Lincoln Financial Securities Corp. ("LFS"), two broker-dealers and registered investment advisors affiliated with Lincoln Financial Group ("LFG").[1] Currently, LFN maintains an affiliation with over 8,500 financial advisors, which include registered representatives, investment advisor representatives, insurance brokers and agents. LFN has an open architecture business model, allowing its financial advisors the ability to offer a variety of investment products, including securities (e.g., stocks, bonds, mutual funds, variable annuities), advisory services, and non-securities products (e.g., fixed annuities and life insurance, including insurance sold by insurance companies others than LFG).

I. Regulatory Notice 15-37 Background

FINRA proposes amending Rule 4512 to require firms to make reasonable efforts, at account opening, to obtain the name and contact information for a "trusted contact person" for all non-institutional accounts. The trusted contact person cannot be an individual who is authorized to transact business in the account. The firm would then be able to contact this individual if the firm reasonably believes the accountholder is being exploited.

[1] The affiliated companies of LFG act as issuers of insurance, annuities, retirement plans and individual account products and services. The affiliates include, but are not limited to the Lincoln National Life Insurance Company ("LNL"); Lincoln Life and Annuity Company of New York ("LLANY") and Lincoln Financial Distributors ("LFD"), Lincoln's wholesaling arm, a broker-dealer registered with the SEC and a member of FINRA.

FINRA has also proposed the adoption of Rule 2165, which would enable firms to place temporary holds (up to fifteen days) on disbursements of funds or securities from the accounts of certain customers (e.g., vulnerable adults and account holders over 65 years of age) when there is a reasonable belief of financial exploitation. Proposed Rule 2165 also permits firms to notify a customer's "trusted contact person" about the account hold.

Lincoln is very supportive of FINRA's efforts to protect vulnerable clients. This is an issue of growing concern for the financial industry and Lincoln appreciates how diligently FINRA is working to identify solutions and options for firms and advisors when a vulnerable client is being exploited. The basic principles of protecting vulnerable adults are present in Regulatory Notice 15-37. However, Lincoln encourages FINRA to consider some additional items and make minor changes so that the rule proposal will be more effective and allow member firms to operationalize a process which is consistent with all regulations across the industry.

II. Conflicting Regulatory Framework

The existing regulatory environment for dually registered broker-dealers and investment advisers is complex and robust. LFN's broker-dealers and investment advisers are subject to regulation by FINRA, the SEC and the States. At times, these regulatory regimes conflict or are inconsistent.

In the area of elder abuse, a number of states have more mature regulations and statutes. Lincoln would encourage FINRA to evaluate whether changes can be made to this proposal to allow for more harmonization with state regulations or with the Model Rule recently proposed by the North American Securities Administrators Association (NASAA). As an example, many states have different criteria (e.g., age) to determine whether an individual qualifies as a vulnerable adult. Additionally, states have varying reporting requirements or obligations of financial institutions if fraud or exploitation is expected. Also, the "safe harbor" provisions vary among the states. While uniform rules and regulations are not always attainable, Lincoln would encourage FINRA to engage the SEC, NASAA and any individual state securities regulators to develop a harmonized proposal acceptable all constituents.

III. Proposed amendments to Rule 4512

Lincoln is in favor of the proposed amendment to FINRA Rule 4512 that would require firms to make reasonable efforts at account opening to obtain the name and contact information of a trusted contact person. It is critical for firms to have the ability to consult with someone other than the account holder when suspected financial exploitation or diminished capacity issues arise.

A. <u>Explicit Consent of Customer</u>

Lincoln encourages FINRA to add one additional requirement – affirmative consent – to the proposed amendment. FINRA maintains that there is no breach of a firm's privacy obligations if the firm discusses an accountholder's information with a "trusted contact person." FINRA's position is centered on two exceptions under Regulation SP: (1) the customer consents or (2) the disclosure is made to comply with the law (e.g., Rule 4512). The first Regulation SP exception (consent) does not fit squarely within the proposed amendments to Rule 4512. Although an account holder can choose to provide the name and contact information of the trusted contact person, the account holder has only implicitly consented to the individual being contacted about certain information.

The second exception also does not appear to be available under the proposed amendments to Rule 4512 because a firm is not mandated to connect with the trusted contact person if the firm suspects financial exploitation. Rather, FINRA appropriately leaves the choice of whether to contact the "trusted contact person" to the discretion of the firm.

To make the proposed amendments to Rule 4512 unequivocally compliant with Regulation SP (and the exceptions therein), FINRA should require firms to obtain the name/contact information of a trusted contact person and seek the accountholder's explicit consent to reach out to the trusted contact when the firm has concerns regarding the accountholder.

B. Expanded Definition of "Trusted Contact Person"

Proposed Rule 4512 defines the "trusted contact person" as someone who is "age 18 or older and *not authorized to transact business on behalf of the account*." (*Emphasis added*). Many firms in the industry have already engaged in proactive measures to encourage accountholders to obtain a POA or provide a "limited trading authorization" to a trusted person so that firms have a contact in the event of financial abuse. Unfortunately, the limitations on who qualifies as a trusted contact person would frustrate many enhanced controls that firms have already employed. Consequently, Lincoln encourages FINRA to modify this definition to include individuals who are authorized to transact business on behalf of the account. For example, an attorney-in-fact under a Power of Attorney (POA) or a trustee under a Trust may be the most appropriate individual to act and provide assistance for fraud prevention. If a firm reasonably suspects that this individual is engaged in the fraudulent activity, a firm can then contact another individual, like an immediate family member.

Lincoln also suggests expanding the individuals who may be contacted under proposed Rule 2165(b)(1)(B)(ii) if a temporary hold is placed on the account. Under this provision, if a Trusted Contact Person of a Specified Adult is unavailable, the member firm can reach out to an immediate family member. There are instances when the accountholder (i.e., the Specified Adult) does not have any immediate family members. In these instances, FINRA should allow firms to exercise discretion in whom to contact. An accountant, attorney, close friend or neighbor may be best suited to assist the firm in preventing fraud. Consequently, expanding the "alternative" contact beyond an immediate family member is advisable.

C. Operational Challenges

FINRA's requirement to attempt to obtain the name of a trusted contact person from the accountholder at the time of account opening is a reasonable approach. However, Lincoln respectfully requests that these requirements apply only to accounts opened after the effective date of the proposal. Although accounts are updated every thirty-six months, accounts are generally updated through a negative consent process. This type of information requires affirmative response and consent by the accountholder, increasing the operational challenges and costs associated with affirmatively seeking this information from all accountholders.

D. <u>Discussions With Trusted Contact Person</u>

FINRA's Supplementary Material .06(a) to Rule 4512 is very prescriptive regarding the categories of information that can be discussed with the trusted contact person. This provision suggests that information about the account can be disclosed only to confirm specifics regarding the customer's current contact information, health status, identity of the legal guardian, executor, trustee or POA and as permitted in proposed Rule 2165. Under proposed Rule 2165, when a firm notifies the trusted contact person, the notification appears only to relate to the fact that a hold has been placed and the reason for the hold.

Member firms need more discretion on how to interact with the trusted contact person and what can be discussed with the trusted contact person. In reality, a firm may need to engage the trusted contact person to provide assistance on the internal review or to validate some of the firm's suspicions. The firm may need to encourage the trusted contact person to seek guardianship of the specified adult. However, the Rule does not seem to permit information-sharing of this nature or the level of engagement that may be needed with the trusted contact person in certain situations. Lincoln suggests that FINRA make these rules more "principles" based and less "prescriptive" or "rules"-based so that the best interests of the customer can be achieved based on the unique and distinctive set of facts for each customer.

IV. Proposed Rule 2165

Proposed Rule 2165 allows (but does not require) qualified persons of firms to place temporary holds on disbursements of funds or securities from the accounts of specified customers where there is a reasonable belief of financial exploitation of these customers.

A. <u>Length of Time</u>

As stated previously, the fifteen (15) day hold period appears to conflict with other regulations or model regulations. Lincoln would encourage FINRA to work collaboratively with NASAA and other state securities to develop a more consistent and harmonized regulatory framework for the relevant hold periods.

B. <u>Fundamentals of the "Hold"</u>

Proposed Rule 2165 is fairly prescriptive on when a hold can be placed and how long the hold can be in place. However, there may be other situations where the current prescriptions are insufficient to prevent an investor from being harmed. For example, there are situations where a vulnerable adult has diminished capacity. In these situations, the vulnerable adult's own actions may result in self-harm. FINRA should evaluate whether a temporary hold is appropriate in these instances to prevent harm.

Lincoln also envisions that a customer could be harmed even before a disbursement occurs. As an example, certain transactions or sales of investments (e.g., liquidation of an annuity or the redemption of certain mutual funds) can have significant tax consequences to an accountholder. Lincoln encourages FINRA to extend this proposal to trade execution or buy/sell/liquidate orders. If a firm reasonably believes that financial exploitation is occurring, a firm should be able to take any action necessary, including failing to execute a transaction, to prevent a fraud.

Lincoln also requests that FINRA provide additional guidance to firms on actions to be taken after a hold expires. Firms are ill-equipped to seek relief in a court of competent jurisdiction, even if that may be in the best interest of the accountholder. If state or county agencies, who generally investigate financial exploitation of seniors, are unable to timely act before a hold expires, firms may be obligated under the rule to execute a transaction or release funds. Unfortunately, in these situations, the vulnerable adult may still be victimized. As such, FINRA should provide additional guidance as to what course of action a firm should take when a hold expires. Alternatively, if no additional guidance is provided, Lincoln respectfully requests FINRA expand the safe harbor provision to extend to "post-hold" situations.

C. Broaden Safe Harbor Provision

The proposed rule appropriately provides a safe harbor provision for firms and qualified employees when a vulnerable adult's account is frozen to prevent a disbursement of funds. While the current proposal insulates firms from liability when a hold is placed on an account, Lincoln requests that FINRA expand the safe harbor to cover more circumstances, including disclosing account information and ultimately releasing funds once a hold expires. Although implied in the proposed rule, Lincoln encourages FINRA to explicitly state in the final rule that no private right of action is created under this rule for acting or failing to act.

V. Responses to Specific Requests for Comment

Below are Lincoln's responses to FINRA's specific requests for comment.

Question: Should the scope of the proposed rules be expanded to encompass other requirements?

Answer: As explained previously, Lincoln recommends that Rule 2165 be expanded to cover other situations in which a vulnerable adult may be harmed, including activities resulting from diminished capacity and all transactions occurring as a result of financial exploitation.

Question: Should Rule 4512 require customer consent to contact the trusted contact or is customer notice sufficient? Should the types of information that may be disclosed to the trusted contact under Rule 4512 be modified?

Answer: As discussed previously, in order to make the proposed amendments to Rule 4512 unequivocally compliant with Regulation SP (and the exceptions therein), FINRA should require firms to obtain the name/contact information of a trusted contact person and seek the accountholder's explicit consent to reach out to the trusted contact when the firm has concerns regarding the accountholder. In addition, the regulatory requirements should be expanded to allow firms to disclose more information than was outlined in Rule 4512 Supplementary Material .06 (a).

Question: What are firms' current practices when they suspect financial exploitation has occurred, is occurring, has been attempted or will be attempted? Would the proposed rules change firms' current practices?

Answer: There are aspects of these proposed rules that would enhance member firms' current practices. However, as discussed, FINRA should evaluate expanded the definition of "trusted contact person" to ensure that individuals authorized to act on the account can also serve in that capacity.

Question: What are firms' views on any potential legal risks associated with placing or not placing temporary holds on disbursements of funds or securities at present and under the proposal?

Answer: As addressed in section IV, there are potential legal risks. However, in most situations where it is clear that a financial exploitation or fraud is occurring, the financial harm to a customer in not placing a hold on a transaction or disbursement outweighs the risk to a financial institution. That being said, Lincoln encourages FINRA to explicitly state that no private right of action exists under these rules and expand the safe harbor provisions beyond just placing a "hold" on an account disbursement.

Question: Should FINRA mandate specific procedures for escalating matters related to financial exploitation?

Answer: While some prescriptive regulation is necessary, regulation should not be overly prescriptive or remove discretion from a firm to act in a manner that is in the best interests of the client. Every client situation will be different and firms need the ability to react to each set of unique facts and circumstances. Firms should retain decision-making on how to respond to a situation, including when or how to escalate a matter. As such, FINRA should not prescribe or mandate specific procedures for escalating matters involving financial exploitation.

VIII. Conclusion

Lincoln is supportive of FINRA's objective to more efficiently and effectively protect the investing public, especially its vulnerable members. Lincoln looks forward to a continuing dialogue with FINRA in the hopes that FINRA can provide additional guidance and create a proposal that will enable firms to protect vulnerable adults without undue legal liability. If you have any questions, please do not hesitate to contact me at 484.583.1413 or carrie.chelko@lfg.com.

Respectfully Submitted,

Carrie L. Chelko, Esquire
Chief Counsel
Lincoln Financial Network

Dear Marcia,as a senior my self I respect FINRA's intentions but believe the intentions would be better served if these rules were shortened and put into a language easily read by seniors and their families.Far too many rules and regulations can only be read by lawyers or accountants just like our entire US tax codes.
I believe an attempt should be made to shorten and simplify the language of these rules and amendments while maintaining your intentions of protecting seniors.

Bill Coughlin

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November 24, 2015

Ms. Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street
Washington, D.C. 20006-1506

Re: Notice 15-37

Dear Ms. Asquith:

These comments are being submitted in response to the invitation in Notice 15-37, proposing new rule 2165 and an amendment to rule 4512. The effect of these changes would be to permit firms to temporarily suspend distributions of funds to a customer if the firm has a "reasonable belief" that "financial exploitation" of the customer is occurring, or has been attempted or will be attempted. The proposed rule provides for the identification of a "qualified person" at the firm who would have the initial responsibility and authority for making this determination subject to a subsequent internal review of that determination. It would require the firm to make reasonable efforts to identify a "trusted contact person" who would be advised of such a hold, and offer some protection from liability for disclosing private information to the trusted contact person or, if no trusted contact person is available, an immediate family member. It also attempts to offer some protection from liability if the firm declines to suspend distributions. In general, it applies to accounts of investors over the age of 65 but, in some circumstances, will also apply to younger investors. It applies immediately to new accounts, but older accounts will not be covered until a later time.

While the new rule and amendment may be commendable as an initial step in providing some protection against financial exploitation of the elderly, its objective falls too far short of what is reasonable and necessary. But even given that limited objective, it has too many technical deficiencies to accomplish its purported purpose.

The first part of these comments sets forth the reason why a much broader rule is desperately needed and should be adopted. The second part reviews several technical deficiencies and ambiguities that would undermine the proposal's efficacy, even given its much more limited scope.

Part One: Why a Broader Rule is Necessary

To explain why it is so important to have a much broader and more effective rule, it is appropriate to review the nature of the problem in some detail before outlining the steps that need to be taken.

Many of the facts set forth below are well known and mentioned in numerous SEC publications and elsewhere, but they are repeated here for context.

A significant part of these comments refer to IRA accounts because they constitute the largest single category of retirement assets of the elderly[1] and present unique problems[2] for protecting against exploitation. However, to a varying extent, the comments are relevant for all investors, including those under the age of 65.

1. Identifying the Problem

No one is immune from the threat of becoming the victim of a financial predator, but the elderly are especially vulnerable. As we age, the likelihood increases that we will suffer from diminished capacity and lose the ability to protect ourselves adequately from that threat. It is also more likely for the elderly to experience emotional fragility, which contributes to that vulnerability.[3]

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[1] As of June 30, 2015, the Investment Company Institute estimated that total retirement assets in the US came to $24.8 trillion. Of this amount, IRA accounts, the largest category, hold $7.6 trillion, or close to one third of that total. See https://www.ici.org/research/stats/retirement/ret_15_q2.

[2] Most assets can be protected from fraud by conveying them to trusts of various types. It is also possible to make gifts to adult children. However, none of these methods are available for IRA accounts (including ROTH IRAs). Treasury Regulation Section 1.408-4(a)(2) does not explicitly prohibit a transfer, but subjects the value of an IRA account that is transferred to full taxation at ordinary income rates (which can exceed 50%). This has the practical effect of preventing transfers. Moreover, the laws of every state except Alaska presently prohibit transfers of IRA accounts.

[3] E.g., The Metlife Study of Elder Financial Abuse (June 2011) at p. 22 (http://www.alz.org/facts/overview.asp). See, also, The Interagency Guidance on Privacy Laws and Reporting Financial Abuse of Older Adults :

> "Older adults . . . may be especially vulnerable due to isolation, cognitive decline, physical disability, health problems, and/or the recent loss of a partner, family member, or friend". (https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCoQFjAAahUKEwi664zdzZDJAhWEox4KHZEPDKo&url=http%3A%2F%2Fwww.sec.gov%2Fnews%2Fpress%2F2013%2Felder-abuse-guidance.pdf&usg=AFQjCNGoJq3CutmLet6lhtV-XbTbP8xGQQ&sig2=shfWum4xPIP11CS9NF5AOg&bvm=bv.107467506,d.dmo&cad=rja)

Peck and Law, in their book, "Alzheimer's and the Law" (ABA Publishing 2013), at pages 297-300 refer to several studies that conclude that, because of changes in the brain that can commence as early as the mid-50s, the elderly lose the ability to discriminate between legitimate requests for financial assistance and fraudulent ones: "These changes in the senior's brain help explain why people that no one ever would have expected are giving money

Recent studies suggest that by age 75, close to 25% of males and 50% of females[4] are already adversely affected by the precursors to Alzheimer's Disease, the most common form of dementia in the elderly.[5] But regardless of these statistics, investors of all ages can be victimized and there is no reason why reasonable steps to protect all of them, regardless of age, should not be adopted, especially where, as in the situations discussed in these comments, the out-of-pocket costs to the institutions for doing so are close to zero.

By the end of 2015, there may be close to $8 trillion dollars in IRA accounts, the largest single category of retirement assets for the elderly.[6] Because of the interplay of the required minimum distribution ("RMD") rules for tax-exempt retirement plans[7] and the long term yields that even conservative investment strategies often produce,[8] these accounts usually reach their

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away to the Canadian lottery or all these other scams . . .[A]ll of a sudden, many things are believable to them, because of changes in the brain."

[4] Women appear to be twice as vulnerable as men, both to the ravages of Alzheimer's and as targets of financial predators. The Metlife Study of Elder Financial Abuse (June 2011). http://www.alz.org/facts/overview.asp.

[5] The most recent statistics indicate that, by age 85, 36% of the population will have dementia and that, of this group, 95% have Alzheimer's Disease (the remaining 5% includes Parkinson's, strokes and other problems). Two-thirds of the victims are female (suggesting that 24% of males and 48% of females suffer from it by age 85). In all cases, the percentages increase almost exponentially as you go up the age brackets toward 90 and 95. Many observers believe that only half of those who do have it come to the attention of medical authorities, indicating that the real numbers are much worse than these. Finally, recent studies indicate that cognitive impairment actually starts up to 10 or even 20 years before changes in behavior and problems with memory become apparent and Alzheimer's is specifically diagnosed. (See, e.g., http://www.alz.org/facts/overview.asp.) Accordingly, by age 75 or perhaps even earlier, if these studies are correct, a significant percentage of the population will already have begun to suffer a degradation of mental capacities.

[6] As of June 30, 2015, the Investment Company Institute estimated that IRA accounts held $7.6 trillion. See https://www.ici.org/research/stats/retirement/ret_15_q2. This is up from $6.5 trillion as of the end of 2013. http://www.icifactbook.org/fb_ch7.html#snapshot, which extrapolates to a current growth rate of close to another $1 trillion annually. The mere size of this pot of gold in the hands of people who are mentally and emotionally fragile is inevitably going to attract the attention of the wrong parties.

[7] The RMD rules require that, starting at age 70 ½, the owner withdraw a minimum percentage of the account balance each year. That percentage starts at 3.77% the first year and increases a small amount each year thereafter. It does not exceed 5% until age 79, 6% until age 83, 7% until age 86 or 8% until age 89. https://www.irs.gov/.../uniform_**rmd**_wksht.pd. The ICI reports that most IRA account owners over the age of 70½ withdraw only that RMD, and usually withdrew that amount even when the law temporarily permitted them to withdraw less. See https://www.ici.org/ira.

[8] Most investors put a majority of their retirement funds in equities, including mutual funds and ETFs. See, e.g., http://www.icifactbook.org/fb_ch7.html#investors. Over the past 10 years, the average equity yields have exceeded the RMD amounts by significant amounts. For example, as of October 31, 2015, the Dow Jones Total Market Index Fund had a net yield over the past 10 years of 8.07%. Over that same period, the S&P 500 index resulted in a net yield of 7.85%, and the Dow Jones Industrial Average yielded 8.18%. Vanguard's Total Stock Market Index Fund had a return of 8.10%. (For other studies of average yields over extended periods, see http://pages.stern.nyu.edu/~adamodar/New_Home_Page/datafile/histretSP.html_and http://www.stockpickssystem.com/historical-rate-of-return/.) The RMD factor does not exceed the lowest of these numbers, 7.85%, until age 88. Therefore, the typical IRA account balance of an owner who withdraws only the RMD amount has been increasing every year until well past age 85. Moreover, ROTH account owners are not required to withdraw the RMD and, since ROTH withdrawals are tax free, retirees need to withdraw less from ROTH's than from regular IRA accounts to cover the same amount of ordinary day to day living expenses.

maximum values after age 80, just when the frailties of old age start to become significant and the ability of the owners to manage and protect their investments becomes increasingly impaired.

2. Identifying the Vulnerabilities

Possibly as much as 90% of the financial losses to predators is to people known to the victim.[9] This includes caretakers, friends and close relatives. Moreover, it is believed that most losses are not reported. For example, the owner's son may have a gambling habit with large debts, and always be desperate for more money, or a daughter may have a drug addiction with a similar need for acquiring funds at any cost. In these cases, the victim often declines to report the theft because the victim does not want to send a son or daughter or other relative or friend to jail.[10] A more common problem is the trusted caretaker who has access to all of the victim's files and financial statements. The caretaker will quickly learn where the victim keeps a list of passwords and account numbers and how much is in each account. Often, the victim requests the caretaker to assist him or her to manage the financial matters, for example, by helping to log in to a web site or withdraw money from an ATM machine or write out checks or pay a bill with a credit card. Mental problems are not the only reason why the elderly might need and request assistance with such matters. For example, arthritis or other handicaps might make it too difficult for the victim to travel to the bank or use a keyboard, and he will request the caretaker to assist in those activities, either at a computer terminal or an ATM machine. Often, especially once dementia is present, the caretaker can just ask the victim to sign a check payable to the caretaker (or to a friend or relative of the caretaker), with a phony explanation like "it is necessary to pay the electric bill." The victim signs without any understanding of what is involved.

Just as they don't report losses to relatives, victims often do not report thefts by caretakers, either. First, they do not want to admit how gullible they were. Second, they are concerned that if the caretaker is arrested, there will be no one at home to take care of them afterwards. And this assumes that they understand that they were victimized, which is not always the case. Finally, if they do report the loss, law enforcement agencies are usually helpless to do anything about it, anyway.

Accordingly, it is likely that ROTH accounts grow at even faster rates than these numbers suggest for ordinary IRA accounts.

[9] See, e.g., Peck and Law, "Alzheimer's and the Law: Counseling Clients with Dementia and their Families" (2103), a publication of the Senior Lawyers Division of the American Bar Association. The Metlife Study of Elder Financial Abuse, note 3, *supra*, reports that 51% of the losses are to strangers (not clear if this category includes caretakers) and 34% to friends and relatives.

[10] See http://www.nytimes.com/2015/04/25/your-money/as-cognitivity-slips-financial-skills-are-often-the-first-to-go.html?ref=business&_r=1. The article supports the conclusion that "senior abuse is often committed by a close relative or trusted professional" In one case reported in the newspapers, the thief was a "younger" woman (age 63) who married the victim (age 80) and then promptly emptied his bank accounts and insurance policies and gave the money to her own children.

3. Identifying A Solution

In the area of trust and estate planning, a solution to problems of this sort is to use a "protectors' committee". This is a practice that became common in Europe a long time ago and has become almost standard practice today in the United States.

The idea is to have a group of trusted individuals who are able to monitor the actions of the trustee to make sure that the trustee does not engage in actions that are inappropriate. When circumstances call for it, the monitors can step in and require a trustee to post a bond or file a judicial accounting. In appropriate cases, the monitors may also have the right to veto or disapprove actions of the trustee, or require the trustee to make or not make certain elections. If nothing else works, the committee can even replace the trustee or terminate the trust.

This type of approach, which has proved to work very well to protect the family's interests posthumously, easily works to provide necessary protections of the accounts of the elderly during periods of incapacity or declining competency during their lifetime.[11]

To implement this idea, the owner of the account, while still able to make financial decisions (e.g., when creating the trust initially or signing a will), designates one or more trusted individuals to act as "protectors" or monitors.[12] As noted in more detail, below, more than one may be desirable to make sure that one of the monitors does not himself become the problem. Those monitors would have access to account information and receive periodic statements and notices of significant actions. It is possible to also give them various powers like buying and selling securities or even directing distributions, but that is not necessary to achieve the anti-fraud protection.

What is necessary in the current context is that the monitors be alerted as soon as possible to important "red flag" events in the account that suggest that inappropriate activities might be occurring. This can include changes in passwords or sign-ins, changes in beneficial interests (either adding or subtracting beneficiaries or changing the percentage interests of each), changes in bank account linkages, changes in e-mail or postal addresses and distributions

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[11] The NY Times article noted above, in footnote 7, contains this same suggestion:

> "Another financial adviser asks his clients to assemble what he calls a protective tribe, or a handful of people who are willing to step in and assist if and when the need arises. 'The protective tribe is important because senior abuse is often committed by a close relative or trusted professional,' said Jean-Luc Bourdon, a certified public accountant who specializes in financial planning in Santa Barbara, Calif. 'A tribe is needed to have checks and balances.'"

[12] Having diminished mental capacity, even during the early stages of Alzheimer's Disease, does not necessarily disqualify a person from executing legal documents, including wills and trusts. See Peck, "Exploitation and Alzheimer's, 15 Experience Magazine No.2 (ABA Senior Lawyers Division (2015)). Accordingly, they may still be able to indicate the people whom they trust to serve as monitors or protectors.

that are unusual in timing or amount or otherwise atypical.[13] Notices would be sent out electronically, making them virtually instantaneous.

Upon receipt of information that suggests problems, the monitors can take whatever actions they believe necessary. After inquiring into the situation, they might decide to request the assistance of law enforcement or social services. They may attempt to arrange medical examinations. They may try to eliminate a caretaker's access to the account owner, by removing him (or, with the help of the police, the caretaker) to another location. If nothing else works, albeit as a last resort, they can commence a guardianship or conservatorship proceeding to take control of the victim's finances. Or they might be able to conclude that there is nothing amiss, and take no action at all.

It should be noted that these monitors are persons whom the account owner determined are trustworthy when he was still capable of making that determination. By designating them, he also consents to providing them with confidential information about himself; there is no legitimate concern that providing that information to the monitors involves an invasion of privacy, since full consent to that was given up front. In fact, the consent is not intended to be merely permissive; in these circumstances the owner wants that information to go to the monitors and not to be withheld.

From all of the above, the use of monitors to serve as the analog to a protectors' committee has substantial benefits in securing against fraudulent loss, and no discernible downside. Given today's computer technology, the cost of providing alerts and duplicate statements is infinitesimally small.

Nevertheless, when the undersigned attempted to institute this procedure at several major financial institutions (all members of FINRA), he was usually advised that the institution would not undertake to alert third parties, even those designated for the purpose, of information about his personal accounts. In some cases, the institution justified its action based on privacy concerns; in other cases, no justification was proffered.[14]

Mr. Rick Fleming, Investor Advocate at the SEC, in one of his recent talks, spent some time discussing this privacy concern. He explained that if a financial institution suspected something was amiss, it was difficult to determine whom to warn about that. The financial institution could be giving information to someone who should not be getting it, e.g., the son

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[13] Another list of "red flag" event, many dealing with the actions of caretakers, can be found in the Interagency Guidance on Privacy Laws and Reporting Financial Abuse of Older Adults, note 3, *supra*.

[14] One institution did agree to most of these suggestions, but sent the notices only by regular mail, which arrived more than one week later. If the addressee is out of town for a week or two, it could take close to a month before he would get those notices and realize that there might be fraudulent activities going on in the account. In today's world of electronic commerce, that delay undermined the value of those notices to the point where they may be close to useless. Another institution said it would only send an alert to the account owner and not to anyone else, even if it knew that the account owner had advanced dementia and did not have to ability to comprehend what the alert was trying to alert him about. It was irrelevant to that institution that such an alert is useless.

with the gambling addiction or a sibling with a criminal record. The account owner may have deliberately withheld from that son or other relative information about the existence or size of the IRA account.[15]

But the situation here is different. The account owner has specified individuals that he believes are trustworthy and has consented to the disclosures.[16] He does not want the information to be trapped inside a black hole where his own support team is unable to see what is happening. The disclosures are almost certainly beneficial to the interests of the account owner and privacy concerns should not stand in the way. Actually, it is virtually impossible to perceive any downside to such disclosures, at least when there is more than one monitor involved. The rules on privacy are intended, and should be construed, to protect the individual, not impede that protection.

Of course, there could be some concern that the monitor might become the financial predator, notwithstanding the account owner's trust. But that risk is almost entirely eliminated by having two or three monitors; each would be in a position to observe the actions of the other monitors and take appropriate steps if needed. The proposed rules already recognize that the financial institution may discover evidence that the person to whom it would normally provide information (i.e., the trusted contact person) is in fact engaged in financial abuse and, in those circumstances it can withhold that information notwithstanding the account owner's permission to release it to that individual. That same limitation can still apply even where the account owner has designated multiple monitors in the fashion suggested in these comments. But the use of multiple monitors makes it much less likely that the institution would ever get to that point.

What is sorely needed, then, is a rule that requires all financial institutions to permit account owners—and, as discussed below, not necessarily just those over 65—to specify one or more monitors who would receive copies of all monthly statements, as well as alerts of red flag events, like changes in beneficiaries and especially the termination of a monitor's status, as quickly as technically feasible.[17] To keep costs down and actually improve efficacy, all such statements and notices can and should be delivered electronically.

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[15] It may well be that the currently proposed changes to the rules are addressed strictly to the situation contemplated by Mr. Fleming, where the institution has to guess whom to tell. It relieves the institutions from fault if it makes a mistake on whom to contact about suspicious activity by designating a trusted contact party in advance. But it does not cover all of the other possibilities, nor does it even require action in this context. Nor does it entail the involvement of one or more trusted individuals to participate in the detection and possibly the prevention of fraudulent activity unless and until the financial institution first reaches a "reasonable belief" that such activity is in fact happening and voluntarily decides to act.

[16] He can also withdraw or change that designation—and consent—at any time that circumstances indicate that the particular monitor is no longer trustworthy.

[17] It could include the right to give one or more of the monitors powers of attorney, although that is a serious step with potential pitfalls. See, e.g., Kerry Peck, "Exploitation and Alzheimer's, 15 Experience Magazine No.2 (ABA Senior Lawyers Division (2015). A monitor could also have the ability to buy and sell securities, although there might need to be certain limitations on the dual role of monitor and account manager, a matter discussed in the text, *infra*.

To make this work effectively, it is important to make sure that the monitors are themselves alerted to the most important red flag of all: any attempt to remove one or more of them from the picture. That would be the first step any financial predator planning to raid the account would take: shrink the black hole horizon and make sure that no third party can see or get information about what is happening inside the account. But if the monitors are alerted to the termination of their ability to oversee what is going on in the account, they will be able to determine whether that termination is itself a preliminary step to a pending financial exploitation. In these times where everything happens in split seconds on a computer, it is essential that that particular notice be given as quickly as possible, i.e., electronically.

That would advance the cause of protecting the accounts of all investors, not just the elderly. Nor is there any downside to such a rule. [18]

Part Two: <u>Technical Issues with Current Proposal</u>

a) <u>Effective date</u>:

To start with, the effective date of the rule grandfathers existing accounts. Older accounts will not be brought within the rule until a date some time, possibly years, from now. There is no justification for that kind of delay. Older accounts need this kind of protection more, not less, than newer accounts. The older accounts are more likely to be held by older individuals already suffering cognitive and physical impairment, or being cared for by caretakers, and they are more likely to have larger balances than brand new accounts. It is those accounts that need this kind of protection now, not later.

The rules should become effective for all accounts no later than 12 months after they are adopted, if not sooner.

b) <u>Too Much Discretion to Ignore Signs of Fraud:</u>

Next, the rule has little teeth. Apart from the requirement to attempt to identify a trusted contact person, the substantive portion of the rule, i.e., to suspend distributions, appears to be within the sole and absolute discretion of the firm. Nor, unless it determines to suspend distributions, is it required to advise either the account owner or the trusted contact

[18] The recent decision in *Federal Trade Commission v. Wyndham Worldwide Corporation*, Memo Op. 14-3514 (3d Cir. 2015) suggests that institutions risk liability for loss under section 45(a) of the Federal Trade Commission Act if they do not take reasonable steps to protect account holders from losses due to breakdowns in cybersecurity. In the current context, given the extremely small cost that would be involved in providing the greatly enhanced protections suggested by these comments, it would seem unreasonable not to do so. However, it is not clear to what extent the rationale of that decision might be applicable in this context.

person of any suspicions it might have that financial exploitation might be occurring. In fact, the way the rule works, there is a disincentive to do anything at all.[19]

There is no way to overemphasize the need to convey suspicions of financial skullduggery to someone who can protect the investor. Overall, it is submitted that a trusted contact person is in a better position to evaluate circumstances that might be viewed as suspicious. The trusted contact person will have personal knowledge of the account owner that no corporate employee or officer will ever acquire. It is not clear how many accounts a qualified person might be charged with supervising, but it would likely be enough that would make it impossible for him to spend much time studying, learning and understanding the patterns, habits and needs of each and every account owner, even with the assistance of computer programs designed to watch for unusual activities.

The discretion to do nothing, notwithstanding a reasonable belief, or even a strong suspicion, of wrongdoing, is not justified.

c) Safe Harbor Probably Not Needed and, If Needed, Probably Not Effective Anyway

The rule purports to provide a safe harbor from liability for breach of privacy restrictions for disclosing account information to the trusted contact person or other person. But that seems to be a gratuitous provision. A person who designates a trusted contact person to receive information from the financial institution is, by signing the form, waiving any privacy rights that would limit giving that trusted contact person the personal information. If there is any doubt, Notice 15-37 indicates that FINRA expects to release a new form for opening accounts, and an express waiver can be included in that document. On the other hand, if the person opening the account does not adequately waive that privacy right, it is dubious that FINRA can do that by fiat, by issuing a rule of this sort. In general, many, if not most, privacy rights are created by state law, and FINRA does not have the authority to override those state laws. On the other hand, the investor may waive those rights, with or without the authorization of FINRA.

If there is doubt about the validity of the waiver, it should be resolved in favor of allowing the institution to provide that information to the trusted contact person, since the purpose is to protect the owner, not damage him, by that release of information.

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[19] See proposed Rule 2165(b)(1): "A qualified person *may* place a temporary hold . ." on distributions. (*Emphasis added*). This seems to allow the qualified person to decline placing a hold on a distribution even if he has a reasonable belief that financial exploitation is occurring. There is no requirement to withhold distributions regardless of the circumstances. Moreover, there appears to be a built-in disincentive to withhold distributions even if there is a reasonable belief because of a concern that the owner of the account might sue the firm and/or the qualified person, claiming that the belief and consequent suspension of distributions was not reasonable. If, on the other hand, the distribution is not withheld, the risk of such a suit and the liability (and the corresponding legal costs of defense) disappear. Therefore, from the firm's and the qualified person's viewpoints, it is always safer to do nothing. And if the firm does nothing, it also does not warn either the owner or the trusted contact person of its suspicions of fraudulent activity. Although it may be required to report it to law enforcement agencies, those agencies usually are unable to react with sufficient speed or attention to make a difference.

d) <u>An Account Owner Should Be Allowed To Designate More Than One Trusted Contact Person</u>

The rule only requires that the account owner be giving the opportunity to designate a single trusted contact person. That is insufficient. If the trusted contact person is unavailable or temporarily incapacitated, the financial institution may choose, on its own initiative from within a class of certain close relatives, to whom to provide the information. But the institution has no basis for such a choice. It won't have an ongoing relationship with most, and perhaps, any, of them. The account owner is in a better position to decide on the choice of an alternate trusted contact person. The rule that information would not be given to a trusted contact person if it is suspected that that person might be involved in the questionable activities would still apply to these additional designees. Unless all the monitors are working as co-conspirators (which is unlikely) one of them will realize whether something is amiss.[20]

Any account owner should be permitted to name several monitors (at least three) to avoid the possibility that one of the monitors will become part of the problem rather than part of the solution. If one monitor starts going bad, the other two will be able to see it and take appropriate steps.

Note that if the financial institution suspends distributions, it can only do so for a maximum of 30 days under the proposed rules and, then, it must make the distribution anyway. This stresses the need to permit alerts to more than one trusted contact person. Multiple monitors reduce the problem that might arise if a single monitor were temporarily unavailable for part of all of the suspension period.

e) <u>Different Rules for Those Under Age 65</u>.

While these comments focus primarily on the elderly, there is no reason why the same protections should not be made available to the entire investing public. No one is immune from fraud; advanced age is only a contributing factor. It is even possible for someone under age 65 to have Alzheimer's.[21] The standards for withholding distributions to those under age 65 should be the same as for those over age 65.

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[20] If there are two and they are closely related somehow, e.g., they are married to each other, or business partners, it is possible that they might be co-conspirators. But even this risk is reduced significantly when a third trusted contact person is involved who is not so related to the other two. If all three are in on the scheme, it may be unlikely that the financial institution will be able to find anyone at all who is not so involved, in which case, no arrangement is going to work out and it is probably time to get law enforcement agencies involved. Having three or more trusted contact persons substantially reduces the chances of that occurring .

[21] Approximately 4 % of the victims are under age 65. http://www.alz.org/facts/overview.asp. In addition, there are persons under age 65 who are partially or wholly incapacitated by strokes, Parkinson's Disease, physical injuries and other ailments.

As proposed rule 2165(a)(1) is currently written, a "Specified Adult" is anyone over age 65. It also includes individuals between 18 and 65, but only if the institution "reasonably believes [that person to have] a mental or physical impairment that renders the individual unable to protect his own interests." It is difficult to understand how an institution that interacts with a customer only on a computer terminal, as is very common today, would be able to know the medical or physical condition of a new customer, or be able to stay current about changes in such a condition in a timely manner.[22] Presumably, the qualified person is not going to invite every customer to dinner one evening a month or so to observe possible changes in medical, mental, or physical condition of the customer, or to be able to evaluate what he observes. The new rule should apply to all account owners over the age of 18. The rule as proposed only requires the institution to do something those over 65 if it has a "reasonable belief" that a fraud has been or is about to be committed. If it has that same reasonable belief about someone who is less than 65—that a financial crime is in progress-- it should take the same actions as in the case of an investor who is age 66. If it believes that a fraud is occurring, it should not be necessary for the institution to have to make additional inquiries about medical conditions of its customer before it acts.

f) Some trusted contact persons should be allowed to have authority to transact business.

Rule 4512(a)(1)(F) provides that the trusted contact person may not be a person "authorized to transact business on behalf of the account". There may be circumstances where this limitation makes sense. For example, there may be a higher risk that a person authorized to transact business on behalf of the account might actually be the potential financial abuser. Moreover, that person already has unlimited access to the information in the account, and giving him or her notice of irregularities may be unnecessary. Alerting a person who already has access to that information may not enhance the protection of the account owner.

However, there are other circumstances where this limitation will impede the objective. As an example, in many families, the spouses exchange durable powers of attorney, to be used at times when one of them is unavailable or incapacitated. Each spouse also gives the other spouse authority to access information about his or her financial accounts and may also include the ability to arrange transactions during either spouse's unavailability or incapacity. Although the second spouse has the authority to access the account and discover what is going on, it is also common for the second spouse not to do that on a regular basis, but only when necessary, or perhaps at specified times, like once a year. Unlike the outside investment advisor who may pay attention to the account frequently, the second spouse may only do that on the rare occasions when the first spouse is unavailable or incapacitated for a long period of time. An alert to that second spouse of some irregularity may be the most effective (and possibly the only) way of stopping a problem in its tracks.

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[22] Even the best of physicians have trouble diagnosing mental impairment or the extent to which such impairment makes a patient legally incompetent or unable to manage day to day matters. It is hard to believe that a corporate employee could do better.

This raises the question of what happens if the second spouse is in fact the financial abuser? If the institution suspects that, it can still suspend the distributions and need not send an alert to that second spouse. Under the current rule, it would instead notify another close relative, if one could be found. Moreover, if the suggestion made in these comments to permit the account owner to have more than one trusted contact person, is adopted, this problem becomes moot.

It is suggested that a person should be able to serve as a trusted contact person and also have authority to transact business if that person is a primary beneficiary of the account. That person will have probably the strongest interest in aborting financial misbehavior from the get-go. Alternatively, if there are two or more trusted contact persons, as suggested above, it should suffice that at least one is a person without the authority to transact business. A primary beneficiary should qualify to be a trusted contact person even if he or she has authority to transact business, provided that there is at least one other trusted contact person who does not have that authority. It is submitted that this would provide the necessary safeguards and still allow for a very typical and useful family arrangement with respect to management of family resources.

g) Reasonable Belief

There are also some difficulties about the concept of "reasonable belief". Even a apart from the vagueness of such a standard, it is too strict a standard. Under the rule as proposed, even a strong suspicion of serious wrong-doing would be insufficient to spur any action at all. The rule requires "belief", not mere suspicion, no matter how strong that suspicion may be. The rule requires the qualified person to believe that there is fraudulent activity, not merely suspect it.

Also, the qualified person's conclusion remains subject to an internal review that might or might not back up the qualified person's initial conclusion, leaving him exposed to potential criticism and/or liability. It was noted above that avoiding a threat of litigation creates a disincentive to act; the possibility that the internal review might be critical of the qualified person's actions and that that might adversely affect his potential future with the firm, creates an additional disincentive for any person acting as the "qualified person" from ever reaching a conclusion that there is a reasonable belief, no matter what the suspicious activity might be. Ideally, a qualified person would not let these factors affect his judgment, but we will have to deal with real people, not theoretical ideals, and the actions of real people do not always conform to some preconceived ideal.

In any event, the standard for initiating action and review should be a substantial "suspicion" of potential fraud or abuse, which is a much lower bar to action than a "reasonable belief" that the fraud is actually occurring.

Suspicions are generated by actions that raise red flags. There are many events that may constitute red flags. This includes distributions that are unusual in amount or timing, adding new beneficiaries not obviously related to the owner, or deleting current beneficiaries (especially of a spouse), or changing their percentage shares. Attempts to change bank account linkages or contact information, such as e-mail addresses, may be signs of a problem. There is a list of other warning signs in Interagency Guidance on Privacy Laws and Reporting Financial Abuse of Older Adults.[23] This list includes many examples involving caretakers who make it difficult or impossible to communicate directly with the account owner, or to communicate with him in the absence of that caretaker.

But the most important red flag would be any attempt to delete or change the identity of the trusted contact person or other account monitors. The first step a fraudster is going to do is make sure that no one else can learn of changes in the account or of unusual distributions, so this is probably by itself sufficient to raise a suspicion of fraud.

What the red flag should achieve is that, in and of itself, it may generate a suspicion of fraud that justifies further inquiry. It should not be necessary for the qualified person to first reach a "reasonable belief" that fraud is actually occurring (or occurred) before an inquiry is initiated. If there are two or more unrelated red flags,[24] it should be virtually mandatory for the qualified person to commence that investigation and withhold distributions until, before or after review, it can be concluded that no fraud is pending. For example, if the address to which distribution checks should be mailed is changed at the same time there is the addition of a new beneficiary not related to the account owner, an investigation is probably warranted and no distributions should be made until the original trusted contact person is notified.

In no event should the status of a trusted contact person be terminated until the trusted contact person is notified of that change and a reasonable period of time transpires that permits that trusted contact person to investigate the circumstances.

One red flag may be more important than all the others: if the trusted contact person (or any close relative, attorney or similar individual) notifies the institution that he or she suspects that there is a problem and possible financial fraud, that should be sufficient by itself to hold up distributions pending a review.

Again, this does not place an administrative burden on the institutions. In this day of electronic bookkeeping and accounting, the cost of implementing this proposal is insignificant.

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[23] Interagency Guidance on Privacy Laws and Reporting Financial Abuse of Older Adults, note 3, *supra*, lists 13 separate items, including a number involving caretakers who make it difficult to communicate directly with the account owner.

[24] By "unrelated", it is meant to discount two or more red flags relating to the same incident, like two situations in which a caretaker restricts access to the account owner at a specific meeting with an account representative. By itself, that may or may not create a suspicion. But if this is accompanied by a change in beneficial interest close in time to that event, it will usually be sufficient to raise a suspicion that requires investigation.

h) Privacy

As previously mentioned, the objection sometimes raised about privacy issues is baseless. This is a situation in which the account owner has consented to giving those trusted contact persons or other monitors full information, if not control, over the account. The customer is the ultimate owner of that information and he wants it to be transmitted to the designated third parties. The owner will not designate anyone whom he believes should not get that information. Releasing the information to the account owner's designees will enhance the security of the owner's account, with only a very minimal risk. Privacy restrictions should not be applied in situations where it is very likely to help the owner avoid a financial disaster, and where the possibility of injury is very remote and extremely unlikely. At most, the institution may opt to warn the account owner of the risks of disclosure, but then it must leave it for that owner to decide for himself whether to accept that risk. If the owner knowingly accepts the risk, the financial institution should not attempt to override that decision, except possibly where it is overly clear that circumstances have changed since the owner made that decision and the institution believes that it has clear evidence that disclosure would now be wrong.

Finally, there is also the problem that, under the proposed rule, an important restriction on the trusted contact person would not apply to the related person who might be contacted when the trusted contact person is unavailable. The limitation, that the trusted contact person may "not be authorized to transact business on behalf of the account", does not apply to the related person contacted by the institution. To the extent that the rule prohibits the designation of a person to serve as the trusted contact person who has authority to transact business on behalf of the account, it makes little sense to not apply that same restriction to providing information to a "close relative" who has that authority.

Accordingly, this comment recommends that further consideration be given to this issue before the final rule is enacted.

Conclusion

Thank you for giving me the opportunity to submit these comments. I will be available to discuss any of these matters with you at any time.

Respectfully

Martin B. Cowan

COMMONWEALTH *financial network*

VIA ELECTRONIC MAIL

November 25, 2015

Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

RE: Regulatory Notice 15-37 – Financial Exploitation of Seniors and Other Vulnerable Adults

Dear Ms. Asquith:

In its Regulatory Notice 15-37, the Financial Industry Regulatory Authority, Inc. ("FINRA"), solicited comments regarding a proposal to amend Rule 4512 (Customer Account Information) (hereinafter "Proposed Amendment") and adopt new FINRA Rule 2165 (Financial Exploitation of Specified Adults) (hereinafter "Proposed Rule").

Commonwealth Financial Network® ("Commonwealth") is an independent broker/dealer and an SEC-registered investment adviser with home office locations in Waltham, Massachusetts, and San Diego, California, and more than 1,600 registered representatives ("RRs") who are independent contractors conducting business in all 50 states. Commonwealth and its RRs serve, among others, individual retail investors, many of whom would fit the Proposed Rule's definition of "Specified Person."

Commonwealth supports FINRA's efforts to protect seniors and other vulnerable investors from financial exploitation. FINRA's approach provides member firms with effective tools to help safeguard vulnerable investors, without exposing its members to additional liability.

I. Proposed Amendment to Rule 4512, Customer Account Information

FINRA's Proposed Amendment to Rule 4512, requiring firms to make a reasonable inquiry to obtain a trusted contact's information when opening an account or updating existing accounts, is fair because it does not prohibit firms from opening or maintaining the account if the customer fails to provide the requested information. FINRA should provide template language that member firms can use in account applications or stand-alone forms to obtain the trusted contact's information and requisite consent to notify the trusted contact if the firm believes financial exploitation of the account owner has occurred, is occurring, has been attempted, or will be attempted.

Commonwealth supports the Proposed Amendment's requirement that the trusted contact be 18 years of age or older. FINRA should modify the final rule in a manner that expressly permits firms to rely on the representations of the account owner regarding the trusted contact's age, so that firms will not have to independently verify that the trusted contact is 18 years of age or older.

With regard to existing accounts, firms should be able to rely on existing procedures for updating accounts pursuant to Securities Exchange Act Rule 17a-3(a)(17)(i)(B) to obtain trusted contact information. It should be sufficient to indicate that no trusted contact has been provided to the member firm, and the account owner should contact the member firm if he or she would like to provide the firm with a trusted contact.

II. Proposed Rule 2165, Financial Exploitation of Specified Adults

The Proposed Rule is a welcome safe harbor for firms maintaining accounts for persons who may be vulnerable to financial exploitation. Commonwealth appreciates any tool it can use to help with the challenging issue of working with clients who are potential victims of elder abuse or other undue influence. Proposed Rule 2165 will permit Commonwealth to place temporary holds on disbursements, allowing us to notify a trusted contact or immediate family member if it believes the client is a potential victim of financial exploitation.

The Proposed Rule also requires members to develop training policies or programs. It would be helpful for member firms if FINRA provided guidance regarding training for registered persons, including FINRA-created training modules.

III. Specific Requests for Comment

Q3. "Should Rule 4512 require customer consent to contact the trusted contact or is customer notice sufficient? Should the types of information that may be disclosed to the trusted contact under Rule 4512 be modified?"

A3. Customer notice should be sufficient for a member to contact the trusted contact. Requiring customer consent could jeopardize the member's ability to seek to protect seniors and other vulnerable investors from financial exploitation, as the customer could be manipulated, afraid, or mentally incapable of providing informed consent. The types of information that may be disclosed to the trusted contact under Rule 4512 should be modified to include the reason for the temporary hold, as well as the details about the request to disburse funds.

Q7. "Should the definition of 'account' be expanded to include accounts for which a specified adult is named a beneficiary?"

A7. No, it would not be appropriate to include accounts for which a specified adult is named a beneficiary in the definition of “account” because beneficiaries typically do not have the authority to direct account activity or withdraw funds from an account.

Q9. “Is the two business day period for notifying the appropriate parties under proposed Rule 2165 appropriate? If not, what circumstances may warrant a shorter or longer period?”

A9. It may be difficult to notify the appropriate parties within 2 business days if the trusted contact or family member is unavailable. If a member firm is unable to reach a trusted contact or family member within 2 business days of placing a temporary hold on an account, the firm should have up to 10 business days to make contact with the appropriate party.

Q12. “What direct costs for the firm will result from the proposed rules?”

A12. To comply with the Proposed Amendment and Proposed Rule, Commonwealth will need to make changes to existing account profile systems that will require development time. A rough estimate of the costs associated with making the changes is approximately $40,000.00.

Overall, Commonwealth supports the Proposed Amendment to Rule 4512 and Proposed Rule 2165. If FINRA adopts the changes as proposed, however, it should allow for at least 12 months for firms to implement changes to systems, policies, and procedures to comply with the rules.

If you have any questions regarding our comments or concerns, please contact me at 781.736.0700.

Sincerely,
Brendan Daly
Legal and Compliance Counsel
Commonwealth Financial Network

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alzheimer's association®

Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

November 30, 2015

Re: Regulatory Notice 15-37; Proposed Rules Relating to Financial Exploitation of Seniors and Other Vulnerable Adults

Dear Ms. Asquith,

The Alzheimer's Association appreciates the opportunity to comment on FINRA's proposed rules addressing the financial exploitation of seniors and other vulnerable adults.

The Alzheimer's Association is the world's leading voluntary health organization in Alzheimer's care, support, and research. Today, there are more than 5 million Americans living with Alzheimer's disease, including an estimated 200,000 people under the age of 65. Individuals affected by Alzheimer's experience impaired judgment and progressive cognitive decline, making them susceptible to financial exploitation. As more baby boomers reach the age of greater risk of developing Alzheimer's, it can be expected that millions of them will spend their retirement years either living with the disease or caring for someone who has it. Protecting their financial future must be a priority.

The Alzheimer's Association supports legislative and regulatory efforts to protect people with Alzheimer's disease from financial exploitation. Through our chapters across the country, we will be working to see such protections enacted in all states. The proposed rules by FINRA are an important contribution to this cause. Thus, we offer the following comments to Regulatory Notice 15-37.

Specific Comments

Proposed amendments to FINRA Rule 4512 (Customer Account Information)

The Alzheimer's Association appreciates FINRA's proposal to identify a trusted contact person, but believes the proposed amendment can be strengthened with earlier identification of trusted contacts, required notification of the designation, and a broader approach in engaging with these individuals.

Early identification of trusted contacts ensures clients are able to name a person for this role before cognition declines. Advancing age is the biggest known risk factor for developing Alzheimer's disease; thus, older existing customers may already be experiencing cognitive deficits by the time firms request a trusted contact name through routine and customary business. We suggest FINRA amend its proposal to encourage firms to request this information from all its existing clients within 12 months of the amendment's effective date.

We also suggest FINRA require firms notify individuals in writing when they are named as trusted contacts and when their designation changes because account holders have named new trusted contacts. Currently, the proposed amendment makes the underlying assumption that a trusted contact will engage in conversation with a firm and willingly confirm personal details about its customers. However, many individuals who are unaware of their status as a named trusted contact will likely find it concerning when a stranger contacts them about someone they know and asks about personal details like the customer's contact information, health status and any existing legal representation. Notifying individuals in writing that they've been named as trusted contacts will help to mitigate confusion when a firm reaches out. Likewise, notifying named trusted contacts when their designation has changed may serve as a flag for these individuals to investigate if the change is due to factors such as diminished capacity or financial exploitation.

Lastly, we suggest FINRA amend the type of information firms seek to confirm from trusted contacts. Rather than attempting to confirm a customer's health status, firms should seek other information potentially relevant to an account's unusual activity. As previously mentioned, trusted contacts may decline to reveal personal details about a customer with firms they do not recognize. Trusted contacts may also live long-distance and be unable to speak accurately to a customer's cognitive or functional status. Furthermore, "health status" does not adequately assess whether a customer is being financially exploited and can be subject to interpretation. Thus, we suggest FINRA amend its supplementary material so firms do not seek to confirm a customer's health status, but rather information relevant to an account's unusual activity.

Proposed New FINRA Rule 2165 (Financial Exploitation of Specified Adults)

The Alzheimer's Association appreciates FINRA's efforts to encourage firms to protect clients from financial exploitation by providing safe harbor if they exercise discretion, but believes this new proposed rule can be strengthened by including situations of suspected diminished capacity; requiring firms to report suspected financial exploitation or diminished capacity; and clarifying some of its processes for temporary holds and record retention.

Currently, the only type of situation FINRA defines for the purposes of this rule under §(a)(6) is financial exploitation. However, delaying disbursement may also be appropriate due to suspected diminished capacity. Alzheimer's disease is characterized by a progressive decline in memory, problem-solving, and other cognitive skills that affect a person's judgment and executive function. As their cognition declines, affected individuals may engage in poor decisions and fail to recognize the consequences of their actions. Firms may encounter these types of situations and be asked to take action on customers' preferences, even if these preferences are based on impaired judgment. FINRA appears to acknowledge the potential of encountering customers with diminished capacity by including in its definition of specified adults, "a natural person age 18 and older who the member reasonably believes has a mental or physical impairment that renders the individual unable to protect his or her own interests." We suggest FINRA include suspected diminished capacity under §(a) and §(b)(1) so firms are encouraged to apply this rule if a customer is making poor financial decisions due to the presence of cognitive impairment.

We also suggest firms be required to report suspected financial exploitation or diminished capacity to appropriate external authorities such Adult Protective Services (APS) and the state securities agency. As outlined under §(b)(1)(B)(i) and (ii) in the proposed rule, the only people a firm is obligated to inform in the event of a delayed disbursement due to financial exploitation are authorized parties on the account, a named trusted contact, and if needed, an immediate family member. Because financial exploitation is a recognized crime and diminished capacity may indicate self-neglect, a recognized form of abuse in several state statues on APS, it would be appropriate for firms to notify external authorities if they reasonably suspect one of these situations is occurring, and thus, choose to exercise discretion under this rule.

Lastly, we suggest FINRA further clarify some of its processes outlined under §(b) and §(c). Specifically:

- The window of time allowed to take action under §(b)(1)(B) should be reduced to 24 hours. This is in line with most guidance for mandatory reporters of abuse. FINRA should also clarify how individuals will be notified, including external authorities such as APS.
- It is not clear how a firm would identify an "immediate family member" in the event the named trusted contact cannot be reached under §(b)(1)(B)(ii).

- The provisions for a delay of disbursement expiration [§(b)(2)] or extension [§(b)(3)] should be clarified. Because firms may not recognize cognitive change or be trained in detection of cognitive impairment, it is not clear under what expertise or authority a temporary hold on disbursements would expire or continue, or under what mechanism a case involving delayed disbursement would reach a court, even though these provisions indicate a court may terminate such a delay.
- Under §(c), firms should also be required to document referral to external authorities such as APS and the final outcome of the temporary holds they place.

Thank you for the opportunity to comment. The Alzheimer's Association would welcome a chance to serve as a resource to FINRA as it refines its rules and considers other issues facing individuals living with Alzheimer's and other dementias. Please contact Hye Kim, Sr. Associate Director, Policy Development, at 312-335-5809 or hkim@alz.org if you have questions or if we can be of additional assistance.

Sincerely,

Robert Egge
Executive Vice President, Government Affairs

FINANCIAL SERVICES ROUNDTABLE

November 30, 2015

Via pubcom@finra.org

Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

Re: Regulatory Notice 15-37—Financial Exploitation of Seniors and Other Vulnerable Adults

Dear Ms. Asquith:

The Financial Services Roundtable ("FSR")[1] appreciates the opportunity to comment on FINRA's proposed (i) amendments to its current Rule 4512 (Customer Account Information) and (ii) new Rule 2165 (Financial Exploitation of Specified Adults) (jointly, the "Proposals").[2] The proposed amendments to Rule 4512 would require FINRA members ("firms") to make reasonable efforts to obtain the name of and contact information for a "trusted contact person" for each retail customer's account.

1 As *advocates for a strong financial future*™, FSR represents the largest integrated financial services companies providing banking, insurance, payment, and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. FSR member companies provide fuel for America's economic engine, accounting directly for $92.7 trillion in managed assets, $1.2 trillion in revenue, and 2.3 million jobs.

2 Regulatory Notice 15-37, Financial Exploitation of Seniors and Other Vulnerable Adults (October 2015), *available at* http://www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory-Notice-15-37.pdf.

Proposed Rule 2165 would permit (but not require) a "Qualified Person" of a firm to place temporary holds on disbursements of funds or securities from the "Account" of a "Specified Adult" if there is a reasonable belief of "financial exploitation" of the customer.

I. Executive Summary

- FSR supports a uniform and coordinated approach to protect senior investors and vulnerable adult investors.
- FSR urges FINRA to coordinate with other regulators to address the Proposals' significant potential legal risks to firms.
- FSR urges FINRA to adopt a principles-based rule that would permit a firm to develop compliance tools in keeping with its unique business model.
- Expanding Rule 2165 beyond "disbursements" to include "transactions" would provide significantly more robust protections for seniors and vulnerable adults.
- FSR urges FINRA to provide guidance regarding who can be designated as a trusted contact person, and require the trusted contact person's acknowledgment of this designation.
- Proposed Rule 2165 should address the information that firms can share with the trusted contact person, and with other financial services firms.
- FINRA should expressly allow firms to use the Temporary Hold period(s) to seek intervention by the relevant governmental agencies.
- FSR urges FINRA to clarify the scope of the internal review requirement.
- Proposed record retention provision would impose new books and records requirements, which will result in substantial actual costs to firms in addition to potential legal risks.
- FINRA's Economic Impact Assessment fails to demonstrate that the designation of a trusted contact person would be an effective mitigant against financial exploitation of the elderly and vulnerable adults. FSR urges FINRA to present findings that show evidence that a customer designating a trusted contact person is, or is likely to be, an effective mitigant against the financial abuse that the Proposals are intended to address.

II. Introduction

FSR has long supported efforts to protect senior investors, as demonstrated, in part, by its many efforts to educate older Americans ("senior investors") as they prepare for retirement.[3] BITS (FSR's technology policy division)[4] has been at the forefront of initiatives to protect senior investors and provide fraud-reduction resources to the financial services industry.[5]

FSR applauds FINRA for the steps that it, too, has taken to educate senior investors and to provide resources to these investors, including through its Senior Helpline. The reports that FINRA, the United States Securities and Exchange Commission ("Commission"), and the North American Securities Administrators Association ("NASAA") have published over the past eight years are useful resources for the financial services industry in developing practices, policies, and procedures related to senior investors.[6]

3 A sampling of FSR's financial education efforts with respect to senior investors can be found at http://fsroundtable.org/financial-literacy/.

4 BITS addresses issues at the intersection of financial services, technology and public policy, where industry cooperation serves the public good, such as critical infrastructure protection, fraud prevention, and the safety of financial services.

5 *See* BITS AND THE FINANCIAL SERVICES ROUNDTABLE, *Elder Financial Exploitation Prevention*, 2015 (Webinar advocating awareness on issues related to elder financial abuse such as emerging elder fraud scams, industry efforts to combat abuse and provide resources for the financial services community (2015); Roxane Schneider, *FSR Members Thwart Fraud Perpetrators* (BITS and The Financial Services Roundtable), 2014, *available at* http://fsroundtable.org/bits/world-elder-abuse-awareness-day/; BITS AND THE FINANCIAL SERVICES ROUNDTABLE, *BITS At-Risk Adult Training Curriculum*, 2013, *available at* http://www.bits.org/publications/doc/BITS-RoundtableAt-RiskAdultTrainingCurriculumJan2013.pdf; BITS AND THE FINANCIAL SERVICES ROUNDTABLE, Statement of BITS President Paul Smocer On Behalf Of The Financial Services Roundtable Before The Special Committee On Aging Of The U.S. Senate, *America's Invisible Epidemic: Preventing Financial Elder Abuse*, Nov. 15, 2012, *available at* http://www.bits.org/publications/regulation/BITSTestimonySenateAging15Nov12.pdf; BITS AND THE FINANCIAL SERVICES ROUNDTABLE, *FSR Older Americans Financial Abuse Prevention Working Group*, June 2012), *available at* http://www.bits.org/publications/doc/RoundtableWEAADBookletJune2012.pdf; BITS AND THE FINANCIAL SERVICES ROUNDTABLE, *Protecting the Elderly and Vulnerable from Financial Fraud and Exploitation*, April 2010, *available at* http://www.bits.org/publications/fraud/BITSProtectingVulnerableAdults0410.pdf.

6 *See, e.g.*, SEC. & EXCH. COMM'N, Office of Compliance Inspections and Examinations and FINRA, *National Senior Investor Initiative—A Coordinated Series of Examinations* (Apr. 15, 2015), *available at* https://www.finra.org/sites/default/files/SEC%20National%20Senior%20Investor%20Initiative.pdf; SEC. & EXCH. COMM'N, Office of Compliance Inspections and Examination, NASAA, and FINRA, *Protecting Senior Investors: Compliance, Supervisory and Other Practices Used by Financial Services Firms in Serving Senior Investors* (Sept. 22, 2008), *available at* http://www.sec.gov/spotlight/seniors/seniorspracticesreport092208.pdf; and SEC. & EXCH. COMM'N, Office of Compliance Inspections and Examination, NASAA, and FINRA, *Protecting Senior Investors: Report of Examinations of Securities Firms Providing "Free Lunch" Sales Seminars* (September 2007), *available at* https://www.finra.org/sites/default/files/Industry/p036814.pdf.

III. FSR supports a uniform and coordinated approach to protect senior investors and vulnerable adult investors

FINRA noted in Regulatory Notice 15-37 that proposed Rule 2165 could create potential liability for firms and their associated persons. FINRA's discussion centers on a firm's determination to disburse or withhold funds; but FINRA provides no analysis of potential conflicts with broker-dealers' obligations under state or federal law with respect to privacy or other consumer protection requirements. Further, there is no indication that FINRA has consulted with state or federal authorities regarding the interplay of the Proposals with consumer protection requirements, including with respect to privacy.

Before finalizing the Proposals, FSR believes that FINRA should confer with the states (represented by NASAA) as well as the Commission in order to reconcile the Proposals with firms' existing legal and regulatory requirements and to eliminate potential conflicts among those requirements. The outcome of such discussions should be published by FINRA for firms and investors to consider and reflect in their respective comments regarding the Proposals. FSR further believes that the end result should be national standards to achieve a uniform and coordinated approach to this important component of investor protection, rather than the *ad hoc* approaches that will be the outcome if FINRA, through the Proposals, and each of the states pursue separate initiatives.[7]

IV. FSR urges FINRA to coordinate with other regulators to address the Proposals' significant potential legal risks to firms

Notwithstanding the collaboration of FINRA, the Commission, and NASAA on other senior investor initiatives, the Proposals do not appear to reflect input from any other federal or state governmental agency or regulatory organization. In light of the potential for civil—and possibly criminal—liability risks that the Proposals may create for firms and their associated persons, the absence of coordination with relevant authorities and companion rulemaking raises substantial concerns. FINRA itself notes that " . . . there may be significant impacts with respect to legal risks and attendant costs to firms that choose to rely on the proposed rule in placing temporary holds on disbursements; although the direction of the impact is ambiguous."[8]

If adopted as proposed without corollary action by the states or the federal government, firms and their associated persons will be faced with the dilemma of: (i) refraining from

[7] FINRA noted that Delaware, Missouri, and Washington State have each enacted legislation permitting broker-dealers and other financial institutions to place temporary holds on disbursements and transactions if they suspect financial exploitation of specified persons. *See* Regulatory Notice 15-37, *supra* note 2, at page 9, endnote 4 *citing* Del. Code Ann. tit. 31, § 3910 (2015); Mo. Rev. Stat. §§ 409.600-.630 (2015); and Wash. Rev. Code §§ 74.34.215, 220 (2015).

[8] *See* Regulatory Notice 15-37, *supra* note 2, at 6.

disbursing funds or securities, which potentially could result in economic hardship to customers (*e.g.*, if the funds were needed to pay medical expenses or to satisfy other financial obligations, such as mortgage payments); or (ii) disbursing funds and securities based either on Supplementary Material .01 to Rule 2165, which states that "[t]his Rule does not require members to place temporary holds on disbursements of funds or securities from the Account of a Senior Adult, or because, based on the limited information available to it, the firm determined that it did not have a reasonable basis to believe that the customer was the subject of financial exploitation."

We, note, however that many situations do not involve a *reasonable basis of belief*. For example, some situations start out with a red flag or suspicion of possible wrong-doing that creates a duty to investigate to avoid liability. As such, FSR believes a "reasonable basis to suspect the customer may be the subject of financial exploitation" may be a better standard.

Although FINRA proposes to provide a safe harbor when firms exercise discretion in placing temporary holds on disbursements of funds or securities under the circumstances specified in proposed Rule 2165,[9] the scope of the safe harbor may in practice provide only limited protection to firms. Moreover, if proposed Rule 2165 is adopted without companion federal and state action, a "Catch-22" situation would be created because the mere existence of Rule 2165 may create liability for firms that do not withhold disbursements, even though the supplementary language expressly provides that Rule 2165 does not create any obligation.

Accordingly, FSR urges FINRA to engage with federal and state regulators to address in a comprehensive manner the potential significant legal risks the Proposals pose for firms that could arise as a result of multiple and conflicting legal or regulatory requirements imposed by governmental authorities and FINRA.

V. FSR urges FINRA to adopt a principles-based rule that would permit a firm to develop compliance tools in keeping with its unique business model

FINRA solicited comment on whether it should "mandate specific procedures for escalating matters related to financial exploitation."[10] FSR believes that firms that intend to rely on the proposed safe harbor provided by Rule 2165 should be allowed to develop their own policies and procedures reasonably designed to achieve compliance with the conditions of the safe harbor, (including determining their own internal escalation procedures), which would be based on each firm's business model. Accordingly, FSR recommends that FINRA replace the prescriptive approach in proposed Rule 2165 with a principles-based approach that would allow

9 *See* proposed Supplementary Material .01 to Rule 2165.

10 *See* Regulatory Notice 15-37, *supra* note 2, at 8 (Question 11).

a firm to develop policies and procedures within its supervisory system[11] based upon its unique business model, rather than a "one-size-fits-all" prescriptive rule.

FSR also recommends changes to the definition of "Qualified Person."[12] First, FSR believes that the definition of "Qualified Person" should be revised to eliminate the provision that a person acting in a legal or compliance capacity is qualified *per se.* Legal and compliance personnel seldom witness the events that give rise to a suspicion of exploitation (transactions, personal interaction, *etc*.). As a result, while legal and compliance departments will likely advise and guide customer-facing personnel when these situations arise, legal and compliance personnel are rarely, if ever, in a position to substitute their judgment for the judgment of customer-facing personnel.

Additionally, in our view, the phrase "reasonably related to the account," used to describe those personnel of the firm that are authorized to place a hold, ought to be eliminated or clarified. Firms ought to be allowed, in their discretion, to establish the processes for detecting and addressing suspected exploitation that best fit their customer base and risk profile. Indeed, many firms have done so, for purposes of compliance with state laws requiring them to report suspected or detected elder abuse. It is highly likely that the service areas supporting these processes do not have relationships to particular Accounts. Therefore, the inclusion of the "reasonably related" phrase will at a minimum require firms to assess current processes to ensure that persons placing a hold on the Account are "reasonably related to the account." It might require firms to incur financial and operational costs to review and possibly revamp existing infrastructure that is already working satisfactorily in order to achieve technical compliance with the rule. We believe that "Qualified Person" is a designation that firms should confer on those groups or individuals best positioned to administer the firm's programs addressing exploitation.

VI. Expanding Rule 2165 to include "transactions" would provide significantly more robust protections for seniors and vulnerable adults

FINRA should expand the rule beyond "disbursements" and include "transactions." The focus solely on "disbursements" unnecessarily limits the protections provided by proposed Rule 2165. The inclusion of "transactions" (as permitted in the Delaware law) would provide significantly more robust protections for seniors and vulnerable adults. For example, under the current language in proposed rules, should an exploitative liquidation of investments occur, the firm would only be protected by the proposed safe harbor afforded by proposed Rule 2165 when if refuses to disburse the fruits of the exploitative sale, but would receive no protections for

11 *See* FINRA Rule 3110.

12 As proposed, a "Qualified Person" means "an associated person of a member who serves in a supervisory, compliance or legal capacity that is reasonably related to the Account of the Specified Adult." *See* paragraph (a)(3) of proposed Rule 2165.

refusing the initial sale of the investment—an action that can be almost as damaging to an investor as the disbursement.

We note that transactions also can trigger significant tax consequences (*e.g.*, a liquidation of securities or an IRA); incur fees or cause other negative financial implications for the senior or vulnerable investor because the transaction may not be suitable or may be inconsistent with a client's risk tolerance; or expose the senior or vulnerable investor to financial losses. Other examples of exploitative, non-disbursement transactions include: the buying of an investment product for the benefit of the wrong-doer, a change in ownership of an Account, a change in the beneficiary of an Account, or incurring penalties due to another change in the Account (such as annuity-related surrender charges).

VII. FSR urges FINRA to provide guidance regarding who can be designated as a "trusted contact person," and require the trusted contact person's acknowledgement of this designation

Proposed new paragraph (a)(1)(F) of Rule 4512 would require that a firm make reasonable efforts to obtain the name of and contact information for a "trusted contact person" who may be contacted about an Account. The Proposals do not clarify what activities constitute "reasonable efforts" by a firm to obtain the identity of a trusted contact person. For currently existing account owners, would this include a disclosure or questionnaire in what the industry refers to as the "SECBAR letter" that is mailed to clients at least once every three (3) years? For new accounts, would this question be asked in the new account documents? Moreover, the only qualifications for a trusted contact person are that he or she be at least 18 years of age, and not be authorized to transact business on behalf of the account. There is no requirement that the trusted contact person be an immediate family member, or have any professional training in determining the mental state of the customer or the appropriateness of any disbursement from or other activity in the Account.

In general, we believe the customer should have discretion to designate any adult as a "trusted contact person" for the Account (including persons to whom the customer granted a power of attorney with respect to the Account), and that the firm should have the benefit of the safe harbor contemplated in proposed Rule 2165 for acting in accordance with the customer's designation. FSR recommends that FINRA require that the "trusted contact person" acknowledge his role at the time of designation (or at Account opening, for a new account), because the "trusted contact person" may take on legal liability due to his actions or inactions. We also believe it would be helpful for the final rule to provide that firms may obtain contact information for a successor/alternate "trusted contact person." However, due to liability concerns, registered representatives should be prohibited from being designated as a "trusted contact person."

The Proposals only require firms to seek information regarding trusted contact persons at the time of Account opening and when a firm updates account information as part of its regular process pursuant to rule 17a-3 under the Securities Exchange Act of 1934[13] or as otherwise required by applicable law or rule. FSR asks FINRA to clarify that if a customer does not direct a firm to remove or replace the trusted contact person, the firm is not liable if it contacts the trusted contact person previously designated by the customer as reflected in the firm's books and records. As discussed above, FSR believes that FINRA should coordinate with appropriate federal and state authorities to ensure that firms will not have legal liability for contacting trusted contact persons or immediate family members pursuant to the Proposals.

FSR further notes that proposed Rule 2165 does not specify the role of a trusted contact person and the extent to which a firm should or is required to rely on information provided by the trusted contact person. FSR is concerned that firm interactions with trusted contact persons could place a firm and its associated persons in the role of mediating disagreements among a customer, the trusted contact person, and the proposed payee with respect to disbursals from an Account. Furthermore, a firm could even be placed in the precarious position of mediating family disputes if it were to contact an immediate family member in lieu of a trusted contact person in accordance with paragraph (b)(1)(B)(ii) of proposed Rule 4512. In many circumstances, there will be conflicting information and firms will not be able to determine the appropriate course of action to take. Actions taken and decisions made under these complex—and often emotional—circumstances should not be the responsibility of firms.

In the absence of a trusted contact person, or if a trusted contact person is suspected of being involved in the financial exploitation, FINRA proposes to permit firms to discuss possible exploitation with immediate family members. FSR further believes that firms should be permitted to contact and discuss matters with the customer's accountants and/or attorneys if the customer has authorized these communications. FSR urges FINRA to clarify that where "time is of essence," the firm may in its discretion contact an immediate family member in instances in which the trusted contact person is not immediately available.

FSR believes that such modifications to the Proposals would help mitigate potential issues regarding inconsistencies with a customer's indicated preference, such as when a customer has authorized a firm to share Account information with an attorney or accountant, or has appointed a power of attorney to an Account. Among other things, these modifications, if adopted, would preserve the customer protections of permitting a firm to contact an immediate family member if it has a reasonable basis to suspect that the trusted contact person is, was, or will be involved in financial exploitation of the customer.

[13] 17 C.F.R. § 240.17a-3.

VIII. Proposed Rule 2165 should address the information that firms can share with the trusted contact person, and with other financial services firms

As proposed, Rule 2165 does not address the scope of information that can be shared with the Account's trusted contact person. In September 2013, eight federal agencies jointly issued guidance to clarify that "reporting suspected financial abuse of older adults to appropriate local, state, or federal agencies does not, in general, violate the privacy provisions of the [Gramm-Leach-Bliley Act] or its implementing regulations."[14] As a consequence, firms are uncertain as to what additional information they can share with a governmental agency (even in mandatory reporting states) beyond the information the firm is required to include in the initial report. This uncertainty will only increase with respect to third parties who are not authorized to act on an Account, as will be the case with the "trusted contact person." FSR urges FINRA to provide the necessary guidance to aid firms in handling information under the circumstances presented in these very difficult situations. We believe the firm also should be permitted to share information with a contra-broker-dealer in the event the Account is in the process of transferring out. Uncertainty about what information firms can share (and with whom) will compromise the effectiveness of any final rule adopted under the Proposals.

FINRA should expressly permit holds on ACATS transfers, and should permit firms to share information concerning the Account with financial institutions which are receiving counterparties of an Account transfer. FSR members have observed that an individual who seeks to gain control or exploit a senior or vulnerable adult will submit an ACATS request in order to avoid an advisor with whom the customer has a familiar and trusted relationship and move the customer's assets to an institution that is unfamiliar with the customer.

IX. FINRA should expressly allow firms to use the Temporary Hold period(s) to seek intervention by the relevant governmental agencies

Proposed Rule 2165 provides for a temporary hold of up to 15 business days on Account assets, which may be extended one time for another 15 business days. However, proposed Rule 2165 does not specify the steps that firms should take with respect to Account assets at the expiration of Rule 2165 hold(s) if there remains a reasonable belief of financial exploitation with respect to the relevant Specified Adult. As proposed, FSR is concerned that Rule 2165 would require firms would to release assets notwithstanding a reasonable suspicion, or even a determination, that financial exploitation has, did, or will occur.

[14] *See* "Interagency Guidance on Privacy Laws and Reporting Financial Abuse of Older Adults," *available at* http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20130924a2.pdf. The guidance was issued by the following agencies: Board of Governors of the Federal Reserve System, Commodity Futures Trading, Consumer Financial Protection Bureau, Federal Deposit Insurance Corporation, Federal Trade Commission, National Credit Union Administration, Office of the Comptroller of the Currency, and Securities and Exchange Commission.

To protect against such an outcome, which clearly would be inconsistent with the stated purpose of the Proposals, FSR recommends that any final rule permit firms to impose a temporary hold on an Account for up any period within the reasonable discretion of the firm, or until a third party notifies the firm that the need for the hold has expired (*e.g.*, action by adult protective services, or an order of a court of competent jurisdiction), or subsequent events show that the threat no longer exists. FSR further recommends that any final rule permit firms to petition a governmental agency for a determination concerning the proposed disbursement, which would allow the applicable jurisdiction's adult protective services to intervene.

In addition, if the customer has a durable power of attorney, the individual granted that authority could be designated as a trusted contact person to discuss possible concerns with a proposed disbursement, which would allow this individual to direct a temporary hold on Account assets in order to provide the individual the opportunity to obtain a court order freezing the Account.

Finally, FINRA proposes to require that firms provide notice that they have imposed a temporary hold no later than two (2) business days following the imposition of a temporary hold on the Account. Due to the complexity of the proposed notification requirements, FSR recommends that proposed Rule 2165(b)(1)(B) be revised to require a firm to provide notice of a temporary hold no later than five (5) business days after it was imposed, and to clarify when the time period commences and terminates. For example, if a firm decides to place a temporary hold on May 1st at 2:15 p.m. (PT), does the firm have until 2:15 p.m. (PT) on May 3rd to take action? Until the close of business on May 3rd? Also, what form of notice would be acceptable? Would leaving a voice message or e-mail be acceptable? If notifying by regular U.S. MAIL, what is deemed within the two (2) business days' requirement—placing the notice into the mail, or must the notice be delivered to the customer within the required number of business days? FRS requests clarification so that firms can comply with applicable deadlines.

X. FSR urges FINRA to clarify the scope of the internal review requirement

Pursuant to paragraph (b)(1)(C) of proposed Rule 2165, once a firm places a temporary hold on disbursements from an Account, it must initiate an internal review of the facts and circumstances causing a Qualified Person to have a reasonable belief that there has, was, or will be financial exploitation of the Specified Adult. We note that firms will not have access to relevant information, including: (i) the Specified Adult's medical professionals; (ii) detailed or complete information about the proposed disbursement; and/or (iii) the identity of immediate family members or other close relatives. Further, in some cases, firms will not necessarily have the necessary expertise or complete information to allow them to evaluate the appropriateness of Account disbursements. FSR respectfully requests that FINRA clarify the scope of the internal review requirement, including the factors to be considered and the nature of inquiry that firms must conduct.

XI. Proposed record retention provision would impose new books and records requirements, which will result in substantial actual costs to firms in addition to potential legal risks

Although the Proposals would impose substantial new books and records requirements on firms, FINRA did not address the economic impact of such requirements in its Economic Impact Assessment. FSR believes the Proposals, particularly those related to obtaining and updating additional information with respect to customer accounts, making determinations of financial exploitation, documenting such determinations, and conducting and documenting internal reviews would require firms to devote substantial work on systems and processes to build these new requirements into the firm's verification process. If adopted as proposed, we believe the Proposals will result in substantial actual costs for firms in addition to the potential legal risks discussed above. FSR urges FINRA to address the economic impact of the proposed books and records requirements.

XII. FINRA's Economic Impact Assessment fails to demonstrate that the designation of a trusted contact person would be an effective mitigant against financial exploitation of the elderly and vulnerable adults

Unfortunately, the predominate source of financial exploitation of the elderly and other vulnerable adults reportedly is the person's family, which by some estimates represent almost 75 percent of this criminal activity.[15] However, FINRA's Economic Impact Assessment fails to examine the potential efficacy of the Proposals with a view to assessing the most likely source of financial exploitation of the elderly and vulnerable adults. FSR urges FINRA to present findings that show evidence that a customer designating a trusted contact person is, or is likely to be, an effective mitigant against the financial abuse that the Proposals are intended to address.

FSR believes it is important for FINRA to determine how well the Proposals will work, and how effective the Proposals will be *vis-à-vis* reporting to the applicable jurisdiction's adult protective service (under mandatory or permissive reporting statutes) or other potential mitigants. Absent further analyses, FSR is concerned that the Proposals would impose substantial risks to firms without evidence of a corresponding benefit to anyone.

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[15] *See*, Paul Smocer, STATEMENT FOR THE RECORD BEFORE THE SPECIAL COMMITTEE ON AGING OF THE U.S. SENATE at 1 (Nov. 15, 2012) (stating that "the most frequent perpetrators of financial abuse are family members, who by some estimates commit nearly 75% of crimes"); BITS, "Protecting the Elderly and Vulnerable from Financial Fraud and Exploitation" at 4 (Apr. 2010) (noting that "exploitation is often traced to family members, trusted friends, or caregivers").

FSR appreciates the opportunity to comment on Regulatory Notice 15-37. If it would be helpful to discuss our specific comments or views on any of these issues, please contact Richard Foster at Richard.Foster@FSRoundtable.org; or Felicia Smith, Vice President and Senior Counsel for Regulatory Affairs, at Felicia.Smith@FSRoundtable.org.

Sincerely,

Rich Foster

Richard Foster
Senior Vice President and Senior Counsel
for Regulatory and Legal Affairs
Financial Services Roundtable

Attachment – Appendix, FSR/BITS, *"Preventing Elder Financial Abuse"*

With a copy to:

James S. Wrona, Vice President and Associate General Counsel
Jeanette Wingler, Assistant General Counsel
Office of General Counsel

Ann-Marie Mason, Director and Counsel
Shared Services

FINRA

APPENDIX

THE FINANCIAL SERVICES ROUNDTABLE • BITS

“PREVENTING ELDER FINANCIAL ABUSE”

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BITS
FINANCIAL SERVICES ROUNDTABLE

PROTECTING THE ELDERLY AND VULNERABLE FROM FINANCIAL FRAUD AND EXPLOITATION

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PROTECTING THE ELDERLY AND VULNERABLE FROM FINANCIAL FRAUD AND EXPLOITATION

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INTRODUCTION

This paper, *Protecting the Elderly and Vulnerable from Financial Fraud and Exploitation*, is designed to address special needs for which financial institutions are uniquely suited to assist. The paper provides information to support the implementation or improvement of a financial institution's internal program for education and awareness about abuse of, and exploitation against, the elderly and vulnerable (vulnerable adults). For purposes of this paper, vulnerable adults includes those either over the age of 60–65, depending on the state, or disabled individuals over the age of 18. Often, vulnerable adults lack the physical or mental capability to care for themselves.

According to a 2008 survey by the University of Chicago[1], approximately 13 percent of elderly Americans have been verbally mistreated (9%) or financially exploited (3.5%) or have had advantage taken of them. In a telephone survey[2] of more than 5,500 older adults, 5.2% of respondents reported current financial exploitation by a family member and 6.5% reported lifetime financial exploitation by a non-family individual. A 2001 study by the National Association of Adult Protective Service Administrators (NAPSA) reported 38,015 documented cases of financial exploitation of vulnerable adults. The study also states that only one out of 14 cases of domestic elder abuse incidences is reported, which could mean that numbers of cases of abuse exceed 850,000 annually. NAPSA conducted an informal study of U.S. news articles regarding elder abuse reported between October 1, 2008 and March 31, 2009. Of the 1,971 incidents publicly reported, 458 of the incidents included financial exploitation[3]. A 2009 report estimates the annual financial loss by victims of elder financial abuse to be at least $2.6 billion. It also describes the typical victim of elder abuse as a woman over 75 who lives alone.[4]

By 2030, the number of Americans aged 65 and older will more than double to 71 million, roughly 20 percent of the U.S. population. In some states, fully a quarter of the population will be aged 65 and older[5]. This dramatic increase in the aging population can also lead to a large pool of potential victims for financial exploitation

According to the National Center on Elder Abuse (NCEA), financial exploitation can include "the illegal or improper use of an elder's funds, property, or assets." Examples include, but are not limited to, "cashing a vulnerable adult person's checks without authorization or permission; forging an older person's signature; misusing or stealing an older person's money or possessions; coercing or deceiving an older person into signing any document (e.g., contracts or will); and the improper use of conservatorship, guardianship, or power of attorney."[6]

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[1] This study was based on a 2005-2006 survey by the National Social Life, Health and Aging Project (NSHAP) that collected data from a random sample of 3,005 community-dwelling adults aged 57-85. The study was supported by the National Institutes of Health (NIH) and published in the *Journal of Gerontology: Social Sciences*.
[2] *March 2009 National Elder Mistreatment Study, http://www.ncjrs.gov/pdffiles1/nij/grants/226456.pdf.*
[3] Other categories tracked by NAPSA included physical, sexual, and emotional abuse, neglect (including self-neglect), abandonment, and information about scams, proposed legislation, community meetings, etc.
[4] *Broken Trust: Elders, Family, and Finances*, MetLife Mature Market Institute; produced in conjunction with the National Committee for the Prevention of Elder Abuse and Virginia Tech, *http://www.metlife.com/assets/cao/mmi/publications/studies/mmi-study-broken-trust-elders-family-finances.pdf.*
[5] *The State of Aging and Health in America,* Centers for Disease Control and Prevention (CDC) and The Merck Company Foundation, 2007, *http://www.cdc.gov/Aging/pdf/saha_2007.pdf.*
[6] The National Center on Elder Abuse, http://www.ncea.aoa.gov/ncearoot/Main_Site/index.aspx.

Financial exploitation can be devastating to the victim. Research has shown that elders who suffer from abuse, neglect or exploitation are three times more likely to die than those who have not suffered from abuse, neglect or exploitation.[7] Compounding the devastation is that the exploitation is often traced to family members, trusted friends, or caregivers. Financial abuse often occurs with the implied acknowledgment and/or consent of the elder person, even when that person is mentally capable, and therefore can be more difficult to detect or prove. In addition, many victims may be unable or unwilling to implicate a friend or family member as the perpetrator. The University of Chicago survey found that adults over the age of 60 are less likely to report verbal or financial mistreatment than those aged 50–60.

Why are older persons at risk? Greed is the major motivator of the perpetrator of the financial crime. Persons over 50 control the majority of the personal wealth in this country and the problem will only increase as the "baby boomer" generation ages. Fear is also a primary factor. Older adults are afraid of being left alone or being placed into a nursing home. The physical and mental impairments of aging make the elderly dependent on others for care which allows the abuser to isolate and control the victim both physically and emotionally.

Employees within the financial services industry may often be the first to detect changes in the behaviors of customers with whom they have regular contact. A pilot program instituted by a financial institution to identify and detect cases of financial abuse of the elderly showed that in 7 out of 10 cases when a teller suspected something was wrong, they were correct. This front-line relationship places institutions in a unique position to assist in protecting customers, upholding their inherent trust relationship with clients. Misconceptions and misunderstandings of privacy laws[8] may cause institutions to avoid reporting suspected financial exploitation even though many states mandate such reporting. A July 2003 NAPSA survey found that financial institutions accounted for only 0.3% of reports of financial exploitation[9].

Financial institutions are encouraged to broaden dialogue with and report suspected fraud to Adult Protective Services (APS), as required by law[10]. In turn, APS will conduct investigations, prepare assessments and arrange for services needed to help victims correct or eliminate financial exploitation. This is an area in which they may make a positive contribution to the well-being of vulnerable customers.

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[7] Lachs, M.S., Williams, C.S., O'Brien, S., Pillemer, K.A., and Charlson, M.E., "The mortality of elder mistreatment" *Journal of the American Medical Association*, (1998) 280(5),428-432.

[8] See Role of Legal Departments section for more information.

[9] "State Adult Protective Services Program Responses to Financial Exploitation of Vulnerable Adults," NAPSA, July 2003, http://www.ncea.aoa.gov/NCEAroot/Main_Site/pdf/publication/NAAPSA_9.pdf.

[10] Currently, 20 states and the District of Columbia require financial institutions to report suspected cases of financial abuse of the elderly. To view your state's law, as well as state-specific data and statistics, statewide resources, etc., visit http://www.ncea.aoa.gov/NCEAroot/Main_Site/Find_Help/State_Resources.aspx. See also, http://www.ncea.aoa.gov/NCEAroot/Main_Site/Library/Laws/APS_IA_LTCOP_Citations_Chart_08-08.aspx, for the American Bar Association Commission on Law and Aging's list of state statutes.

ROLE OF THE FINANCIAL SERVICES INDUSTRY

The financial services industry is uniquely positioned to assist in detecting and preventing financial fraud and exploitation of the elderly and vulnerable. Following are some of the reasons this role is so critically important.

- A primary role of financial institutions is the protection of assets and prevention of financial losses. Experts from BITS member financial institutions develop and share best practices and other voluntary guidelines to safeguard consumer information.

- For decades, financial institutions have been at the forefront of fraud detection utilizing sophisticated technology, modeling, training and education, and are often the first to detect patterns of fraud. These proactive measures help to promote goodwill within the financial institutions' communities.

- Using a variety of safeguards, financial institutions ensure the reliability and security of financial transactions as well as protect financial privacy. While some of these safeguards are required by federal regulators, financial institutions often exceed the minimum standards of such regulation for the benefit of their customers, shareholders and employees. In some states financial institutions are mandated to report instances of abuse or financial exploitation and in 49 states they are provided immunity from civil or criminal liability if acting in good faith in such reporting.

- Financial institutions educate employees and customers on steps to secure accounts against the lure of fraudsters. Often, fraud is committed by trusted third-parties, family or friends, and may be committed with the implied consent of the customer. The ability to detect changes in behavior places financial institutions in a unique position to assist in protecting customers and uphold the inherent trust relationship with their clients.

TYPES OF ABUSE AND SCAMS

NCEA recognizes seven types of abuse[11]. In addition to signs of financial abuse, financial institution personnel may recognize, identify and report other forms of abuse. Identification of non-financial abuse may indicate that financial abuse is also occurring. The types of abuse below may be independent of each other:

- **Self-neglect** – Failure by oneself to provide goods or services essential to avoid serious threat to one's physical or mental health.

- **Neglect** – Failure to fulfill any part of a person's obligations or duties to an elder. Neglect can be willful/intentional (e.g., deliberately withholding food or medicine) or unintentional (e.g., untrained or "burnt out" caregiver).

- **Physical abuse** – Infliction of physical pain, injury, etc.

- **Sexual abuse** – Non-consensual sexual contact of any kind with a vulnerable adult.

- **Abandonment** – Desertion of a vulnerable adult by an individual who has assumed responsibility for providing care.

- **Emotional or psychological abuse** – Infliction of mental anguish by demeaning name calling, threatening, isolating, etc.

- **Financial or material exploitation** – Illegal or unethical exploitation by using funds, property, or other assets of a vulnerable adult for personal gain irrespective of detriment to the vulnerable adult.

Financial exploitation can be classified into two broad categories. These categories of exploitation may affect more than vulnerable adults, however they are highlighted for purposes of understanding the direct risk they pose to the vulnerable:

- **Theft of income** – Most common form of financial exploitation and fraud; is typically between $1,000 - $5,000 per transaction.

- **Theft of assets** – Often more extensive and typically involves abuse associated with Powers of Attorney, real estate transactions, identity theft or tax manipulation.

Some forms of exploitation may be considered "scams," in which a person (or persons) unknown to the adult (a stranger) attempts to trick the victim for financial gain. Vulnerable adults, who may be more trusting, gullible, or less financially sophisticated, are often the preferred targets of scams.

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[11] These definitions are similar to those provided by the Centers for Disease Control (CDC), http://www.cdc.gov/ViolencePrevention/eldermaltreatment/definitions.html. The CDC and their partners are developing a document containing standardized definitions and recommended data elements for use in elder maltreatment public health surveillance. The updated document is expected to be released in late 2010.

The scams outlined below are not unique to seniors, but the opportunity and impact can be greater than on the average consumer.

- **Power of Attorney fraud** – The perpetrator requests a Limited or Special Power of Attorney, specifying that legal rights are given to manage funds assigned for investment to the perpetrator, a trustee, an attorney, an asset manager, or other title that sounds official and trustworthy. Once the rights are given, the perpetrator uses the funds for personal gain.

- **Sweetheart scam** – The perpetrator enters the victim's life as a romantic interest in order to gain influence and eventual financial control. This type of scam often goes unreported due to the embarrassment and emotional impact on the victim. At times the victim knows they are being duped but they simply don't want to be alone.

- **Pigeon drop** – A victim is approached by a stranger (or strangers) claiming to have found a large sum of money who offers to share it with the victim. However, the fraudster requests "good faith" money and offers to accompany the victim to the bank to withdraw the funds. In return, the victim is given an envelope or bag that contains blank pieces of paper rather than money.

- **Exploitation by a financial institution employee** – While institutions go to great lengths to avoid hiring known fraudsters[12] and employ monitoring and access controls to prevent them from unnecessarily accessing customers' records, some employees may abuse their relationships or use their knowledge of internal processes to steal from their elderly customers.

- **Financial institution examiner impersonation fraud** – The victim believes that he or she is assisting authorities to gain evidence leading to the apprehension of a financial institution employee or examiner that is committing a crime. The victim is asked to provide cash to bait the crooked employee. The cash is then seized as evidence by the "authorities" to be returned to the victim after the case.

- **Unsolicited work** – Victims are coerced, intimidated or otherwise conned into paying unreasonable amounts for poor quality work for services such as roofing, paving, auto body repair, etc. Often the work is fully paid for, but never started or of such poor quality that the victim must pay legitimate contractors to repair the work. Sometimes the work is only partially completed and the fraudster will insist that more money must be paid for the job to be completed. Often the perpetrator will accompany the victim to the bank to withdraw cash to pay for the substandard or incomplete work.

- **Misappropriation of income or assets** – A perpetrator obtains access to a vulnerable adult's Social Security checks, pension payments, checking or savings account, credit or ATM cards, and withholds portions of checks cashed for themselves.

[12] Many institutions perform background checks during the hiring process or screen names against the Internal Fraud Prevention Service which was developed by BITS and is maintained by Early Warning Services. For more information about the Internal Fraud Prevention Service, see http://www.earlywarning.com/human_resources.asp.

- **Foreclosure rescue scam** – The perpetrator claims to be able to instantly stop foreclosure proceedings on the victim's real property. The scam often involves the victim deeding the property to the perpetrator who says that the victim will be allowed to rent the property until some predetermined future date when the victim's credit will have been repaired and the property will be deeded back to the victim without cost. Alternatively, the perpetrator may offer the victim a loan to bridge his or her delinquent payments, perhaps even with cash back. Once the paperwork is reviewed, the victim finds that his or her property was deeded to the perpetrator. A new loan may have been taken out with an inflated property value with cash back to the perpetrator, who is now the property owner. The property very quickly falls back into foreclosure and the victim, now tenant, is evicted.

- **Reverse mortgage scam** – Fraudsters may target senior citizens who have accumulated a sizeable amount of equity in their home. While there is nothing illegal with reverse mortgage products, the process can be complex and homeowners must carefully review all of the terms and conditions (preferably with family members and an attorney) before signing anything. Unscrupulous estate planners may charge fees for information that is available at no charge from the U.S. Department of Housing and Urban Development (HUD)[13] or "mortgage consultants" may insist that unnecessary renovations must be done to the home in order to qualify for the loan and specify which contractor should be used to make these repairs.

- **Debt relief scams** – Senior Americans are using their credit cards more to compensate for decreasing retirement portfolios and increasing medical costs,[14] and financially distressed elders may be susceptible to debt relief scams by unscrupulous companies that promise to repair a bad credit report or renegotiate a debt. Seniors may fall victim to these companies that seek upfront fees for services that are often provided at little or no cost by the government. They may instruct the senior to redirect the payments to them, not the creditor, and either keep the payment entirely or charge exorbitant fees (sometimes 50%) as service charges. These companies often require payment in cash or money order, claiming that this decreases their overhead costs and keeps fees to a minimum, when it's actually done so the payments cannot be tracked like credit or debit card payments

- **Telemarketing or charity scams** – The victim is persuaded to buy a valueless or nonexistent product, donate to a bogus charity, or invest in a fictitious enterprise. Seniors are particularly vulnerable to this type of fraud because they are often at home during the work day to answer the phone. Social isolation is also a factor where fraudsters prey on lonely seniors anxious for someone to talk to. They devise schemes that require multiple phone calls and development of a trusting relationship.

- **Fictitious relative** – The perpetrator calls the victim pretending to be a relative in distress and in need of cash, and asks that money be wired or transferred either into a financial institution account.

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[13] http://www.hud.gov/offices/hsg/sfh/hecm/hecmhome.cfm.

[14] *The Plastic* Safety Net*: How Households are Coping in a Fragile Economy*, Demos, July 2009, http://www.demos.org/pubs/psn_7_28_09.pdf. The study reports that low- and middle-income consumers 65 and older carried $10,235 in average card debt in 2008, an increase in 26% from 2005,

- **Identity theft** – Using one or more pieces of the victim's personal identifying information (including, but not limited to, name, address, driver's license, date of birth, Social Security number, account information, account login credentials, or family identifiers), a perpetrator establishes or takes over a credit, deposit or other financial account in the victim's name.

  Fraudsters gather victim's information through various means; however, senior citizens are often susceptible to social engineering techniques that fraudsters use, such as **"phishing"** to entice victims to supply personal information such as account numbers, login IDs, passwords, and other verifiable information that can then be exploited for fraudulent purposes. Phishing is most often perpetrated through mass emails and spoofed websites, but it can also occur through old fashioned methods such as the phone, fax and mail.

- **Advance fee fraud or "419" frauds**. Named after the relevant section of the Nigerian Criminal Code, this fraud is a popular crime with West African organized criminal networks. There are a myriad of schemes and scams – mail, email, fax and telephone promises are designed to entice victims to send money, ostensibly to bribe government officials involved in the illegal conveyance of millions outside the country. Victims are to receive a percentage for their assistance.

  There are many variations of phishing and 419 schemes, but they all have the same goal: to steal the victims' money or personal and account information. *See Appendix A for more information about the various schemes*.

Financial institutions should train staff to be especially alert to suspicious activities and transactions involving their older customers and continue to ask the fundamental question, "Does it make sense for *this* customer to be conducting *this* transaction?" They should also look for signs that senior customers have been threatened or unduly influenced.

Relatives and Caregivers

Unlike strangers, relatives, caregivers, and others with fiduciary responsibilities, hold a position of trust and have an ongoing relationship with the vulnerable adult. Financial exploitation occurs when the offender steals, withholds or otherwise misuses the victim's money or assets for personal profit. Perpetrators take advantage of the victim and rationalize their actions in various ways. For example, perpetrators may feel that they are entitled to receiving their inheritance early and do not view their actions as wrong, while others simply take advantage of the victim. Methods can include:

- **Theft of the victim's money or other cash-equivalent assets** (e.g., stocks, bonds, savings bonds, travelers checks), both directly and through establishing joint accounts or signatory authority on existing accounts. Perpetrators may convince the elder to add them to the account as an authorized user without the elder understanding that the perpetrator can withdraw funds without their knowledge.

- **Borrowing money** (sometimes repeatedly) with no intent to repay.

- **Cashing or keeping some portion** of the person's pension, Social Security or other income checks without permission.

- **Using the victim's checks or ATM, debit or credit cards** without permission.

- **Transferring title on, or re-encumbering, real property** of the vulnerable adult. Financial exploitation utilizing real property is particularly appealing to family members or caregivers who may feel they are "owed" something for their efforts, however meager those efforts may be in reality. For many vulnerable adults, their most significant economic asset may be the equity they have built in their real property over decades of ownership. *See also* *foreclosure rescue scam*.

- **Opening or adding their name to banking accounts** without the elder's permission. Often, a fraudster may use the victim's personal information to open an account online, as opposed to opening an account at a branch location. The fraudster often opts to receive online statements to avoid having statements sent to the victim's address and elude detection.

The tactics used by these offenders may include intimidation, deceit, coercion, emotional manipulation, psychological or physical abuse and/or empty promises. The offender may try to isolate the victim from friends, family and other concerned parties who would act in the victim's best interest. By doing so, the perpetrator prevents others from asking about the person's well-being or relationship with the offender and prevents the person from consulting with others on important financial decisions.

DEVELOPMENT OF AN INTERNAL AWARENESS AND TRAINING PROGRAM

This section is intended to serve as recommendations for financial institutions to consider when creating awareness and detection programs to protect their elderly and vulnerable customers from fraud and financial exploitation. Additional resources are located in *Appendix B*.

Program Design and Employee Training

Corporate support is important when developing and maintaining a successful awareness and training program. Institutions should involve and seek input not only from their internal departments, but also from external groups such as protective services and law enforcement, as they often have a keen understanding regarding the cases and issues affecting a specific region.

- Internal Sources:
  - Branch Administration
  - Loss Prevention/Security Department
  - Legal
  - Compliance
  - Public/Community Relations
  - Training

- External Sources:
  - Adult Protective Services (APS)/Department of Social Services
  - Local and/or State and Federal Law Enforcement
  - Local and/or State Prosecutorial Authorities (e.g. Attorneys General, District Attorneys)

BITS has developed a presentation deck that can be use to train financial institution employees. Contact Heather Wyson, heather@fsround.org, for more information.

Role of Customer Contact Staff

Customer contact staff are in a unique position to identify potential abuse of vulnerable populations through greater awareness and recognition of "red flags" in customer behavior. Below are "red flags" that staff may identify during routine account servicing that could indicate actual or potential fraud. Individually, these indicators are not problematic; however, further investigation is warranted if multiple red flags are present.

Changes to Accounts and/or Documentation

- Recent changes or additions of authorized signers on a vulnerable adult's financial institution signature card.

- Statements are sent to an address other than the vulnerable adult's home.

- Vulnerable adult has no knowledge of a newly-issued ATM, debit or credit card.

- Abrupt changes to, or confusion regarding changes in, financial documents such as Power of Attorney, account beneficiaries, wills and trusts, property titles, deeds and other ownership documents.

- Sudden unexplained transfers of assets, particularly real property.

- Sudden appearance of previously uninvolved relatives claiming their rights to a vulnerable adult's affairs and possessions.

- Discovery of a vulnerable adult's signature being forged for financial transactions or for the titles of his or her possessions.

- Refinance of the vulnerable adult's property, particularly with significant cash out or with the addition of new owners on the deed and, most particularly, without the new owners shown as co-borrowers on the loan.

Changes in Checking and/or Credit/Debit Spending and Transaction Patterns

- A set of "out-of-sync" check numbers.

- A sudden flurry of "bounced" checks and overdraft fees.

- Transaction review shows multiple small dollar checks posting to the senior's account in the same month. This could be indicative of *telemarketing or charity scams*.

- Large withdrawals from a previously inactive checking or credit account or a new joint account.

- Account use shortly after the addition of a new authorized signer.

- Abrupt increases in credit or debit card activity.

- Sudden appearance of credit card balances or ATM/debit card purchases or withdrawals with no prior history of such previous use.

- Withdrawals or purchases using ATM or debit cards that are:
  - Repetitive over a short period of time;
  - Inconsistent with prior usage patterns or at times (e.g., late night or very early morning withdrawals by elderly customers, withdrawals at ATMs in distant parts of town by customers who don't drive or are house bound.); or
  - Used shortly after the addition of a new authorized signer.

- Unexplained disappearance of funds or valuable possessions, such as safety deposit box items.

- Vulnerable adult appears confused about the account balance or transactions on his or her account.

- A caregiver appears to be getting paid too much or too often.

- Significant increases in monthly expenses paid which may indicate that expenses for persons other than the customers are being paid.

- Sudden changes in accounts or practices, such as unexplained withdrawals of large sums of money, particularly with a vulnerable adult who is escorted by another (e.g., caregiver, family member, "friend") who appears to be directing the changing activity patterns.

Changes in Appearance or Demeanor

- Vulnerable adult has a companion who seems to be "calling the shots."

- Change in the vulnerable adult's physical or mental appearance. For example, the customer may appear uncharacteristically disheveled, confused or forgetful. These signs could indicate self neglect or early dementia and leave the vulnerable adult open for financial exploitation.

- Vulnerable adult acknowledges providing personal and account information to a solicitor via the phone or email.

- Excitement about winning a sweepstakes or lottery.

- Allegations from a vulnerable adult or relative regarding missing funds or physical or mental abuse.

If you "**suspect fraud**" with your vulnerable adult customer:

- Carefully verify the transactional authority of person(s) acting on the customer's behalf.

- Avoid confrontation and attempt to separate the vulnerable adult from the individual accompanying him or her.

- Use probing questions to determine the customer's intent. It is important to let the customer express their intent using his or her own words without prompting. Examples include:
  - *Power of attorney (POA) request*: "Mr. Jones, do you want Ms. Smith to be able to withdraw money from your account at any time without needing your permission?"
  - *Home repair or 419scam*: "Mrs. Green, $4,000 is a lot of cash to be carrying around. For your safety, I can make a check out to the other party if you have the receipt with the correct spelling of the name."

- If your customer has asked for a large cash withdrawal which appears out of pattern, consider developing an "awareness" document for the consumer to read prior to receipt of funds. This could include:
  - Brief overviews of common fraud schemes. *See Types of Abuse and Scams and Appendix A for more information,*

- – Warnings that perpetrators of such schemes could present themselves as an FBI agent, financial institution examiner, police officer, detective or financial institution official.

- – Warning that customers should use caution if they are asked for information about their account, or asked to withdraw money to help "catch someone," or provide money to show "good faith."

- – Notice that the financial institution does not conduct investigations or verification of accounts by telephone (since swindlers often use this method to gain information on accounts, as well as the confidence of their victims) nor will local, state or federal law enforcement authorities, financial institution regulatory authorities, or financial institution officials conduct investigations by asking individuals to withdraw cash from their account for any reason.

- – Phone numbers for the appropriate agencies, if any of the circumstances listed above are present, with instructions to customers that they should contact their branch, local police department, Adult Protective Services, or the Federal Trade Commission to investigate before they withdraw money.

- – Reminders that swindlers nearly always are friendly and have "honest" faces, and that they particularly tend to take advantage of older individuals.

- Delay the suspicious transaction, if possible, by advising the customer that additional verification of the transaction is required.

- Contact loss prevention and/or legal departments for assistance and guidance.

Role of Loss Prevention/Security

Loss prevention/security staff are strongly encouraged to proactively contact and establish relationships with local law enforcement and APS offices to increase collaboration and information sharing with these groups before an incident occurs.

In addition, the regional field offices of the Federal Bureau of Investigation (FBI) and U.S. Secret Service (USSS) sponsor task forces that serve as an excellent means to network and share information regarding crimes affecting the region. Contact your local FBI[15] or USSS[16] field office to determine if a task force is established in your region.

When abuse is suspected, staff are encouraged to:

- Document the situation.

- Take immediate protective action on accounts by placing holds or restraints and follow normal prevention and recovery steps to follow the money as needed.

[15] List of FBI field offices, http://www.fbi.gov/contact/fo/fo.htm.
[16] List of the USSS field offices, http://www.secretservice.gov/field_offices.shtml.

- Report the incident to law enforcement following your institution's normal protocol.

- Make a verbal report to the local APS and provide investigative research and services as needed.[17] Financial institutions should consult with legal departments on the specific reporting guidelines for the states in which they do business. In some cases, a written request from APS is sufficient to release customer statements and transaction copies, while other states require a subpoena or written consent from the customer. To locate the APS office that serves the customer, call 1-800-677-1116 or use their web database located at http://www.eldercare.gov/Eldercare.NET/Public/Home.aspx.

- Continue to monitor the account during legal proceedings, if necessary.

- Advise customer contact staff and appropriately document files of final outcome.

Role of Legal Departments

Financial institutions may be reluctant to report suspicious activity to APS due to concerns with federal and state privacy laws. According to the American Bar Association (ABA) Commission on Aging, The Right to Financial Privacy Act of 1978 applies only to federal agencies requesting consumer information from financial institutions. Further, the Gramm-Leach-Bliley Act applies to federal, state and local agencies, but it contains several exemptions that permit disclosure, including "to protect against or prevent actual or potential fraud, unauthorized transaction, claims, or other liability." In addition, 49 states and the District of Columbia include immunity provisions in their APS laws that protect individuals who make reports in good faith. These immunity provisions may be interpreted as overriding the restrictions in applicable state privacy laws.

In 2003, the ABA published the document, *Can Bank Tellers Tell? Reporting Financial Abuse of the Elderly*,[18] which outlines state laws associated with elder abuse. Another paper, *Legal Issues Related to Bank Reporting of Suspected Elder Financial Abuse*[19] provides an overview of the legal issues that institutions may consider when reporting suspected cases of financial exploitation of the elderly.

As stated above, financial institutions should consult with legal departments on the specific reporting guidelines for the states in which they do business. In some cases, a written request from APS is sufficient to release customer statements and transaction copies, while other states require a subpoena or written consent from the customer.

The Role of Law Enforcement and Communities

National Organization of Triads (NATI) is a partnership of law enforcement, senior citizens and community groups to promote senior safety and reduce the unwarranted fear of crime that the elder community often experiences. A handbook[20] is available to assist law enforcement and senior citizens in implementing a comprehensive crime prevention program for older adults.

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[17] If you suspect elder abuse, neglect or exploitation, visit the National Center on Elder Abuse's State Elder Abuse Helplines and Hotlines Web page to find out where to report it.

[18] http://www.ncea.aoa.gov/ncearoot/main_site/pdf/publication/bank_reporting_long_final_52703.pdf

[19] http://www.ncea.aoa.gov/ncearoot/main_site/pdf/publication/bank_reporting_summary_final_52703.pdf

[20] http://www.nationaltriad.org/tools/Draft_Triad_Handbook.pdf

WORKING WITH STATE AND FEDERAL AGENCIES

Adult Protective Services (APS)

The role of APS, which operates under state law in every state, is to receive and investigate reports of vulnerable adult abuse, and offer services when the abuse is confirmed. APS confidentially investigates each case, making contact with and interviewing the customer. If financial abuse is confirmed, steps are taken to eliminate the abuse. APS also often works with legal service providers to offer protection to victims through the legal system and with law enforcement and the criminal justice system to prosecute those responsible for abuse. While financial institutions are often the first to identify suspected fraud and in turn contact APS directly, APS may also be notified by other external sources.[21] When this occurs, APS contacts financial institutions to assist in confirming the fraud. If the financial institution is the abuse reporter, APS will, if allowable under state law, advise the financial institution of the final determination. Furthermore, APS works to educate the elderly and vulnerable community as well as others of the problems facing consumers. APS also promotes the development of needed legislation and public policy.

U.S. Administration on Aging (AoA)[22]

The Administration on Aging was created by the Older Americans Act (OAA), originally signed into law by President Lyndon B. Johnson on July 14, 1965. The Act authorized grants to states for community planning and services programs, as well as for research, demonstration, and training projects in the field of aging. Later amendments to the Act added grants to local agencies on aging for local needs identification, planning, and funding of services, including nutrition programs in communities as well as for those who are homebound; programs to serve native American elders; health promotion and disease prevention activities; in-home services for frail elders; and services to protect the rights of older persons.

AoA supports two programs that specifically promote the rights of seniors and protect them from exploitation. AoA coordinates these programs at the national level, and members of the Aging Network implement them at the State and local level. The goal of the *Elder Abuse, Neglect, and Exploitation Prevention Program* is to develop and strengthen prevention efforts at the State and local level. This includes funding for State and local public awareness campaigns, training programs, and multi-disciplinary teams. The State Legal Assistance Development Program is another essential element in protecting elder rights under Title VII of the Older Americans Act. The Act is one of the top funding sources for low-income senior legal assistance. Nationwide, approximately 1,000 legal services providers funded through the Act provide more than one million hours of assistance to seniors per year on a wide range of legal issues, including predatory lending, investment schemes, identity theft, home repair scams, and other types of financial exploitation.

To augment and enhance these consumer protection efforts, AoA funds a number of other projects. The National Center on Elder Abuse (NCEA) is a gateway to resources on elder abuse, neglect, and exploitation. Among its activities, NCEA makes available news and materials; provides consultation, education, and training; answers inquiries and requests for information; and operates a listserve forum for professionals. NCEA also facilitates the exchange of strategies for uncovering and

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21 Many professionals, including bankers in about 20% of states, are mandated to report suspected vulnerable adult abuse to APS.

22 For more information on all of AoA's consumer protection efforts, please visit the Elder Rights section of the AoA website, http://www.aoa.gov/AoARoot/AoA_Programs/Elder_Rights/index.aspx.

prosecuting fraud in areas such as telemarketing and sweepstakes scams, and has produced a number of telemarketing fraud alert and elder fraud alert newsletters. For more information, see http://www.ncea.aoa.gov.

The AoA also provides funding for the National Legal Resource Center (NLRC), which provides tools to legal services providers to help older adults facing the most difficult challenges to their independence and financial security. Through the NLRC, legal and aging services providers receive intensive case consultation and training on complex and emerging issues in law and aging, technical assistance in the efficient, cost effective and targeted provision of legal services, and access to other informational resources. Major topics of focus include consumer credit, bankruptcy, debt collection, unfair and deceptive practices, sales and warranties, foreclosure prevention, energy assistance, and public utility practices. NCLC has several products related to older consumer fraud available on their website, http://www.consumerlaw.org/initiatives/seniors_initiative/.

In addition, AOA has supported special projects like the Philadelphia APS-Wachovia collaboration and the Stetson University Consumer Protection Education Project. These projects developed collaborations between APS, law enforcement, banks, and other community members to identify, prosecute, and prevent fraud and financial exploitation of seniors.

CONSUMER AWARENESS AND EDUCATION

Consumer education is critical to preventing fraud. Most individuals will take action if they believe it will decrease their chances of being victimized by fraud, as long as the action does not significantly inconvenience them. By educating customers, financial institutions can decrease fraud losses.

Included in the *Appendix* are resources institutions may refer customers for tips on preventing fraud. Institutions can share this information with customers through various channels, such as postings at the branches, flyers sent with monthly statements, emails, through a Web site, and/or by request to a call center.

APPENDIX A: VARIATIONS OF COMMON PHISHING AND 419 SCAMS

- **Inheritance scams** – Victims receive mail from an "estate locator" or "research specialist" purporting an unclaimed inheritance, refund or escheatment. The victim is lured into sending a fee to receive information about how to obtain the purported asset.

- **Internet sales or online auction fraud** – The perpetrator agrees to buy an item available for sale on the Internet or in an online auction. The seller is told that he or she will be sent an official check (e.g., cashier's check) via overnight mail. When the check arrives, it is several hundred or thousand dollars more than the agreed-upon selling price. The seller is instructed to deposit the check and refund the overpayment. The official check is subsequently returned as a counterfeit but the refund has already been sent. The seller is left with a loss, potentially of both the merchandise and the refund.

- **Recovery Room Scams** – Fraudsters build lists of consumers who have previously fallen victim to a scam and sell them to telemarketers. These "sucker lists" contain detailed information about the victim including the name, address, phone number and information about money lost in the scam. The telemarketers contact the victims, often posing as government agents, and offer–for a fee–to assist the victim in recovering the lost money. The consumer is often victimized twice, as a government or consumer advocacy agency would not charge a victim for this assistance.

- **Work-from-Home Scams** – Potential employees are recruited through newspaper, email and online employment services for jobs that promise the ability to earn money while working from the comfort of home. However, many customers unwittingly become mules for fraudsters who use their accounts to launder money or even steal from them. For example, a customer may apply for a position as a "mystery shopper," "rebate processor," "trading partner," or a "currency trader." Upon being hired, the new "employee" provides their bank account information to their employer or establishes a new account using information provided by the employer. The employee is instructed to wire money that is deposited into the accounts to drop boxes via Western Union. Rather than processing rebates or trading currency, the customer is actually participating in a money laundering scheme where the fraudsters use the employee's (mule's) legitimate account to transfer stolen money to other accounts out of the country.

- **International lottery and sweepstakes fraud** – Scam operators, often based in Canada, use telephone and direct mail to notify victims that they have won a lottery. To show good faith, the perpetrator may send the victim a check. The victim is instructed to deposit the check and immediately send (via wire) the money back to the lottery committee. The perpetrator will create a "sense of urgency," compelling the victim to send the money before the check, which is counterfeit, is returned. The victim is typically instructed to pay taxes, attorney's fees and exchange rate differences in order to receive the rest of the prize. These lottery solicitations violate U.S. law, which prohibits the cross-border sale or purchase of lottery tickets by phone or mail. In a similar scam, victims are advised that they are the winner of a sweepstakes. However, they do not receive their initial "winnings" but are encouraged to write small dollar checks in order to get them to the next round to win a larger sweepstakes prize.

- **Fake prizes** – A perpetrator claims the victim has won a nonexistent prize and either asks the person to send a check to pay the taxes or obtains the credit card or checking account number to pay for shipping and handling charges.

- **Charitable donation scam** – Scam artists claiming to represent charitable organizations use e-mails and telephone calls to steal donations and in some cases donors' identities.

- **Government grant scams** – Victims are called with the claim that the government has chosen their family to receive a grant. In order to receive the money, victims must provide their checking account number and/or other personal information. The perpetrator may electronically debit the victim's account for a processing fee, but the grant money is never received.

- **Spoofing** – An unauthorized website mimics a legitimate website for the purpose of deceiving consumers. Consumers are lured to the site and asked to log in, thereby providing the perpetrator with authentication information that the perpetrator can use at the victim's legitimate financial institution's website to perform unauthorized transactions.

- **Pharming** – A malicious Web redirect sends users to a criminal's spoofed site even though the user entered a valid URL in the browser's address bar. This redirection usually involves worms and Trojans or other technologies that attack the browser address bar and exploit vulnerabilities in the operating systems and Domain Name Servers (DNS) of the compromised computers.

- **Home Stealing** – Using public records to obtain information about property records and property transfer forms purchased at any office supply store, fraudsters may use false identification, forge the true property owner's signature and transfer the deed without the true owner's knowledge. Many states do not require deed recorders or those who oversee property closings to authenticate the identities of buyers or sellers who submit the information filed with the city or county recorder's office. These "stolen homes" are often used as collateral for new loans or sold to cash-paying buyers at a fraction of the property's value. The buyers themselves are often victims of this scam as they are unaware that the property was hijacked from the true owner.

- **Investment Property** – Property is sold to the vulnerable adult as a guaranteed investment with high yield returns. The victim is convinced to buy investment property through, or in conjunction with, a property management firm that will handle all the loan documents, make all the loan payments, place the tenants, collect the rents and maintain the property. The victim is told that he or she has to do nothing other than be the buyer and borrower. The property then falls into foreclosure. The victim finds that the property was inflated in value, payments at the closing were made to the property management company or affiliated parties, no loan payments have ever been made, and any collected rents have been stolen as well.

APPENDIX B: RESOURCES FOR FINANCIAL INSTITUTIONS

AGENCIES AND ASSOCIATIONS

Department of Health and Human Services
Administration on Aging (AoA)
Washington, DC 20201
Ph: (202) 619-0724
Fax: (202) 357-3555
Email: aoainfo@aoa.hhs.gov
http://www.aoa.gov

National Adult Protective Services Association (NAPSA)
920 S. Spring Street, Suite 1200
Springfield, IL 62704
Ph: (217) 523-4431
Fax: (217) 522-6650
http://apsnetwork.org

National Center on Elder Abuse (NCEA)
c/o Center for Community Research and Services
University of Delaware
297 Graham Hall
Newark, DE 19716
Email: ncea-info@aoa.hhs.gov
http://www.ncea.aoa.gov
Resources by State:
http://www.ncea.aoa.gov/NCEAroot/Main_Site/Find_Help/State_Resources.aspx

National Center for Victims of Crime
2000 M Street NW, Suite 480
Washington, DC 20036
Ph: (202) 467-8700
Fax: (202) 467-8701
Email: gethelp@NCVC.org
http://www.ncvc.org
A helpline is staffed Monday through Friday 8:30am to 8:30pm EST:
Toll-free Helpline: 1-800-FYI-CALL (1-800-394-2255)
TTY/TDD: 1-800-211-799

National Organization of Triads, Inc. (NATI)
1450 Duke Street
Alexandria, VA 22314
Ph: (703) 836-7827
Fax: (703) 519-8567
Email: nati@sheriffs.org
http://www.nationaltriad.org

Identity Theft Assistance Center (ITAC)
ITAC, the Identity Theft Assistance Center, is a nonprofit founded by The Financial Services Roundtable as a free service for consumers. Since 2004, ITAC has helped more 60,000 consumers recover from identity theft by giving them a single point of contact to identify and resolve suspicious account activity. ITAC shares victim data with law enforcement agencies to help investigate and prosecute identity crime and forms partnerships on identity theft education and research initiatives. Through its partner Intersections Inc., ITAC offers the ITAC Sentinel® identity management service (www.itacsentinel.com). For more information visit http://www.identitytheftassistance.org.

TRAINING MATERIALS AND TOOLKITS

Attorney General of Texas – Senior Texans Page – Texas has launched a statewide outreach campaign to raise awareness for protecting senior Texans. More information can be found at the Texas Attorney General website: http://www.oag.state.tx.us/elder/index.shtml

Clearinghouse on Abuse and Neglect of the Elderly (CANE) – CANE is a collaborator in the National Center on Elder Abuse (NCEA), which is funded by the Administration on Aging, U.S. Department of Health and Human Services. CANE identifies a comprehensive list of resources on the many facets of elder mistreatment. Visit
www.cane.udel.edu for more information.

The Elder Consumer Protection Program – The program, housed at Stetson University College of Law's Center for Excellence in Elder Law, serves as a progressive and evolving educational, informational, and instructional resource, to both professionals and the public, on general and legal topics regarding current and developing issues, matters, and concerns in the area of elder consumer protection. The Program, which is supported in part by state and federal funding, offers assorted materials and various services that provide and promote general knowledge, public awareness and assistance, and professional development and training. Materials and services include, but are not limited to, speeches and presentations, brochures and handouts, web page platforms and interfaces, non-legal consumer inquiry assistance, reference databases, and resource guides. Details and additional information can be found at http://www.law.stetson.edu/elderconsumers.

Elder Financial Protection Network (EFPN) – The Network works to prevent financial abuse of elders and dependent adults through community education programs, public awareness campaigns and coordination of financial institution employee training. Financial institution statement stuffers, brochures and posters can be ordered via the website at http://bewiseonline.org.

Elder Abuse Training Program – Developed in conjunction with the Oregon Department of Human Services, this 2-hour educational curriculum teaches professional and family caregivers about the complexities of domestic elder abuse and neglect. More information on this program, including cost, can be found at: http://www.medifecta.com/.

Federal Bureau of Investigation (FBI) – The FBI offers a free fraud alert poster, available at http://www.fbi.gov/majcases/fraud/fraud_alert.pdf, for placement in branches to help alert customers to common check fraud scams. The FBI's site also provides information about common fraud schemes and those targeting senior citizens. For more information, see
http://www.fbi.gov/majcases/fraud/fraudschemes.htm or
http://www.fbi.gov/majcases/fraud/seniorsfam.htm.

Fiduciary Abuse Specialist Team (FAST) – The Los Angeles FAST team was developed to provide expert consultation to local APS, Ombudsman, Public Guardian and other case workers in financial abuse cases. The team includes representatives from the police department, the district attorney's office, the city attorney's office private conservatorship agencies, health and mental health providers, a retired probate judge, a trust attorney, an insurance agent, a realtor, an escrow officer, a stock broker, and estate planners. The FAST coordinator and consultants have also provided training to bankers and police officers across the state of California. They have developed a manual and have helped other communities start up FAST teams. For more information, visit http://www.preventelderabuse.org/communities/fast.html.

Financial Institution Elder Abuse Training Kit – Developed in 1995 and updated in 2007 in conjunction with the Oregon Department of Human Services, this kit also includes videos, manuals and other materials. For more information contact:

Oregon Bankers Association
777 13th Street SE, Suite 130
Salem, OR 97301
or
PO Box 13429
Salem, OR 97309
Ph: (503) 581-3522
Fax: (503) 581-8714
http://www.oregonbankers.com/community/efapp

The Massachusetts Bank Reporting Project: An Edge Against Elder Financial Exploitation – The Massachusetts' Executive Office of Elder Affairs, in collaboration with the Executive Office of Consumer Affairs, and the Massachusetts Bank Association, developed the bank reporting project to provide training to bank personnel in how to identify and report financial exploitation, as well as foster improved communication and collaboration between the financial industry and elder protective services. The project has been successfully replicated in numerous communities. Sample materials, including model protocols, procedures for investigating and responding to abuse, and training manuals are available. For more information contact:

Jonathan Fielding
One Ashburton Place, 5th Floor
Boston, MA 02108
Ph: (617) 222-7484
Fax: (617) 727-9368
Email: jonathan.fielding@state.ma.us

Missouri Department of Health and Human Services – Missourians Stopping Adult Financial Exploitation (MOSAFE) Project – The MOSAFE website includes training materials for financial institution employees to help spot the warning signs of financial exploitation, and take steps to stop it. The materials include a video, brochure, PowerPoint presentation, resource manual, and eight articles, which can be viewed and/or downloaded from this site.
http://www.dhss.mo.gov/MOSAFE/index.html

National Center on Elder Abuse (NCEA) Training Library – In response to the needs of various agencies for training materials on elder abuse, neglect, and exploitation, the NCEA developed this national resource library. Technical assistance is provided to library users both on what is available through the library and on how to select the right materials to meet the user's particular needs. Most of the library's materials are now available for downloading. To learn more and access the library, visit:
http://www.ncea.aoa.gov/NCEAroot/Main_Site/Library/Training_Library/About_Training_Library.aspx

CONSUMER RESOURCES

AARP Foundation – In conjunction with the Colorado Attorney General the AARP Foundation has created the Colorado ElderWatch Project (http://www.aarpelderwatch.org/) to fight the financial exploitation of older Americans through collection of data.

Attorney General of Texas – Senior Texans Page – Texas has launched a statewide outreach campaign to raise awareness for protecting senior Texans. More information can be found at the Texas Attorney General website, http://www.oag.state.tx.us/elder/index.shtml

Federal Bureau of Investigation (FBI) – This FBI site includes information about common fraud schemes and those targeting senior citizens. For more information, see http://www.fbi.gov/majcases/fraud/fraudschemes.htm or http://www.fbi.gov/majcases/fraud/seniorsfam.htm.

Federal Deposit Insurance Corporation (FDIC) – The Federal Deposit Insurance Corporation publishes the FDIC Consumer News quarterly to help people protect and stretch their money. The Fall 2005 edition of "Fiscal Fitness for Older Americans: Stretching Your Savings and Shaping Up Your Financial Strategies" included a section on frauds targeting the elderly. For more information, see http://www.fdic.gov/consumers/consumer/news/cnfall05/index.html.

Federal Trade Commission (FTC) – The Federal Trade Commission's Bureau of Consumer Protection provides free information to help consumers detect and avoid fraud and deception. For more information, visit http://www.ftc.gov/bcp/index.shtml.

The FTC also operates a call center for identity theft victims where counselors tell consumers how to protect themselves from identity theft and what to do if their identity has been stolen (1-877-IDTHEFT [1-877-438-4338]; TDD: 1-866-653-4261; or http://www.ftc.gov/idtheft).

Identity Theft Assistance Center (ITAC) – ITAC is a nonprofit supported by financial services companies as a free service for their customers. ITAC shares information with law enforcement to help them investigate and prosecute fraud and identity theft. For a list of ITAC member companies and consumer information on identity theft detection and prevention, visit http://www.identitytheftassistance.org.

MetLife Mature Market Institute® (MMI) – The MMI site offers pamphlets, guides and tip sheets designed to assist decision-makers about retirement planning, caregiving and healthcare. Such publications include *Helpful Hints: Preventing Elder Financial Abuse*[23] and *Preventing Elder Abuse.*[24] For more information about other guides, reports, and resources offered by the MMI, visit www.maturemarketinstitute.com.

North American Securities Administrators Association, Inc (NASAA) – The North American Securities Administrators Association (NASAA) is an international organization devoted to investor protection. The NASAA Fraud Center,

[23] http://www.metlife.com/assets/cao/mmi/publications/consumer/mmi-helpful-hints-preventing-elder-financial-abuse-olderadults.pdf
[24] Since You Care guides, http://www.metlife.com/mmi/publications/since-you-care-guides/index.html

http://www.nasaa.org/Investor_Education/NASAA_Fraud_Center/, contains resources and information to protect against investor fraud.

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About BITS

BITS is the technology policy division of The Financial Services Roundtable, created to foster the growth and development of electronic financial services and e-commerce for the benefit of financial institutions and their customers. BITS focuses on strategic issues where industry cooperation serves the public good, such as critical infrastructure protection, fraud prevention, and the safety of financial services by leveraging intellectual capital to address emerging issues at the intersection of financial services, operations and technology. BITS' efforts involve representatives from throughout our member institutions, including CEOs, CIOs, CISOs, and fraud, compliance and vendor management specialists. For more information, go to http://www.bits.org/.

About The Financial Services Roundtable

The Financial Services Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. Roundtable member companies provide fuel for America's economic engine, accounting directly for $74.7 trillion in managed assets, $1.1 trillion in revenue, and 2.3 million jobs. For more information, go to http://www.fsround.org/.

THE FINANCIAL SERVICES ROUNDTABLE

Older Americans Financial Abuse Prevention Working Group

June 2012

Included in this booklet are links to programs on financial literacy and fraud prevention as well as an overview of tips for older Americans.

Financial Literacy Programs

Ameriprise Financial, Inc.

Resources for Senior Investors and Vulnerable Adults

www.ameriprise.com/customer-service/senior-investors.asp

CFP Board

Consumer Guide to Financial Self-Defense

www.cfp.net/learn/FinancialSelfDefense/RedFlag10.asp

Lifelong Financial Strategies: 25 Tips over 25 weeks

www.cfp.net/learn/lifestage3.asp#link11

Federal Trade Commission

Money Matters

www.ftc.gov/moneymatters

Financial Literacy and Education Commission

Planning for Retirement / Retiring

www.mymoney.gov/category/topic1/planning-retirement/-retiring.html

Institute for Financial Literacy

Senior Financial Safety

www.financiallit.org/programs/distancelearning.aspx

Social Security Administration

When to Start Receiving Retirement Benefits

www.socialsecurity.gov/retirementpolicy/retirement-security.html

U.S. Department of Labor

Taking the Mystery Out of Retirement Planning

www.dol.gov/ebsa/Publications/nearretirement.html

Women's Institute for a Secure Retirement & National Council on Aging

Savvy Saving Seniors: Steps to Avoiding Scams

http://www.wiserwomen.org/index.php?id=661&page=Financial_Elder_Abuse_Resources

Wells Fargo & Company

Having a Conversation … With Your Parents

www.wellsfargo.com/beyondtoday/ages-stages/conversations/parents

Guide to Financial Protection for Older Investors

https://saf.wellsfargoadvisors.com/emx/dctm/Marketing/Marketing_Materials/Retirement_Planning/e6540.pdf

Tips for Staying Financially Fit

Establish a budget. Identify all current obligations (e.g., mortgage payment, supplemental health insurance, prescription drugs). Determine the amount to spend each month and develop an appropriate budget.

Determine the appropriate products for you. Institutions offer a wide variety of products to respond to consumer needs. Investigate the products and determine which will benefit your lifestyle.

Plan for your estate. To assist your family when decisions must be made, it is helpful to have the following legal documents: a durable power of attorney in the case of incapacity, living will for health care decisions, and a will for property distribution decisions. Many communities offer free or low cost legal services for seniors. Contact your local Area Agency on Aging for a referral or call 1-800-677-1116.

Be ready for the unexpected. No one can predict when tragedy will strike, but all should plan accordingly. Establish an emergency fund with enough for three months' expenses.

Ask for assistance. Many financial institutions have programs specifically designed to help. Beware of advisors claiming special qualifications and certifications to advise seniors. Contact your state securities regulator to check on specific licenses. In addition, credit counseling resources are available through the following:

National Foundation for Credit Counseling
1.800.388.2227
www.nfcc.org

The Federal Trade Commission
www.ftc.gov/bcp/menus/consumer/credit/debt.shtm

Consumer Credit Counseling Service
1.800.388.2227
www.cccsatl.org

Contact your local Area Agency on Aging or call 1-800-677-1116.

Check your credit report regularly. If you notice something wrong, contact the credit reporting company and business. Visit www.AnnualCreditReport.com or call 1-877-322-8228, the only authorized website for free credit reports. You will need to provide your name, address, Social Security number and date of birth to verify your identity.

Financial Abuse Prevention Programs

American Bankers Association
Protecting the Elderly from Financial Abuse
www.aba.com/aba/documents/statementstuffer samples/ElderAbuse.pdf

Compliance Course for Institution Employees
www.aba.com/eLearning/EL_RCElderFinAbuse.htm

BancWest Corporation
Financial Elder Abuse Prevention Efforts
www.fsround.org/fsr/pdfs/fin-lit-corner/BOTWsCommitmenttoPreventingFinancialElderAbuse20.pd

BITS
Protecting the Elderly and Vulnerable from Financial Fraud and Exploitation
www.bits.org/publications/fraud/BITSProtectingVulnerableAdults0410.pdf

Capital One Financial Corporation
MoneyWi$e: Elder Fraud
www.money-wise.org/modules/module_elder_fraud

Consumer Action
Elder Fraud
http://www.consumer-action.org/english/library/C35

Comerica Incorporated
Financial Literacy Programs
www.fsround.org/fsr/pdfs/fin-lit-corner/ComericaIncorporated.pdf

Federal Bureau of Investigation
The Grandparent Scam
www.fbi.gov/news/stories/2012/april/grandparent_040212

Federal Trade Commission
10 Things You Can Do to Avoid Fraud
www.ftc.gov/bcp/edu/pubs/consumer/general/gen23.pdf

PA Department of Aging's Institute on Protective Services at Temple University
Task Forces
www.instituteonps.org

TD Bank
Identity Theft / Elder Abuse Presentation
www.fsround.org/fsr/pdfs/fin-lit-corner/fraudprevention.pdf

Wells Fargo & Company
Suggestions for Seniors
www.handsonbanking.org/library/en/Suggestions%20for%20seniors.pdf

Fraud Prevention Suggestions for Organizations Working with Older Americans

Develop publications and trainings for staff on identification of abuse and how the institution can help.

Focus education on specific schemes targeting this population (e.g., Grandparent scam, power of attorney abuse, contractor frauds).

Interact with Key Partners

Consider offering educational events with partners (e.g., law enforcement, Adult Protective Services) to reach out directly to individuals at senior centers or community groups (e.g., Rotary, Kiwanis).

Conduct outreach to law enforcement, local hospitals, specifically geriatric practitioners, local Adult Protective Services, and other businesses such as CPA firms.

Work as a team to respond to customer and staff concerns related to diminished capacity or financial abuse of this customer category.

Encourage staff to report suspected abuse. Staff may be able to notice signs of abuse. Instances of suspected abuse should be reported to Adult Protective Services.

Report suspicious activity to the appropriate internal entity to submit reports to Adult Protective Services. The U.S. Administration on Aging's National Center on Elder Abuse has a site outlining state specific information. www.ncea.aoa.gov/NCEAroot/Main_Site/Find_Help/State_Resources.aspx

Create or participate in efforts' that include representatives from prosecutors, attorneys, Adult Protective Services, law enforcement, social service agencies health care providers, senior care agencies, ombudsman offices and financial institutions. A local example includes:

- SAVE (Serving Adults who are Vulnerable and /or Elderly) in Oakland County, Michigan www.oakgov.com/seniors/elder_abuse/

Fraud Prevention Tips for Consumers

Choose a trusted individual when providing power of attorney. Your attorney can discuss the benefits of appointing a power of attorney so someone can make decisions on your behalf when you are no longer able. Carefully review the authority the power of attorney document grants your designee, especially regarding the ability to make gifts.

Stay active and engage with others regularly. Fraudsters prey on individuals who have infrequent contact with others.

Respond cautiously to in-person, mail, Internet or solicitations. Discuss with a trusted friend or family member any deal that sounds too good to be true. For instance, you can't win a lottery, if you haven't entered.

Know that wiring money is like sending cash. Con artists often insist that people wire money, especially overseas, because it's nearly impossible to reverse the transaction or trace the money. Don't wire money to strangers, to sellers who insist on wire transfers for payment, or to someone who claims to be a relative in an emergency.

Contact the institution if a request looks suspicious. Fraudsters may contact you purporting to be your institution. Before providing any information, contact the institution through your regular channels (e.g., in-person visit, phone call) to confirm the request is from the institution.

Protect your passwords and account numbers. Do not share your passwords and / or account numbers with others. If you think someone has obtained your password, immediately notify the institution.

Don't let embarrassment or fear keep you from discussing suspicious activities. The situation could become worse if not escalated. Discuss any suspicious activity with someone you trust (e.g., family member, bank manager, attorney, local Area Agency on Aging, police).

Monitor your financial affairs. Actively track your financial accounts so you will be able to quickly recognize when a fraudulent transaction appears.

Check your credit report regularly. Checking your report can help you guard against identity theft. Visit www.ftc.gov/idtheft if you spot accounts that aren't yours. Visit www.AnnualCreditReport.com or call 1-877-322-8228, the only authorized website for free credit reports. You'll need to provide your name, address, Social Security number and date of birth to verify your identity.

Don't deposit checks you receive from strangers. Fraudsters may ask you to deposit a check and then require you to send a portion back. Ask your institution for help to prove the legitimacy of a check before you send any money to a stranger.

Educate yourself on the products offered by your institution. Contact your institution or the local Area Agency on Aging to request educational information on financial products. Many financial institutions offer resources to explain these.

Keep details of all deals in writing. When making a financial decision always ask questions to ensure that you feel comfortable and confident where your money is going. Keeping a record of this information may help remedy a situation if the deal was in fact a fraud scam.

To locate the Area Agency on Aging in your community call 1-800-677-1116.

Participants:

American Bankers Association
American Bar Association Commission on Law and Aging
Ameriprise Financial, Inc.
BancWest Corporation
Bank of America Corporation
BMO Financial Corp.
Capital One Financial Corporation
Certified Financial Planners Board of Standards
Comerica Incorporated
Credit Union National Association (CUNA)
Employee Benefits Research Institute
Fidelity Investments
PA Department of Aging's Institute on Protective Services at Temple University
JPMorgan Chase & Co.
KeyCorp
M&T Bank Corporation
Montgomery County State's Attorney's Office
National Adult Protective Services Association (NAPSA)
National Endowment for Financial Education
Oklahoma Bankers Association
Philadelphia Corporation for Aging
People's United Bank
The PNC Financial Services Group, Inc.
RBC Capital Markets
RBS Americas (Citizens Financial Group, Inc.)
Regions Financial Corporation
SunTrust Banks, Inc.
TD Bank
U.S. Bancorp
University of Maryland
Wells Fargo & Company
Women's Institute for a Secure Retirement (WISER)

STATEMENT

OF

BITS PRESIDENT PAUL SMOCER

ON BEHALF OF THE FINANCIAL SERVICES ROUNDTABLE

BEFORE THE

SPECIAL COMMITTEE ON AGING

OF THE U.S. SENATE

AMERICA’S INVISIBLE EPIDEMIC:

PREVENTING FINANCIAL ELDER ABUSE

NOVEMBER 15, 2012

Comments of Paul N. Smocer, The Financial Services Roundtable/BITS

The Financial Services Roundtable[1] (the "Roundtable") and BITS appreciate the opportunity to share our thoughts with the members of the Senate Special Committee on Aging regarding the financial exploitation of older Americans and actions we can collectively take to reduce that exploitation.

The financial services industry is a key part of the circle protecting older Americans from financial fraud and exploitation. When employees observe signs of potential exploitation, they can work with families, caregivers, social service agencies and law enforcement to prevent, detect, and help investigate and prosecute the individuals who engage in fraud.

The Roundtable and its members are committed to encouraging their employees comply with high standards of conduct when providing financial advice to all customers, including older Americans and their families. Helping ensure a secure retirement for millions of Americans is central to the business and the mission of the financial services industry.

THE PROBLEM

By 2030, the number of Americans aged 65 and older is projected to double to 71 million, roughly 20 percent of the U.S. population.[2] In some states, fully a quarter of the population is likely to be aged 65 and older.[3] Unfortunately, this increase in the aging population creates a potentially large pool of potential victims for financial exploitation.

It is sad, but true, that the most frequent perpetrators of financial abuse are family members, who by some estimates commit nearly 75% of crimes,[4] and professional criminals. It is also important to note that financial institutions are often the first line of defense against this financial exploitation.

Since many older customers prefer to conduct transactions in person, financial services employees can be the first to detect changes in an older customer's behavior. Signs of exploitation of an elderly customer may include unusual transactions or changes to accounts, unpaid bills, changes in spending patterns, new individuals accompanying the customer to a bank facility, and missing property. When these and other signs are detected, and an investigation suggests that exploitation is taking place, financial institutions can help the

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[1] The Financial Services Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. Roundtable member companies provide fuel for America's economic engine, accounting directly for $85.5 trillion in managed assets, $965 billion in revenue, and 2.3 million jobs.

[2] The State of Aging and Health in America, Centers for Disease Control and Prevention (CDC) and The Merck Company Foundation, 2007, http://www.cdc.gov/Aging/pdf/saha_2007.pdf.

[3] *The State of Aging and Health in America,* Centers for Disease Control and Prevention (CDC) and The Merck Company Foundation, 2007, *http://www.cdc.gov/Aging/pdf/saha_2007.pdf*.

[4] http://www.consumerreports.org/cro/money/consumer-protection/preventing-financial-elder-abuse/overview/index.htm

customer take action to protect his or her assets. Financial institutions also work with agencies such as Adult Protective Services (APS), local law enforcement and prosecutors, many times as part of local or regional task forces focused on elder abuse prevention and prosecution. Institutions also report suspected abuse via the Suspicious Activity Reports (SARs) filed with the Financial Crimes Enforcement Network (FinCEN), an agency of the United States Department of the Treasury.

Following the filing of SARs, institutions may be contacted by law enforcement who are investigating the case. Institutions actively work with law enforcement after filing all legally required documents. Institutions also participate in regional partnerships that involve law enforcement of all levels. During these meetings, institutions will share trends and suspects. This allows for institutions and law enforcement partners to share best practices. Through this active engagement and partnership, cases are able to be more quickly resolved.

For decades, financial institutions have been at the forefront of fraud detection utilizing sophisticated technology, modeling, training and education. Because of these proactive measures, they are often the first to detect patterns associated with fraud. Using a variety of safeguards, financial institutions make every attempt to ensure the reliability and security of financial transactions as well as protect financial privacy. In fact, financial institutions often exceed the standards set by financial regulators in order to protect their customers, shareholders and employees better.

Education – of employees, customers and other stakeholders – is critical for preventing financial abuse of all customers – including more vulnerable ones such as older Americans. Many financial institutions have extensive programs to educate employees and customers on detecting abuse and steps to secure accounts from the lure of fraudsters. Financial institutions also work closely with APS, law enforcement and prosecutors to educate those entities on patterns of fraudulent activity and help identify individual cases of potential fraud. Financial institutions also work closely with community organizations to host panel discussions and community events to educate seniors and their caregivers about the risk of elder financial abuse. These efforts provide older American and their advocates education and resources to not only recognize financial elder abuse, but to also take steps to proactively protect oneself and ones assets through, for example, proper document disposal and identity theft prevention, and reports of the crime when it occurs.

Employees and customers who are better educated about fraudulent behavior and preventing fraud are more likely to take fraud prevention measures. An example of the Roundtable member's education efforts is a white paper produced by the Roundtable's BITS group entitled, "*Protecting the Elderly and Vulnerable from Financial Fraud and Exploitation,"* which helps financial institutions and their customers identify and combat elder abuse.[5]

[5] BITS - "Protecting the Elderly and Vulnerable from Financial Fraud and Exploitation"

The Roundtable also partnered with the Administration for Community Living/Department of Health and Human Services and the Consumer Financial Protection Bureau to support the June 14, 2012 White House Office of Public Engagement symposium in recognition of the 7th annual World Elder Abuse Awareness Day by providing financial industry speakers for the panel addressing the prevention of elder financial abuse.

Recognizing the scope of this issue, the Roundtable's member believe it is important to continue to focus on it and to bring resources to bear. To that end, the Roundtable's members have formed a working group to focus on the issue of preventing financial abuse of the elderly. Further recognizing that solutions will require a multi-faceted approach, the Group's members consist not only of financial institutions, but additionally of a collaborative cross-section of federal agency representatives, representatives from various adult protective services organizations, and academics focused on the area of elder abuse.

The Elder Working Group currently has identified two key projects on which it will concentrate. These are:

- Develop a structure/syllabus for training financial institution consumer-facing staff and all new hires on elder fraud trends and internal procedures for reacting to suspected elder financial abuse, including engaging Adult Protective Services and law enforcement. This work will focus on building on work done previously, will incorporate new learnings and research and broaden the educational base for employees. Once completed, the work will be shared openly across the financial services sector.
- Work with financial institutions with strong education programs to develop a publicly available awareness and education program to be made available to all financial institutions.

CHALLENGES AND IMPEDIMENTS

As we have engaged in our efforts regarding prevention of elder financial abuse and based on the experiences and feedback of financial institutions, we have identified a number of areas where potential impediments exist to improving prevention. For many of those, the assistance of the agencies forming the Elder Justice Coordinating Council (EJCC), either directly or in concert with other non-EJCC agencies, would be helpful to clarify concerns or remove impediments. On October 11, 2012, I had the opportunity to present these ideas to the agencies involved in the EJCC at its inaugural meeting. The impediments and possible solutions include:

- Clarify the permissibility of age-based fraud monitoring. As noted previously, financial institutions utilize sophisticated fraud detection technology and modeling in their attempts to prevent and identify potential fraudulent activity in an attempt to protect customers. An added layer of sophistication could be to segregate their elder customers' activities for special screening. Many financial institutions are concerned, however, that segregating their customer population for this purpose could be interpreted to place them in violation of existing age discrimination laws and, therefore, put the institution at risk for potential fines or regulatory actions.

It would be extremely beneficial if the involved EJCC agencies, particularly the Department of Justice, could clarify permissibility of age-based fraud monitoring. If such segregation is currently permissible, to assuage the concerns we have heard, a written opinion of the permissibility would be extremely helpful. If, in fact, it is considered a violation of current anti-discrimination laws to segregate this population for fraud monitoring purposes, we encourage the EJCC to undertake an effort to pursue legislative action to allow for an exception.

- Authority to authorize a protective hold on a suspicious transaction. One significant challenge financial institution employees encounter is situations where an elderly customer wants to perform a transaction (e.g., a withdrawal, a request to transfer funds) in a situation where the employee strongly suspects or even knows that fraud is involved. This clearly creates a conundrum pitting the financial institution's contractual obligation to carry out its customers and instructions and the financial institutions' desire to prevent the elderly customer from being defrauded.

  There are a few methods that are suggested for dealing with this issue:
  - Working with CFPB and Treasury create an option allowing institutions to put a minimal hold on the transaction pending the sending of an alert of APS and APS discussing the situation with the customer. It will likely be necessary for CFPB and Treasury to work with the states to implement this suggestion.
  - Working collaboratively with input from the U.S. Department of Justice, U.S. Postal Inspection Service, Federal Trade Commission and other agencies along with input from financial institutions, create and maintain a list of known fraudulent actors that can be used to "convince" elders of their involvement in a fraudulent situation.
  - Leverage the work already underway and led by the Consumer Financial Protection Bureau to create a list of local and regional APS services into a shareable database that financial institutions could use to understand who to contact that might be helpful in discussing these types of situations with involved elders. Along with creating a database for contacts, it will be necessary to further clarify the type of information institutions are legally able to share with APS regarding their older customer.

- Another substantial challenge occurs when an individual with a duly executed Power of Attorney to act on behalf of an elder is suspected of trying to perpetrate fraudulent activity or activity not in the best interest of the elder. Duly executed Powers of Attorney give the holder the legal right to act on behalf of the customer. This essentially creates the same conundrum for the financial institution as noted in the previous point.

There are a series of actions we would ask the EJCC members to consider regarding this issue. They include:

- Powers of Attorney laws and regulations vary by state and, particularly in the case of Durable Powers of Attorney, can involve granting rights to the agent even after the principal becomes incapacitated. While the agent is obligated to exercise due care and protect the principal, state law is not uniform with respect to the specific responsibilities of an agent with regard to financial transactions, particularly when the principal is an elder. The development of uniform state laws and a Uniform Power of Attorney would be very helpful. Study of the feasibility and benefits of having a uniform Power of Attorney, particularly one for situations in which the principle is an elder should be undertaken.
- Select agencies – most likely U.S. Department of Health and Human Services, Social Security Administration, CFPB, U.S. Department of Justice, the Federal Trade Commission and the U.S. Department of Veterans Affairs – should consider working collaboratively to develop educational materials that explain clearly to those agents with Powers of Attorney their financial responsibilities and provide specific examples of what are considered abusive behaviors.
- The U.S. Department of Justice could undertake a study of existing criminal statutes that apply to financial abuse of elders. This should include both federal and state level statutes with the goal to develop a model criminal code applicable to this area that strongly disincents criminal actors and those acting as agents from taking advantage of the elderly.

- Financial institutions are sometimes concerned with the liability they or their employees might incur in situations where they suspect and report elder abuse – particularly if it is a situation in which it is ultimately determined that a fraud was not involved. Today, certain states require the reporting of even suspicions of fraud, but that reporting is not uniform on a national level and statutory hold harmless provisions to protect the reporter seem far from consistent.

  The Council should work toward legislative action that would result in a national reporting statute that provides uniform electronic reporting requirements to a single report point which would disseminate the information (or otherwise make it available) to state and local agencies, as well as uniform hold harmless protections for reporting parties. Additionally, the importance of federal and state agencies such as the CFPB, SEC, FINRA, and NSAA, etc., to coordinate their efforts in addressing elder financial abuse can ensure the avoidance of conflicting rules and regulations, which themselves would potentially harm individual clients. This should also include a definition of those individuals who are protected by the requirements, as in some states fraud of vulnerable adults follow the same requirements as fraud of the elderly.

- Confusion of requirements regarding to whom to report the abuse and under what circumstances.

FinCEN, a part of the U.S. Treasury, issued an advisory on February 22, 2011 that addresses the reporting of actual or suspected elder financial abuse on Suspicious Activity Reports (SARS).[6] This provided financial institutions with guidance on reporting specific to SARs' requirements; however, the reporting of elder financial abuse often goes beyond that type of reporting. Reporting would likely include reporting of situations to Adult Protective Services or similar agencies as well potentially, depending on the circumstances, to local law enforcement. Today, however, the structure of adult protective services type agencies is diffused across the country. Some locations have more centralized statewide or regional agencies will others structure such agencies very locally. Determining the correct agency for reporting is often difficult. Law enforcement capabilities to deal with such reports often vary as well. In addition, today with law enforcement often done at the local level, it is often difficult to synthesize information across jurisdictions to identify when elders in different locations may be being subjected to scams and fraudulent activity that relates to the same set of criminal actors.

To assist with overcoming these issues, we suggest the following actions:

- The CFPB is currently working with various constituencies to develop a database of regional and local Area Agency on Aging across the United States. Making that database accessible to financial institutions would facilitate those institutions ability to know and contact the correct agency.
- Recognizing that local law enforcement lacked skills in investigating cybercrime, in 2007, the Department of Homeland Security, the United States Secret Service, the Alabama District Attorneys Association, the State of Alabama, and the city of Hoover, Alabama partnered to create the National Computer Forensics Institute (NCFI). This partnership provides state and local law enforcement officers the training necessary to conduct basis electronic crimes investigations. Creating a similar model to train state and local law enforcement personnel the training necessary to conduct investigations of elder abuse could have significant merits. Short of such a large effort, creating and providing to local law enforcement bodies an educational opportunity through such options as written best practices, webinars and seminars on the subject would be beneficial.

  Note that these same concepts can be generally applied as well to local prosecutorial authorities, who sometimes also lack the knowledge and experience requisite to the successful prosecution of those who prey financially on the elderly. Similar training programs and best practices can also serve this community well.
- The CFPB is currently working to establish state and regional coalitions of APS, law enforcement, prosecutors and financial institutions that can work together on the issue of elder abuse. We encourage continued expansion of this effort

[6] See http://www.fincen.gov/statutes_regs/guidance/html/fin-2011-a003.html.

and offer our services to assist in connecting our Roundtable members into these coalitions.

  - While SARS reporting is working well today, a significant improvement can be made by specifically adding “Elder Financial Abuse” as a category in Section 35 of the SARs Reporting Form. This would allow for easier collation of such activity and facilitate cross matching of potential criminal actors within this area.

- Enhanced financial literacy to empower further consumers, including older Americans, to make sound financial decisions.

  Financial literacy is one of the highest priorities for the Roundtable and its members at the grass roots and at the national policy level. In 2011, Roundtable member companies conducted more than 45,600 financial literacy projects around the country to empower further thousands of consumers to make sound financial decisions.

  As we noted earlier, as a part of the efforts of its Elder Working Group, the Roundtable has committed to work on two projects (i.e., develop a structure/syllabus for training financial institution consumer-facing staff and to develop a publicly available awareness and education program to be made available to all financial institutions).

  We would certainly welcome the engagement of any of the departments or agencies represented on the EJCC in this effort – either in development or ultimately in distribution of the publicly facing awareness and education materials developed. We believe a national-level awareness campaign targeting elder Americans and their family members would provide long-lasting benefits in helping to reduce elder financial abuse.

- One last area of potential improvement involves the licensing of financial professionals who serve the elder community. In its August 20, 2012 letter to the CFPB regarding CFPB’s “Request for Information Regarding Senior Financial Exploitation [Docket CFPB-2012-0018],” the Roundtable mentioned another key area to reduce financial abuse of elders. It noted that an effort to make elders more aware of the licensing of financial professionals coupled with an effort by federal and state agencies and professional organizations’ role in developing best practices for the training and licensing of financial professionals would have benefits. The Roundtable’s comments on this last area are excerpted into Appendix A of this document.

CONCLUSION

We appreciate the opportunity to share our sector’s focus on the issue of financial abuse of the elderly. We are committed to continuing to work on these issues to protect older Americans.

As noted, we recently shared these thoughts with the Elder Justice Coordinating Council. The challenge of reducing elder abuse can only be resolved by continued focus on the issue by all relevant parties, including financial institutions, families of elders, government agencies and legislators. Only through this continued commitment will we be able to protect our seniors from financial abuse. We recognize that the ideas we have outlined in this testimony are, in many cases, concepts and suggestions. They are a starting point for this discussion. We recognize there are various methods to approach these issues and look forward to continuing to work with you and other key constituencies on these issues.

Appendix A

Excerpt from August 20, 2012 letter to the CFPB regarding CFPB's "Request for Information Regarding Senior Financial Exploitation [Docket CFPB-2012-0018]

- **Consumers Should Seek Financial Advice Only From Licensed Financial Professionals, and the CFPB Should Work with Federal and State Agencies and Professional Organizations to Develop Best Practices For the Training of These Professionals**

The financial services industry has played a vital role in expanding retirement security for millions of Americans for the last 100 years. The industry currently manages more than $17 trillion in retirement assets, which represents 36% of all U.S. household assets.[7] The U.S. retirement market is projected to grow to nearly $22 trillion by 2016,[8] a 30% increase in retirement savings over four years.

It is important that consumers of all ages seek professional assistance to prepare for and make major financial decisions involving investments, wealth planning, and retirement. When making these decisions, consumers should seek out individuals who are licensed under federal and/or state law.

The Roundtable believes that consumers should only hire properly licensed investment professionals. Federal law regulating securities brokers, securities dealers, and investment advisers provides strong and effective protection for all consumers, including older Americans. The Securities and Exchange Commission, together with securities self-regulatory organizations like the Financial Industry Regulatory Authority (FINRA) and the Municipal Securities Rulemaking Board, implement the registration and regulatory régime under federal securities law. These protections are complemented at the state level by laws designed to protect consumers from investment fraud. A similar registration and regulatory structure exists for futures professionals and firms, which are subject to oversight by the Commodity Futures Trading Commission, National Futures Association and other futures self-regulatory organizations. Additionally, state insurance commissioners regulate insurance agents in their respective jurisdictions.[9]

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[7] http://www.ebri.org/research/?fa=genretire

[8] http://www.bankinvestmentconsultant.com/news/cerulli-predicts-retirment-market-will-exceed-22-trillion-by-2016-2677132-1.html

[9] The most common license for securities professionals is the Series 7 – General Securities Representative, and the most common license for commodity futures professionals is the Series 3 – National Commodity Futures. Depending on the nature of their activities, investment professionals may need the following licenses: (1) Series 6 – Investment Company Products/Variable Contracts Limited Representative; (2) Series 22 – Direct Participation Programs Limited Representative; (3) Series 31 – Futures Managed Funds; (4) Series 32 – Limited Futures; (5) Series 34 – Retail Off-Exchange Forex; (6) Series 42 – Registered Options Representative; (7) Series 52 – Municipal Securities Representative; (8) Series 62 – Corporate Securities Limited Representative; (9) Series 63 – Uniform Securities Agent State Law (NASAA); (10) Series 65 – Uniform Investment Adviser Law (NASAA); (11) Series 66 – Uniform Combined State Law (NASAA); and (12) Series 82 – Limited Representative, Private Securities Offerings.

We understand that a number of states and professional organizations have laws and programs that govern certifications and titles used by retirement professionals. While training that focuses on the specialized needs of older Americans may be valuable and useful, we urge the CFPB to partner with the financial services industry, federal regulators, financial industry self-regulatory organizations, state agencies and professional organizations in developing best practices for the training and certification of professionals who specialize in advising older Americans.

THE FINANCIAL SERVICES ROUNDTABLE

Financing America's Economy

BITS

FINANCIAL SERVICES ROUNDTABLE

At-Risk Adult Training Curriculum

February 2013

The Financial Services Roundtable and BITS
1001 Pennsylvania Avenue NW
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At-Risk Adult Training Curriculum

The following document provides an outline for institutions to leverage in developing internal training programs on financial abuse of at-risk adults. This document is intended to complement the BITS publication *Protecting the Elderly and Vulnerable from Financial Fraud and Exploitation*[1].

This curriculum provides a general overview for institutions designing their internal training programs. Institutions should consult state and local legal requirements to ensure their institution's training is compliant.

This document covers the following:

Developing an Internal Training Seminar

This section outlines suggestions regarding the content and frequency of a training program for financial institution front-line, customer-facing personnel.

Additional Training for Fraud Investigators

This section provides further suggestions for additional training content for financial institution employees working in fraud investigation. These employees deal with the outcomes of fraudulent activity against vulnerable individuals and, therefore, should have additional knowledge.

Three appendices provide key messaging content for communications material directed to these constituencies:

Appendix A: For Senior Customers
Appendix B: For Family Members and Fiduciary
Appendix C: For Financial Institution Staff

For more information about this or other BITS/Roundtable publications, contact bits@fsround.org.

About The Financial Services Roundtable/BITS

The Financial Services Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. Roundtable member companies provide fuel for America's economic engine, accounting directly for $98.4 trillion in managed assets, $1.1 trillion in revenue, and 2.4 million jobs. BITS, the technology policy division of the Roundtable addresses issues at the intersection of financial services, technology and public policy, where industry cooperation serves the public good, such as critical infrastructure protection, fraud prevention, and the safety of financial services.

[1] Available at http://www.bits.org/publications/fraud/BITSProtectingVulnerableAdults0410.pdf.

Developing an Internal Training Seminar

Frequency. All new employees should receive an initial training. Employees in consumer-facing and high-risk roles (financial institutions[2] and banking and call centers) should receive a thorough annual training. In an effort to minimize the employee's time, this training can be incorporated into compliance or loss prevention training and may complement the institutions anti-money laundering (AML) compliance program. Depending on accessibility of employees, the training can be offered as a web-based training followed by a knowledge assessment.

To reinforce the messages institutions may provide regular (e.g., quarterly) communications. These may include one page tip documents. The appendices provide sample tips, which institutions may use in communicating to their employees and consumers.

Content

1.0 Background

- 1.1 Definitions
  - 1.1.1 **Adult Protective Services (APS)** – An organization established by individual state statutes that investigates reports alleging abuse, neglect and exploitation of elderly and disabled adults, and intervenes to protect vulnerable adults who are at risk.
  - 1.1.2 **Area Agency on Aging (AAA)** – A nationwide network of state and local programs that help older people plan and care for their life-long needs. Services include information and referral for in-home services, counseling, legal services, adult day care, skilled nursing care/therapy, transportation, personal care, respite care, nutrition and meals.
  - 1.1.3 **At-Risk Adult** – A person who is either being or in danger of being mistreated and/or exploited, and who due to age and/or disability, is unable to protect him/herself. At-risk adult is also a commonly used term. State and federal requirements may refer to an at-risk adult as a vulnerable adult or elder.
  - 1.1.4 **Diminished mental capacity** – Permanent or gradual impairment of an individual's cognitive abilities, which may limit their capacity to make sound decisions regarding their investments and finances. This impairment may not be apparent in at-risk adults. Recent medical studies suggest mental impairment regarding financial matters may occur before general cognitive impairment is obvious.
  - 1.1.5 **Fact Pattern** – Legal phrase referring to the summary of what took place in a case for which relief is sought.

[2] An establishment that focuses on dealing with financial transactions, such as investments, loans and deposits (e.g., banks, trust companies, insurance companies and investment dealers).

1.1.6 **Fiduciary** – An individual appointed (1) guardian by a court of another person's property or (2) to act on behalf of another person, by that person in a legal document known as a Power of Attorney. Unlike people in ordinary business relationships, fiduciaries may not seek personal benefit from their transactions with those they represent. In addition, an individual may appoint a lay fiduciary, which is often a family member or close friend with limited financial knowledge.

1.1.7 **Elder (At-Risk Adult) Financial Exploitation or Abuse** – Any action which involves the misuse of an at-risk adult's funds or property.

1.1.8 **Third-Party Financial Exploitation** – Financial exploitation of an at-risk adult by another individual or party. The third party involved may be a caregiver, an individual with the power to act on behalf of the elder (Power of Attorney) or a service provider (e.g., a contractor).

1.1.9 **Executive Function** – An umbrella term for cognitive processes that regulate, control, and manage other cognitive processes, such as planning, working memory, attention, problem solving, verbal reasoning, inhibition, mental flexibility, multi-tasking, and initiation and monitoring of actions.

1.2 Legal Obligations

1.2.1 FinCEN Filings

1.2.1.1 February 2011 FinCEN Advisory

1.2.2 State Requirements

1.2.2.1 Institution's training should address, if applicable, specific legal state requirements, including Washington, DC.

1.3 Role of the Financial Institution

1.3.1 Help protect assets, mitigate losses and safeguard consumer information.

1.3.2 Report suspicious activities to FinCEN.

1.3.3 Report suspicious activities to local Adult Protective Services or law enforcement.

1.4 Stories of experiences

1.4.1 Provide examples of recent cases.

1.4.1.1 Family Fraud

1.4.1.2 Gold Investment Scheme

1.4.2 Reach out to local Area Agency on Aging or Adult Protective Services for examples.

1.4.3 Oklahoma Bankers Association "Senior Cents" Video

1.4.4 Oregon Bankers Association Video – uploaded to YouTube by California Bankers Association

2.0 Fraud Schemes[3]

2.1 Categories of Exploiters

[3] See *Protecting the Elderly and Vulnerable from Financial Fraud and Exploitation* for more information on these scams.

2.1.1 People known to the victim (family members, friends, caregivers, or fiduciaries). The most common type of fraud with over 90% of cases according to the National Adult Protective Services Association.
2.1.1.1 Signing checks or documents without the victim's consent.
2.1.1.2 Charging excessive fees for rent or caregiver services.
2.1.1.3 Theft of money or property.
2.1.1.4 Obtaining money or property by undue influence, coercion, misrepresentation or fraud.
2.1.1.5 Power of Attorney abuse.
2.1.2 Strangers (scam artists, contractors, service providers)
2.1.2.1 Grandparent Scam
2.1.2.2 Telemarking Sweepstakes and lottery scams
2.1.2.3 Nigerian scams
2.1.2.4 Contractor/Home improvement fraud
2.1.2.5 Unsolicited work scam
2.1.2.6 Reverse mortgage proceeds scam
2.1.2.7 Bank examiner fraud
2.1.2.8 Mail fraud
2.1.2.9 Internet fraud
2.1.2.10 Phishing
2.1.2.11 Internet dating scam
2.1.2.12 "Pigeon drop" scam
2.1.2.13 Non-delivery of merchandise or payment
2.1.2.14 Overpayment
2.1.2.15 Advance fee scam
2.1.2.16 Affinity scams – military, cultural, religious

3.0 Suspicious behaviors
3.1 Visual Cues
3.1.1 New individual(s) accompanying the customer and overly interested in the account or encouraging a withdrawal.
3.1.2 Companion not allowing individual to speak for themselves or make decisions.
3.1.3 Individual appears nervous or afraid of the person accompanying them.
3.1.4 Secretive or giving implausible explanations for use of funds.
3.1.5 Unable to remember financial transactions or signing paperwork.
3.1.6 Isolated or inaccessible so the institution is unable to speak directly with the consumer.
3.1.7 Isolated from other family members or close friends.
3.1.8 Decline in physical appearance or lack of hygiene often indicates a neglected older adult who is at risk of becoming a victim.

3.1.9 Sudden appearance of previously uninvolved relatives claiming their rights to the consumer's affairs and possessions.
3.1.10 Excitement about winning a sweepstakes or lottery.
3.1.11 Excitement about a new soon to be delivered purchase.
3.1.12 Excitement about helping a new companion pay expenses to enter the country.

3.2 Transactional Cues
3.2.1 Unusual volume of activity.
3.2.2 Account activity inconsistent with at-risk adult's transaction history.
3.2.3 Suspicious signatures.
3.2.4 A fiduciary or other person (joint account holder) begins handling consumer's affairs and appears to be acting in self-interest or not in the best interest of the at-risk adult.
3.2.5 Statements and cancelled checks are no longer sent to the customer's home.
3.2.6 Change of address on accounts to new recipient's address – especially when distant from customer's home.
3.2.7 Abrupt changes to financial documents, such as power of attorney, account beneficiaries, wills and trusts, property title and deeds.
3.2.8 Unexplained disappearance of funds or valuable possessions, such as safety deposit box items.

4.0 In cases of suspected fraud or abuse
4.1 Verify the transactional authority of person(s) acting on the account holder's behalf.
4.2 Attempt to separate the account holder from the individual accompanying him or her.
4.3 Use probing open-ended questions to determine the consumer's intent.
4.4 Share an awareness document.
4.5 Delay the suspicious transaction, if possible.
4.6 Contact loss prevention and/or legal departments for assistance and guidance.

5.0 Role of the loss prevention department
5.1 Document the fact patterns.
5.2 Take protective action on accounts by placing holds or restraints.
5.3 Report the incident to law enforcement.
5.4 Verbal report to local Adult Protective Services.
5.5 Provide a written report. (required in California and Maryland)
5.6 Advise Customer contact staff on next steps.

6.0 Discussion of successful identification of perpetrator.

Additional Training for Fraud Investigators

7.0 Interview reporting employee.
7.1 Description and/or identification of perpetrator.
7.2 Document steps taken by the employee to prevent and respond.

8.0 Interview victim, if willing.
  8.1 Description and/or identification of perpetrator and suspicious activity.
  8.2 Record on video, if possible.
9.0 Collect and document surveillance videos and photos.
10.0 Completing a Suspicious Activity Report (SAR) for FinCEN.
  10.1 Check the “other” box with a notation “elder financial exploitation”.
  10.2 Other relevant boxes may be checked if appropriate (i.e. wire fraud, identity theft, etc.).
  10.3 In addition, the narrative section of the SAR should provide a detailed description of the violation of law or suspicious activity including any additional delivery channels used in the fraud and any additional fraudulent activities used to perpetrate the fraud.
  10.4 Notify law enforcement contacts that a SAR has been filed.
11.0 Contacting appropriate agencies
  11.1 Local Adult Protective Services
  11.2 Eldercare Locator
  11.3 Local law enforcement
12.0 State Compliance Requirements
13.0 Additional resources
  13.1 American Bar Association’s Commission on Law and Aging
  13.2 Can Bank Tellers Tell?
  13.3 Consumer Financial Protection Bureau’s Office of Older Americans
  13.4 National Adult Protective Services Association
  13.5 National Center on Elder Abuse

Appendix A: For Senior Customers

Establish a budget. Identify all current obligations (e.g., mortgage payment, supplemental health insurance, prescription drugs). Identify all current sources of revenue. Determine the amount to spend each month and develop an appropriate budget.

Determine the appropriate products for you. Institutions offer a wide variety of products to respond to consumer needs. Investigate the products and determine which will benefit your lifestyle. Ask questions if you do not understand a product's features and make sure you understand any fees and, especially for investments, risks associated with the product before agreeing to purchase it. Your bank or financial institution or the local Area Agency on Aging can offer you educational information on financial products. Financial institutions offer resources to explain these.

Plan for your estate. To assist your family when decisions must be made, it is helpful to have the following legal documents: a durable power of attorney in the case of incapacity, living will for health care decisions, and a will for property distribution decisions. You should seek the assistance of a lawyer to complete these documents. If you cannot afford a lawyer, many communities offer free or low cost legal services for seniors.

Be ready for the unexpected. No one can predict when tragedy will strike, but all should plan accordingly. Establish an emergency fund with enough for three months' expenses.

Choose a trusted individual when providing power of attorney. Your attorney can discuss the benefits of appointing a power of attorney (POA) so someone can make decisions on your behalf when you are no longer able. Carefully review the authority the power of attorney document grants your designee, especially regarding the ability to perform financial transactions and give gifts. Ask your POA for periodic reports of the transactions they conduct on your behalf and ask to review your bank statements on a regular basis.

Stay active and engage with others regularly. Fraudsters prey on individuals who have infrequent contact with others. Stay active in your community. Most communities have senior centers that offer social activities.

Respond cautiously to in-person, mail, Internet or solicitations. No one should ask you to send them money unless you purchased or bought a product or service. Likewise, legitimate organizations offering contests or lotteries would never ask you to send them money to "claim your prize." Be cautious of any deal that sounds too good to be true. Discuss with a trusted friend or family member any request you get to send someone you do not know money. For instance, you can't win a lottery, if you haven't entered.

Know that wiring money is like sending cash. Con artists often insist that people wire money, especially overseas. If you wire money, it is nearly impossible to get your money back or trace the money. Don't wire money or write checks to strangers, to sellers who insist on wire transfers for payment, or to someone who claims to be a relative in an emergency.

Contact your bank or financial institution if a request looks suspicious. Fraudsters may contact you claiming to be your bank or financial institution. Before providing any information, especially private information like your social security number, bank account numbers or passwords for your computer, contact your bank or institution through your regular channels (e.g., in-person visit, phone call to the bank's number listed on your bank statement) to confirm the request is from your bank or institution.

Protect your passwords and account numbers. Do not share your passwords and/or account numbers with others. If you think someone has obtained your password, immediately notify the institution.

Don't let embarrassment or fear keep you from discussing suspicious activities. We all make mistakes and often do not realize we have until after it has happened. If you think you have made a mistake with your finances, the situation could become worse if not escalated. Discuss any suspicious activity with someone you trust (e.g., family member, bank manager, attorney, local Area Agency on Aging, police).

Monitor your financial affairs. Actively track your financial accounts so you will be able to quickly recognize when a fraudulent transaction appears. Read your bank and credit card statements. Look for things that you did not authorize or do yourself. If you find suspicious activity, call your bank or credit card company immediately.

Check your credit report regularly. Checking your report can help you guard against identity theft. Visit http://www.ftc.gov/idtheft if you spot accounts that aren't yours. Visit www.AnnualCreditReport.com or call 1-877-322-8228, the only authorized website for free credit reports. You'll need to provide your name, address, Social Security number and date of birth to verify your identity.

Don't deposit checks you receive from strangers. Fraudsters may ask you to deposit a check and then require you to send a portion back. They do this to gather information about you that they then use to impersonate you. Ask your institution for help to prove the legitimacy of a check before you send any money to a stranger.

Keep details of all deals in writing. When making a financial decision always ask questions to ensure that you feel comfortable and confident where your money is going. Keeping a record of this information may help remedy a situation if the deal was in fact a fraud scam.

Look out for common scams. Criminals have similar tactics that they often use. These include posing as a repairman that you did not call, claiming to be a relative in emergency, or stating that you've won a sweepstakes or lottery that you did not enter.

Ask for assistance. Many financial institutions have programs specifically designed to help their customers. Beware of "advisors" claiming special qualifications and certifications to advise seniors. Contact your state securities regulator to check on specific licenses. In addition, credit counseling resources are available through the following:

National Foundation for Credit Counseling (NFCC) 1.800.388.2227 www.nfcc.org	The Federal Trade Commission (FTC) www.ftc.gov/bcp/menus/consumer/credit/debt.shtm	Consumer Credit Counseling Service 1.800.388.2227 www.cccsatl.org

You can also contact your local Area Agency on Aging or call 1-800-677-1116.

Appendix B: For Family Members and Fiduciary

Discuss financial wishes. Before capacity is diminished, discuss financial plans with your elderly family member in a non-confrontational setting. Reassure him or her that you want to learn about their plans and concerns, not impose your own ideas upon them.

Learn about estate documents. These documents may include a will, durable power of attorney and health care proxy. It will be important that you know where these are stored in the event of an unfortunate circumstance. If the family member involved does not have these documents, encourage them to get them through a qualified attorney. If the family member cannot afford an attorney, many communities offer free or low cost legal services for seniors.

Act on behalf of the individual. When given the Power of Attorney, it is your fundamental responsibility to act in the best interest of the individual. You must use the elder's funds for the care of the elder. No funds should be used for your own desires.

Watch for signs of mental changes or abuse.

Diminished mental capacity

- Confusion over simple concepts; disorientation
- Failure to remember basic facts or recent conversations
- Difficulty performing simple tasks
- Drastic shifts in investment styles or investment objectives
- Unexplained withdrawals, wire transfers or other changes in financial situation
- Erratic behavior or dramatic mood swings
- Over-reliance on a third-party
- Inability to make decisions
- Diminished hearing
- Diminished vision
- Memory Loss

Third Party Financial Abuse

- Account withdrawals that are unexplained or not typical
- Inability to contact the vulnerable adult
- Signs of intimidation or reluctance to speak, especially in the presence of a caregiver
- Sudden or highly increased isolation from friends and family
- Checks written to strangers or to parties to whom the elder has never written a check
- Someone forging signatures
- Improper use of conservatorships, guardianships or powers of attorney

If you have been given power to act as a fiduciary, encourage the adult to review his or her bank and credit card statements regularly and consider reviewing them with the individual.

Appendix C: For Financial Institution Staff

Keep a record. When talking with any customer, it is important for the employee to keep all records as required by the institution. In cases of suspected fraud or abuse, the employee may want to note additional details.

Report suspected fraud or abuse to appropriate internal team. Institutions have internal compliance teams that will be able to assist in a suspected fraud or abuse case. The team will assist, as appropriate, with contacting the client's family, involving other third party professionals, reaching out to appropriate institution departments, and engaging adult protective services.

Verify the transactional authority of person(s) acting on the customer's behalf. As with any transaction, ensure that the individual has the legal authority to perform the transaction. In cases of an individual not associated with the account is with the consumer, separate the vulnerable adult from the individual accompanying him or her.

Use probing questions. Specific questions will help determine the customer's intent. It is important to let the customer express their intent using his or her own words without prompting. For example, when finalizing a power of attorney "Mr. Jones, do you want Ms. Smith to be able to withdraw money from your account at any time without needing your permission?" Or when someone accompanies an elder to your institution and you suspect the potential that the person is influencing the elder, you might privately ask, "Mr. Jones, are you sure you want to do this transaction?" and explain the effect of the transaction.

Share an awareness document. In cases where the consumer is suspected to be a potential victim of a fraud scheme, share awareness documents provided by the institution or others to help the consumer understand that the situation involved is a known fraud scheme. Organizations such as the Federal Bureau of Investigation have developed overviews of the most common schemes.

Watch for signs of mental changes or abuse.[4]

Diminished mental capacity

- Confusion over simple concepts; disorientation
- Failure to remember basic facts or recent conversations
- Difficulty performing simple tasks
- Drastic shifts in investment styles or investment objectives.
- Unexplained withdrawals, wire transfers or other changes in financial situation
- Erratic behavior or dramatic mood swings
- Over-reliance on a third-party
- Inability to make decisions

[4] Depending on the relationship of the customer with the employee will determine the inclusion of the following items. For example, financial advisors may have an increased ability to identify and report diminished capacity.

- Diminished hearing
- Diminished vision
- Memory loss

Third Party Financial Abuse

- Account withdrawals that are unexplained or not typical
- Inability to contact the vulnerable adult
- Signs of intimidation or reluctance to speak, especially in the presence of a caregiver or person accompanying the elder
- Isolation from friends and family
- Someone cashing checks without authorization
- Someone forging signatures
- Improper use of conservatorships, guardianships or powers of attorney

WORLD ELDER ABUSE AWARENESS

The United Nations has designated June 15 as World Elder Abuse Awareness Day. This day's aim is to focus attention on the issue of physical, emotional, and financial abuse of elders.

The U.S. Census reports that by the year 2050, people over age 65 will make up approximately 20 percent of the population. Fighting elder fraud is not a competitive issue for FSR members – it's a duty.

Find out below what the financial services industry is doing to encourage others to recognize the problem of elder abuse and create policies that prevent people from taking advantage of our older generations.

Refuse Elder Abuse: FSR Members Thwart Fraud Perpetrators

Fraud and financial abuse schemes targeting the elderly are a growing problem in the United States that cost victims at least $2.9 billion in 2010 alone.

With the evolution of technology, criminals are finding new ways to target the money of vulnerable consumers. The Financial Services Roundtable's member companies are leaders in the elder fraud prevention field, working around the clock to aggressively identify red flags and hinder illicit criminal activity.

According to the Scam Awareness Alliance, popular corruption schemes include Romance Scams, where older, often lonely Americans conned into wiring money to an anonymous love interest they've met online. Other scams include Lottery Scams and Person-in-Need Scams, which are featured in the alliance's series of online ads.

Why is the elder population the bulls-eye for fraudsters? Wells Fargo Advisors (WFA), a non-bank affiliate of Wells Fargo & Company, notes that the elder population is typically more trusting, likely to spend time alone, often inclined to answer their door and phone at home and are hesitant to report suspected fraud. Not only does Wells Fargo Advisors, provide guidance for the financial protection of older investors, but the bank is also at the forefront of collaboration, halting fraud before it occurs. WFA is gearing up to announce the development of a new division of 15,146 advisors represented from all 50 states, allowing elder financial abuse cases flow through a centralized point, enhancing the investigation and reporting process to state Adult Protective Service departments.

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November 30, 2015

VIA ELECTRONIC SUBMISSION

Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
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pubcom@finra.org

Re: FINRA Regulatory Notice 15-37, Financial Exploitation of Seniors and Other Vulnerable Adults

Dear Ms. Asquith:

The Investor Rights Clinic at Pace Law School, operating through John Jay Legal Services, Inc. ("PIRC"),[1] welcomes the opportunity to comment on FINRA's rule proposal addressing the financial exploitation of seniors and other vulnerable adults. PIRC shares FINRA's goal of protecting populations that are especially susceptible to financial exploitation. PIRC supports the proposed amendment to Rule 4512 and the adoption of proposed new Rule 2165, with some additional recommendations, as discussed below.

Trusted Contact Person—Proposed Amendments to Rule 4512

PIRC supports FINRA's proposal to amend Rule 4512 to require firms to make reasonable efforts to obtain the name of and contact information for a trusted contact person upon the opening of a non-institutional customer's account.

[1] PIRC opened in 1997 as the nation's first law school clinic in which J.D. students, for academic credit and under close faculty supervision, provide pro bono representation to individual investors of modest means in arbitrable securities disputes. *See* Barbara Black, *Establishing A Securities Arbitration Clinic: The Experience at Pace*, 50 J. LEGAL EDUC. 35 (2000); *see also* Press Release, Securities Exchange Commission, SEC Announces Pilot Securities Arbitration Clinic To Help Small Investors - Levitt Responds To Concerns Voiced At Town Meetings (Nov. 12, 1997), *available at* http://www.sec.gov/news/press/pressarchive/1997/97-101.txt.

Proposed New Rule 2165

Temporary Hold on Disbursement of Funds or Securities

PIRC supports the part of FINRA's proposed new Rule 2165 which permits "qualified persons" who reasonably believe that financial exploitation is occurring to place temporary holds on disbursements of funds or securities from the accounts of "specified adult" customers.

PIRC recommends that FINRA seek more information on the logistics and cost of exploitation recognition in order to determine whether or not to expand the scope of the proposed rule to cover all investors or whether to expand the definition of specified adult.[2] PIRC has identified several additional questions to supplement the specific questions enumerated on pages 7-8 of the Request for Comment:

1. By what methodology are "qualified persons" at firms able to recognize exploitation?
2. Can this recognition be achieved through existing data and computer analysis?
3. To what extent is this already being done?
4. Does it require enhanced monitoring of "specified adults"?
5. Can recognition of exploitation be achieved without additional costs to firms?
6. If additional investments are required, must they be applied exclusively for the recognition of exploitation of "specified adults," or once a firm makes the initial investment, does it then have the ability to recognize exploitation of any of its investors at little or no cost beyond the initial investment?

The answers to these questions should help FINRA determine the best method to achieve its goal of protecting all investors from financial exploitation. If firms are already able to identify investor exploitation through existing data and analysis, and all that is required to end a particular instance of exploitation is the ability to protect investors pursuant to this proposed rule, then FINRA should expand the scope of the proposed rule beyond "specified adults" to protect all investors. Similarly, if implementing this rule for "specified adults" requires an initial investment by firms, but once that investment is made firms can implement the rule to protect all investors, then FINRA should expand the scope of this rule to cover all investors. However, if implementing the rule beyond specified adults is cost prohibitive at this time, then FINRA should focus on protecting especially vulnerable populations now with the goal of expanding the scope of the rule in the future to cover all investors.

Internal Review

PIRC supports the part of FINRA's proposed new Rule 2165 that requires firms that place temporary holds on disbursements of funds or securities from the accounts of "specified adult" customers to immediately initiate an internal review of the facts and circumstances that caused the qualified person to reasonably believe that financial exploitation of the specified adult has occurred, is occurring, has been attempted, or will be attempted.

[2] Question 6 in the Request for Comment section of the Regulatory Notice asks whether the definition of specified adult should be modified or eliminated.

Notification

PIRC supports the part of FINRA's proposed new Rule 2165 that requires firms to provide notification of the hold and the reason for the hold to all parties authorized to transact business on the account and, if available, the trusted contact person, no later than two business days after placing the hold. PIRC agrees that firms should not contact parties other than the specified adult, such as the trusted contact person, family member, and registered representative, if the firm reasonably believes they have engaged, are engaged, or will engage in the financial exploitation of the specified adult.

In addition, PIRC recommends that FINRA consider requiring firms to contact FINRA and the appropriate state regulatory authority if a qualified person at the firm reasonably believes an investor is being exploited.[3] Such a provision would alert FINRA that a firm has relevant information about investor exploitation that FINRA could use to propose future rules that are responsive to the needs of vulnerable investors. The more information FINRA has on the identity of exploiters and the methodology of exploitation, the more likely it will be able to effectively monitor and prevent investor exploitation in the future. In addition, FINRA could exercise its regulatory leverage if the exploiter is affiliated with a member firm.

Record Retention

PIRC supports the part of FINRA's proposed new Rule 2165 that requires firms that place temporary holds on disbursements of funds or securities from the accounts of "specified adult" customers to retain records related to compliance with the rule, which shall be readily available to FINRA, upon request. In addition to requiring firms to make this information available to FINRA on request, PIRC recommends that FINRA develop a standardized method to collect such information and compile the data received in an investor exploitation database, which could assist FINRA in its efforts to track, prevent, and respond to investor exploitation.

Supervisory Procedures

PIRC supports the part of FINRA's proposed new Rule 2165 that requires firms that place temporary holds on disbursements of funds or securities from the accounts of "specified adult" customers to establish and maintain specific written supervisory procedures reasonably designed to achieve compliance with the rule.

[3] This is not without precedent. For example, Missouri recently passed the Senior Savings Protection Act, which provides that a qualified individual who reasonably believes a specified adult is being exploited may contact the state department of health and senior services and the commissioner of securities. *See* https://legiscan.com/MO/text/SB244/id/1224756/Missouri-2015-SB244-Enrolled.pdf.

Thank you for the opportunity to comment.

Respectfully submitted,

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Investor Advocacy Clinic

November 25, 2015

VIA EMAIL TO PUBCOM@FINRA.ORG

Marcia E. Asquith
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FINRA
1735 K Street, NW
Washington, DC 20006-1506

Re: Regulatory Notice 15-37: Comments on Proposed FINRA Rule on Financial Exploitation of Seniors and Vulnerable Adults

Dear Ms. Asquith:

Thank you for the opportunity to comment on Regulatory Notice 15-37, the proposal on Financial Exploitation of Seniors and Vulnerable Adults. The Georgia State University College of Law Investor Advocacy Clinic is committed to protecting the interests of consumer investors. Because the proposal can help protect the assets of vulnerable adults from financial exploitation, we submit this comment in support of the proposal.

While we support the Proposal generally, FINRA's goal of protecting vulnerable adults is enhanced with a few changes. First, the Rule 2165 should require rather than permit Qualified Persons to act on a reasonable belief of exploitation. Second, FINRA should expand the definition of Qualified Person to include registered persons. Third, FINRA should oversee a mandatory training program to educate Qualified Persons and registered persons on recognizing financial exploitation and their obligations under the proposal. Fourth, the Trusted Contact Person should be informed of their status on the account and asked whether they wish to serve in such a capacity. Finally, FINRA should limit the personal information disclosed to family members not listed as the Trusted Contact Person on the account.

I. FINRA SHOULD CHANGE THE LANGUAGE IN PROPOSED RULE 2165(b)(1) FROM "MAY" TO "SHALL" TO INCREASE THE RULE'S EFFECTIVENESS.

Responding to question one in Notice 15-37, the language in Proposed Rule 2165(b)(1) should require rather than permit a Qualified Person to place a temporary hold on a Specified

Adult's account(s) when there is a reasonable belief that financial exploitation is likely to occur. As proposed, proposed Rule 2165 would create a safe harbor for firms who exercise their discretion and halt exploitative transactions. However, the proposal also allows a Qualified Person to use their discretion to ignore a reasonable belief that financial exploitation is likely and do nothing.

We recommend making the obligation mandatory rather than permissible. The proposal as written lacks any enforcement mechanism. In the event that a Qualified Person does not act when there is a reasonable belief that financial exploitation is likely to occur, the Qualified Person should not be afforded a safe harbor. Creating a safe harbor only when a firm acts to prevent financial exploitation offers protection only to the firm and not to the customer. Protection of the customer should be the paramount concern, and the greatest concern is inaction in the face of a reasonable belief of financial exploitation.

Changing the proposal's language from "may" to "shall" will create an enforcement mechanism if a Qualified Person fails to act even when presented with the likelihood that a customer would be a victim of financial exploitation. A Qualified Person that does not comply with this requirement would be subject to investigation and sanction under FINRA Rule 8000. Moreover, a customer adversely impacted by the failure to act could enforce the obligation through an action against the firm. A safe harbor should only exist if it provides protection to the customer in exchange for a limitation on the firm's liability. Thus, a mandatory provision would require firms to act to protect a customer if there is a reasonable belief of exploitation and a firm would be liable for failing to prevent harm in the face of such a belief.

II. THE DEFINITION OF QUALIFIED PERSONS SHOULD INCLUDE REGISTERED PERSONS BECAUSE THEY ARE MOST LIKELY TO FIRST DETECT FINANCIAL EXPLOITATION

In response to question eight of Notice 15-37, we support including registered persons in the definition of Qualified Person to enhance the Proposal's effectiveness. Because registered persons are the front line employees who interact with the customers and have the most knowledge of their accounts and circumstances, they are in the position most likely to detect financial exploitation. In fact, as written, registered persons are the only firm employees required to receive any training on the proposal. Similar proposals aiming to protect vulnerable adults from financial exploitation include front line employees within the definition of qualified employees and this proposal should do the same. For example, the North American Securities Administrators Association, Inc.'s (NASAA) proposed model legislation aimed at preventing exploitation of vulnerable adults includes front line employees in their definition of "qualified employees."[1] By increasing the scope of Qualified Persons to include front line employees like similar proposals have done, FINRA's proposed rule would be more effective.

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[1] North American Securities Administrators Association Proposed Model Legislation or Regulation to Protect Vulnerable Adults From Financial Exploitation, Section 2.(7), available at http://nasaa.cdn.s3.amazonaws.com/wp-content/uploads/2015/09/Request-for-Comments-Model-Seniors-Legislation-Final-2.pdf.

III. FINRA SHOULD OVERSEE A COMPREHENSIVE TRAINING PROGRAM FOR ALL QUALIFIED PERSONS TO ENHANCE COMPLIANCE AND DETECTION OF EXPLOITATION

While we agree with the proposed 2165.03 to the extent that it recognizes the necessity of training, FINRA should oversee the training and ensure all registered representatives and Qualified Persons are trained. Training is essential to the successful implementation of the Proposal, but leaving it up to the members may create inconsistencies and knowledge gaps from firm to firm. FINRA should use its experiences with its *Securities Helpline for Seniors* and its role in overseeing the continuing education requirements under Rule 1250(a)(1) to develop a training program. Specifically, FINRA should incorporate into its Rule 1250 training a module on recognizing financial exploitation of vulnerable adults as well as the mechanics of the proposed rule. Rule 1250(a)(1) gives FINRA the power to determine the content of the Regulatory Element and requires that each registered person complete the Regulatory Element on the second anniversary of their registration and every three years thereafter. A FINRA created and enforced training program focused on the procedural aspects of the Proposal and detection of financial exploitation will best protect vulnerable adults.

Additionally, all Qualified Persons, not just registered representatives, should receive the proposed training, whether through the Regulatory Element or thorough a separate training. Moreover, because not all registered persons will be required to take the Regulatory Element when the Proposal goes into effect, we recommend offering a web-based training to all Qualified Persons prior to any effective date.

IV. THE TRUSTED CONTACT PERSON SHOULD BE NOTIFIED OF THEIR STATUS WHEN THEY ARE SELECTED TO ENSURE THEIR WILLINGNESS TO ACT AS A RESOURCE IF NEEDED

Firms and registered representatives should take steps to determine whether a Trusted Contact Person is willing and able to serve in that role. The proposed changes to Rule 4512 only require that a Trusted Contact Person's information be obtained. The proposal should go further so that firms have a resource to work with in the event a customer becomes incapacitated or may be exploited. Simply contacting the person designated as the Trusted Contact Person could reveal their willingness to assist before there is a problem, and the firm then can make a reasonable effort to obtain another Trusted Contact Person if the first identified person is unwilling to serve. Such a requirement would also prompt customers to have conversations with their proposed Trusted Contact Person to ensure that the person is willing to serve. This would also open the line of communication between the customer and the Trusted Contact Person about the customer's wishes, aims and goals if they are not able to make decisions on their own behalf. The Trusted Contact Person can serve as an important resource in the event that there is a suspicion of financial exploitation and could offer valuable information and serve as an intermediary to the vulnerable individual. Confirming their willingness to assist, and finding another person in the event that they are unwilling to assist, will facilitate the proposal's aim of stopping financial exploitation and protecting customers.

V. IMMEDIATE FAMILY MEMBERS SHOULD RECEIVE LIMITED INFORMATION IF THEY ARE CONTACTED CONCERNING AN ACCOUNT TO PROTECT CUSTOMER PRIVACY

We agree that, as question three asks, information given to a Trusted Contact Person should be limited. However, question three should be reframed to also address information disclosed to immediate family members if a Trusted Contact Person is unavailable. As proposed, if the Trusted Contact Person is unavailable or the Qualified Person believes that the Trusted Contact Person has engaged, is engaged or will engage in the financial exploitation of the vulnerable adult, then the Qualified Person is to contact an immediate family member. We recommend that anyone who was not designated as a Trusted Contact Person should be contacted only for the purpose of gathering information about the identity of a guardian, executor, trustee or holder of a power of attorney. This would ensure that personal and private information is not disclosed to persons the vulnerable individual did not wish to receive that information.

In keeping with our mission to protect investors, the Investor Advocacy Clinic believes that the proposal will help protect vulnerable adults from financial exploitation. However, we believe that requiring action when a reasonable belief that financial exploitation is likely will enhance the proposal's effectiveness. FINRA should also broaden the definition of Qualified Persons to include registered persons, and notify Trusted Contact Persons when they are first selected to ensure their willingness to act as a resource if needed. Additionally, we believe that a consistent training program and limiting information given to immediate family members will enhance the proposal's preventative measures and protect customer privacy. Thank you again for your consideration and we look forward to any further discussion.

Best regards,

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November 30, 2015

Via Email to pubcom@finra.org
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1735 K Street, NW
Washington, DC 2006-1506

Re: Regulatory Notice 15-37 – Proposed Rules Relating to Financial Exploitation of Seniors and Other Vulnerable Adults; Proposed FINRA Rule 2165

Dear Ms. Asquith:

The University of Miami School of Law Investor Rights Clinic ("the IRC") greatly appreciates the opportunity to comment on FINRA Regulatory Notice 15-37. The IRC is a University of Miami School of Law curricular program in which students provide legal assistance to individuals of modest means who have suffered investment losses, but due to the size of their claim, cannot find legal representation. Under faculty supervision, law students provide legal assistance and advice to investors. Since the IRC opened in January 2012, it has assisted many elderly investors who have suffered financial losses in their retirement accounts. The IRC has a strong interest in rules relating to the protection of elderly and retired investors.

Regulatory Notice 15-37 seeks comments on proposed rules to address the financial exploitation of seniors and other vulnerable adults. Regulatory Notice 15-37 proposes amendments to Rule 4512, Customer Account Information, which would require firms to obtain the name of and contact information for a trusted contact person for a customer's account. The IRC fully supports these proposed amendments because they will provide an outlet to immediately report activity in one's account to a trusted individual. This comment letter will address FINRA's new proposed rule, Rule 2165, Financial Exploitation of Specified Adults, which would permit "Qualified Persons"[1] of firms to place temporary holds on disbursements of funds or securities from the accounts of "Specified Adults"[2] where there is a reasonable belief of financial exploitation of those customers. This rule creates no obligation to place a hold on funds or securities where financial exploitation may be occurring, but it provides a safe harbor to firms who

[1] A "Qualified Person" is defined as "an associated person of a member who serves in a supervisory, compliance or legal capacity" that is reasonably related to the account of the specified adult. Rule 2165(a)(3).

[2] A "Specified Adult" is defined as a "natural person age 65 and older." Rule 2165(a)(1)(A).

exercise discretion to place the temporary hold in such circumstances. The IRC believes that to more effectively protect elderly investors, proposed FINRA rule 2165 should be mandatory, not permissive. Furthermore, when a broker-dealer has a reasonable belief that financial exploitation has occurred, may be occurring, or is about to occur, it should be required to report the financial exploitation to the relevant authorities.

A. The Increasing Need to Protect Aging Population from Financial Exploitation

There is a growing need to protect elders from financial exploitation. An estimated one million elders lose over $2.9 billion each year due to financial abuse.[3] The 2009 MetLife Study found that "[t]he typical victim is between 70 and 89, white, female, frail, cognitively impaired, trusting, and often lonely or isolated."[4] Over 40% of the perpetrators of the abuse were family, spouses, and caregivers.[5] This problem is significantly larger than reported[6] and it's growing by virtue of the fact that the U.S. population is aging. Persons aged 65 and older represent the fastest growing segment of the U.S. population.[7] Approximately 10,000 people will turn 65 every day for the next 15 years.[8]

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[3] MetLife Mature Market Institute ("Metlife"), *Broken Trust: Elders, Family & Finances*, (March 2009), Joint study with National Committee for the Prevention of Elder Abuse ("NCPEA") and the Center for Gerontology at Virginia Polytechnic Institute and State University (hereinafter, "2009 MetLife Study"). In 2010, MetLife conducted a follow-up joint survey that found a 12% increase in the amount of financial losses reported, to $2.9 billion per year. *The MetLife Study of Elder Financial Abuse: Crimse of Occasion, Desperation and Predation Against America's Elders* (June 2011), at 2.

[4] *Id.* at 8.

[5] *Id.* at 12.

[6] The 2009 MetLife Study found that elder financial abuse, like elder abuse generally, is significantly underreported for a variety of reasons, including, embarrassment, fear of interference from family or government in their personal lives, lack of realization that they have been victimized, fear of additional harm from the perpetrator, and a belief that financial abuse is a consequence of "doing business" or taking risks, among other things. *Id.* at 21.

[7] Carrie A. Werner, *The Older Population: 2010*, U.S. Census Bureau, P1 U.S. Government Printing Office, Washington DC (2010). Between 2000 and 2010, the population of persons aged 65 and over grew at over 15% faster than the 9.7% growth of the overall U.S. population. *Id.*

[8] SEC Press Release: SEC Staff and FINRA Issue Report on National Senior Investor Initiative (April 15, 2015). *See also* SEC Office of Compliance Inspections and Examinations and FINRA Report on National Senior Investor Initiative (April 15, 2015) (hereinafter, "SEC/FINRA National Senior Investor Report"), at 3 (citing Administration on Aging Administration for Community Living, U.S. Department of Health and Human Services, A Profile of Older Americans: 2012, page 1 (2012), *available at*: http://www.aoa.gov/Aging_Statistics/Profile/2012/docs/2012profile.pdf)

FINRA has long recognized the important role broker-dealers can play in helping curb financial abuse of the elderly and vulnerable adults. In 2007, FINRA issued Regulatory Notice 07-43, which outlined several significant ways financial firms can play a role in curbing elderly financial abuse.[9] A joint report issued by the SEC and FINRA in 2008[10] summarized information voluntarily shared by firms in connection with senior-focused supervision and compliance reviews, among other things, and the 2010 Addendum to the Report[11] outlined practices firms had put in place on how to handle customers suffering from diminished capacity and potential issues of financial exploitation. Most recently, the National Senior Investor Initiative report issued this year by the SEC and FINRA reminded the industry of its critical role in curbing financial abuse and highlighted the best, or "notable practices," employed at some of the firms which could help identify and address issues relating to senior investors.[12] FINRA also launched this year its Securities Helpline for Seniors, through which it offers seniors an opportunity to call for assistance regarding their brokerage accounts. In Regulatory Notice 15-37, FINRA in fact credits the Senior Hotline as having "highlighted issues" relating to the financial exploitation of seniors and other vulnerable adults, and the importance of the firm's role in curbing that abuse. These issues are precisely why a firm should be *required* to act if a Qualified Person reasonably believes that financial exploitation has occurred, is occurring, has been attempted, or will be attempted, specifically, by reporting that conduct to the relevant authorities and placing a temporary hold on the suspected transaction.

B. FINRA Rule 2165 Should Mandate Firms to Report Financial Exploitation and Abuse to Relevant Authorities

Increasing mental and physical ailments associated with aging can impede an elderly investor's ability to handle his/her financial affairs.[13] Registered persons are in a perfect position to recognize signs and symptoms of diminished capacity and dementia with respect to their clients' ability to handle their finances and prevent elder financial

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[9] Regulatory Notice 07-43, *Senior Investors: FINRA Reminds Firms of Their Obligations to Senior Investors and Highlights Industry Practices to Serve these Customers* (September 2007). Although RN 07-43 largely focused on sales practice and communication issues impacting seniors, it urged firms to review and enhance its policies and procedures "in light of the special issues that are common to many senior investors."

[10] "Protecting Senior Investors: Compliance, Supervisory and Other Practices Used by Financial Services Firms in Serving Senior Investors," by SEC's Office of Compliance Inspections and Examinations, NASAA and FINRA (September 22, 2008) ("2008 Report"), *available at:* http://www.sec.gov/spotlight/seniors/seniorspracticesreport092208.pdf

[11] *Available at:* https://www.sec.gov/spotlight/seniors/seniorspracticesreport081210.pdf

[12] SEC/FINRA National Senior Investor Report, at 3-5, 9, 11, 15, 17, 20, 23, 26 and 31.

[13] Lawrence A. Frolik, *Protecting Our Aging Retirees: Converting 401(k) Accounts into Federally Guaranteed Lifetime Annuities,* 47 San Diego L. Rev. 277, 292-94.

abuse.[14] Financial advisors frequently become aware of suspicious activity before the investor's family or friends.[15] FINRA also acknowledges in Regulatory Notice 15-37 that "a customer's registered representative may be the first person to detect potential financial exploitation." As such, when there are reasonable grounds to believe a client is being financially exploited, the member firm should be required to report potential exploitation to proper authorities.

In fact, many states already require financial institutions to report suspected financial abuse of the elderly. According to the 2013 Nationwide Survey of Mandatory Reporting Requirements for Elderly and/or Vulnerable Persons ("2013 Survey"),[16] all states have passed statutes requiring certain professionals, including, but not limited to, attorneys, accountants, doctors, nurses and other health care workers, nursing homes, and care providers. Brokers and investment advisers should have no less than the same mandatory reporting requirements as other professionals.

The 2013 Survey also makes plain the need for FINRA to level the playing field and *require* the same basic protection for *all* investors. To date, only twenty-one (21) states and the District of Columbia require financial institutions to adhere to reporting requirements.[17] Three states, Iowa, Virginia, and Washington, include "financial institutions" among the group of professionals who may report instances of financial abuse, but reporting is voluntary and not mandatory.[18] Moreover, among the states that include employees of financial institutions within the category of persons either required or permitted to report suspected abuse to authorities, the definition of a "financial institution" may not include a broker-dealer or investment adviser. For example, in

[14] *See* Naomi Karp & Ryan Wilson, Protecting Older Investors: The Challenge of Diminished Capacity, AARP PUBLIC POLICY INSTITUTE 17 (Nov. 2011), http://www.aarp.org/content/dam/aarp/research/public_policy_institute/cons_prot/2011/rr2011-04.pdf.

[15] *Id.*

[16] The 2013 Survey was published by New York District Attorney's Office and NAPSA Elder Financial Exploitation Advisory Board.

[17] Fifteen (15) states require "any person" or "any individual" to report suspected financial exploitation to the relevant authorities, including: Delaware, Florida, Indiana, Kentucky, Louisiana, Mississippi, New Hampshire, New Mexico, North Carolina, Oklahoma, Rhode Island, South Carolina, Tennessee, Texas, Utah and Wyoming. The remaining six (6) states, Arizona, Arkansas, California, Georgia, Kansas and Maryland, and the District of Columbia, have specific references to "financial institutions" or persons having custody or control of the vulnerable adult's property. *See* 2013 Survey.

[18] *Id.* Effective since June 2010, Washington State has a mandatory reporting requirement, but only in special circumstances. Specifically, *if* the institution places a hold on a disbursement of funds due to suspected financial exploitation, only then it *must* report the suspected abuse to authorities. Wash. Rev. Code Ann. § 74.34.215.

California, since January 1, 2007, officers and employees of financial institutions are required to report suspected financial abuse of an elder or dependent adult, with "elder" defined simply as a California resident age 65 or older.[19] However, the California law is limited because, among other things, "financial institutions" are specifically defined to include national banks, savings and loans, state banks, and trust companies whose deposits are not limited solely to funds held in a fiduciary capacity, and federal or state credit unions.[20]

Adding a mandatory reporting obligation to the proposed FINRA Rule 2165 would provide uniform protection for the most vulnerable of the nation's investors. Such a requirement would prompt member firms to provide training to their registered persons on recognizing signs of potential financial abuse or exploitation, which should be encouraged.

C. When There is Reasonable Suspicion of Financial Exploitation or Abuse, a Firm Should Have an Obligation to Place a Temporary Hold on Disbursement of Funds or Securities

As currently proposed, Rule 2165 would permit, but not require, member firms to place a temporary hold on disbursement of funds or securities from the account of a Specified Adult if the Qualified Person "reasonably believes that financial exploitation of the Specified Adult has occurred, is occurring, has been attempted, or will be attempted." Rule 2165(b)(1)(A). Within two days after placing the hold, the firm must notify the person(s) authorized to transact business on the account and the "Trusted Contact Person" or, if the firm believes that person is involved in the financial exploitation, an immediate family member, and must also conduct an internal review. Rule 2165(b)(2)(b). The temporary hold expires after 15 days, unless extended under certain defined circumstances. Rule 2165 (b)(1)(C). The rule provides a safe harbor for those firms that choose to exercise discretion and temporarily hold disbursements. Rule 2165.01.

The proposed rule would allow a broker-dealer to *ignore* evidence of financial exploitation of a vulnerable adult because the rule permits, rather than mandating the reporting. Indeed, as written, if a broker-dealer or a registered person becomes aware of information sufficient to establish a reasonable belief of financial exploitation of a vulnerable adult, it does not have to place a temporary hold on the disbursement of funds or securities. Given the need for strong protection of the elderly investing population, the member firm should be *required* to place a temporary hold in order to prevent or mitigate the dissipation of its client's assets.[21]

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[19] Cal. Welf. & Inst. Code §§ 15610.27, 15630.1.

[20] *Id.* at § 15630.1(b).

[21] While the industry may object to a mandatory requirement on the grounds that it will expose members to civil liability, the proposed rule provides a safe harbor to firms that exercise discretion and implement the procedures outlined in the rule. With respect to civil liability for a

Moreover, in the context of a permissive rule, the procedures that firms must implement and follow create a strong disincentive for firms to provide this important protection to their clients. Specifically, if a firm chooses to exercise its discretion to place a temporary hold on funds, the firm is required to: (1) establish and maintain specific written supervisory procedures reasonably designed to achieve compliance with the rule;[22] (2) develop and document specific training policies or programs reasonably designed to ensure that registered persons comply with the requirements of this Rule;[23] and (3) establish and maintain records related to the compliance with the rule.[24] The easier and less expensive choice for firms would be to simply do nothing.

Requiring *all* member firms to establish and maintain written supervisory procedures and training programs for its registered persons related to the identification, escalation, and reporting of matters involving the financial exploitation of its elderly clients would promote the interest of investor protection and ensure protection for seniors who are being financially exploited. The IRC also believes that mandating Rule 2165 will provide a strong deterrent against misconduct, preventing harm before it occurs in many cases. Thus, the implementation of Rule 2165, with the modification that the actions be mandatory and not permissive, and that the firm report suspected abuse to the relevant authorities, would benefit the elderly community and protect investors.

D. Conclusion

The IRC is committed to protecting seniors and other vulnerable adults and strongly supports FINRA's efforts to providing protection to this vulnerable group. In summary, the IRC asks that FINRA amend the proposed Rule 2165 to address the foregoing serious shortcomings in its current form. The IRC thanks FINRA for the opportunity to comment on this important topic.

Respectfully submitted,

Neda Ghomeshi

Neda Ghomeshi
Legal Intern, Investor Rights Clinic

Teresa J. Verges
Director, Investor Rights Clinic

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firm's *failure* to act, the rule sets forth an objectively reasonable standard that all firms should be required to meet.

[22] FINRA Rule 2165.02.

[23] FINRA Rule 2165.03.

[24] FINRA Rule 2165 (b)(2)(C).

Having retired from AG Edwards as an investment broker, I can say that not all fraud is based on cognitive disability. My client was vulnerable because she lost her husband, lived remotely and was very lonely. Started playing the lottery and a criminal group out of Canada reduced her estate from approximately three million to thirty-five thousand dollars. A CPA, myself, a bank and a doctor's office all risked disciplinary action for working together on confidential issues. Her only disability was loneliness for which there is no exam. Her co-trustee, her son, stated "It's her money." His tune changed when she died.
The bank told me she was making large checks out to people she couldn't explain and she also asked me to withdraw $100,000.00 which was totally out of character. I insisted on hand delivering the check and also insisted we have a couple of strong drinks and under their influence did she admit what was going on, but was also very embarrassed. Gave me back the check and it was re-deposited to her account. I retired and the rest is history. FBI said she was on a "sucker" list.

There needs to be a whole assessment requirement, not just cognitive.

What if the 'senior' does not agree that he is being exploited and wants immediate removal of the 'hold'? How would that happen? What if the hold is done to prevent a logical decision by the senior which the 'trusted contact' does not agree with or which in some way works to the 'trusted contact's' disadvantage? The 'trusted contact', while they might not be able to manage the accounts in question, might well be affected by the results of the 'senior's' decision.

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Via Email to pubcom@finra.org
November 20, 2015

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Washington, DC 20006-1506

Dear Ms. Asquith:

The Investor Justice and Education Clinic of Howard University School of Law (the "IJEC") respectfully submits this comment letter with regard to FINRA Regulatory Notice 15-37, Financial Exploitation of Seniors and Other Vulnerable Adults. The IJEC provides free legal services to the underserved investing community. Many of our clients are senior citizens and retirees in need of protection of their funds and securities from the exploitation by others. In the course of our representation of these senior citizen investors we have become acutely aware that many senior citizens' experience a decline in their ability to manage their own financial affairs, and understand increasingly complex financial products. Many senior citizens also rely on the assistance and advice of trusted family, friends, and advisors in handling their financial affairs. As a result, many of these senior citizens are vulnerable to financial exploitation by these same trusted people and others.

Consequently, the IJEC generally supports the overall purpose of FINRA's efforts to enhance the investor protection of senior citizens and other vulnerable adults in proposed FINRA Rule 2165, and proposed amendments to FINRA Rule 4512. We appreciate the opportunity provide some recommendations to FINRA that we believe will strengthen the effectiveness of FINRA's proposed rules, and enhance investor protections for senior citizens and other vulnerable adults.

Trusted Contact Person

FINRA's proposed rules provide that broker-dealers make reasonable efforts to obtain the names of and contact information for a "trusted contact person" upon the opening of an account for a senior citizen or other vulnerable adult. In general, we believe the proposal would add additional needed protections for vulnerable adult investors. In this regard, there have been numerous news reports of the exploitation of seniors and other vulnerable adults by financial professionals, family, friends, acquaintances, and others. In our legal representation of senior citizen investors we have seen how many of these senior citizen investors could have avoided financial losses if their brokers had the ability to place temporary holds on their accounts, and notify trusted contacts, upon learning of questionable transactions in the accounts.

However, we believe FINRA's current proposal could be made more effective, and provide more protection for senior citizens and other vulnerable adults.

FINRA's current proposal does not require that brokers notify the trusted contact person of their designation as a trusted contact person. Since it is likely that many vulnerable adults may simply forget to provide notification to the trusted contact person themselves, the trusted contact person my never learn of the designation. Therefore, we recommend that brokers be "required" to notify trusted contact persons that they have been designated as such. We believe that this mandatory notification requirement will provide trusted contact persons with the impetus to take an active interest in the financial well-being of the vulnerable adult, and help deter financial exploitation of the vulnerable adult by others.

In addition, mandatory notification will put the brokers on notice that trusted contact persons are aware of their designation as a trusted contact person. This will discourage broker misconduct since brokers will be aware that the trusted contact person will likely help vulnerable adults monitor their accounts to prevent financial exploitation of the vulnerable adult by brokers and others. However, if brokers are not required to notify trusted contact persons of this designation, then the investor protections which would have been afforded to the vulnerable adult by such notification to the trusted contact person will be lost.

In addition, we believe protection of vulnerable adults would be enhanced if the proposed rule requires that brokers identify not just one trusted contact person, but also a second trusted contact person. We believe imposing a two trusted contact person requirement would further enhance the protection of vulnerable adults and prevent financial exploitation. In this regard, in the event that one trusted contact person is also involved in financial exploitation of the vulnerable adult, there would be a second trusted contact person who will be put on notice to help protect the vulnerable adult.

Furthermore, we believe that FINRA's rule should include provisions to ensure that the two trusted contact persons are independent of one another. For example, the rule could prohibit married couples, or family members who live in the same household, from being designated as the two trusted contact persons. Such prohibitions would help mitigate the risks of the two trust contact persons colluding to financially exploit the vulnerable adult.

Vulnerable Adults as Beneficiaries of Accounts of Others

In many cases, vulnerable adults are named as “beneficiaries” of accounts of primary account holders. Such beneficiaries are also vulnerable to financial exploitation by others. For Questionable activities in the account that deplete the accounts assets, or possibly attempt to change beneficiaries, would detrimentally impact the vulnerable adult’s interests as beneficiary. Consequently, we recommend that the protections afforded to account holders by FINRA’s proposed rules, also be provided to vulnerable adults who are “ named beneficiaries” on the accounts of others.

Other Comments

We believe brokers’ costs of identifying and notifying trusted contact persons and customers, placing the temporary holds on accounts, and compliance are greatly outweighed by the considerable investor protections provided by the proposed rules to vulnerable adults. We further believe such added investor protections will encourage more seniors and retirees to trust their brokers and the financial markets with their investments and savings, providing a stimulus to our overall economy. We further believe that any possible litigation costs to brokers are too remote and hypothetical to be of consequence and, in any event, are clearly outweighed by the investor protection benefits of the proposed rules.

Thank you for your kind consideration of our comments.

Regards,

Investor Justice and Education Clinic
Howard University School of Law
Taurean McCrea, Student Attorney
Karissa Getz, Student Attorney
Professor Bruce Sanders, Supervising Attorney

Gail Liberman

Comments on FINRA Regulatory Notice 15-37
Oct. 28, 2015

I applaud brokerage firms that are sensitive to the vast exploitation of seniors, and encourage escalation of suspected senior abuse to proper authorities. However, I urge FINRA to reject rule 15-37.

As a newly-retired financial journalist from South Florida, who has juggled running a company with caring for several elderly relatives, I fear this rule offers too much opportunity for overuse and abuse.

I 'm especially worried about the idea of offering firms a safe harbor if they temporarily freeze client funds when suspecting financial exploitation of a person at least 65 years-old or with a mental or physical impairment. This should be an action taken only upon the order of a state or federal regulator, following a quick independent objective investigation.

I know how difficult it was for me—a legitimately appointed Power of Attorney--to gain access to funds desperately needed to arrange full-time care for a relative who didn't live nearby and became unable to regularly eat or pay bills. Among the obstacles in exercising my POA :

- Demands that I produced a "certified" copy of the power of attorney or a "Medallion signature guarantee." Yet, I lived nowhere near the lawyer who drafted the POA and my own bank branch refused to accept the liability of a signature guarantee.
- One out-of-state financial institution refused to accept ANY Power of Attorney document other than the original. How could I possibly entrust my only copy of the POA to a minimum-wage employee at a bank, let alone the U.S. mail?

Fortunately, my relative totally cooperated and was still able to convey the necessary orders himself. But each effort to obtain access to his assets at a variety of institutions required that I miss valuable time at work to travel to his apartment, get him, and bring him to whatever destination was necessary to accomplish this. This is on top of innumerable work days already missed as I made sure he was eating properly, his health care needs were met and his bills were paid. My caregiving also involved researching and locating a suitable long-term care facility and moving his furniture out of his apartment. This proposed rule comes as some 76 million U.S. baby boomers are likely to be experiencing similar nightmarish headaches with their own parents, friends and relatives. Rule 15-37 can only add to their burdens.

Meanwhile, the markets have been subject to unprecedented volatility. A firm's decision to temporarily withhold disbursement of funds prior to Oct. 17, 1987, for example, could have resulted in an average near-23 percent drop in assets for a senior equity investor. That could mean nearly $23,000 for someone with a $100,000 nest egg—which, based on published reports, is some three times the average amount a retiree has.

If the market performs poorly long-term, as some say it could, this proposed rule also would provide firms with a very good excuse to freeze senior funds. A temporary freeze would pose an attractive way for a firm to preserve valuable fee income required for profitability or even to stay in business. Although the rule does maintain specific supervisory procedures and requires firms to develop and document specific training, regulatory enforcement tends to be spotty and slow-moving at best. Just look at how well all these enforcement tactics worked prior to the recession in 2008!

As for requesting clients to provide a "trusted contact" in the event of suspected financial exploitation, what guarantee is there that a person whose mental capacity is diminished will use good sense in choosing such a contact? Perhaps the contact will prove just as incompetent as the client or more unsavory than the person suspected of doing the exploiting. Virtually anyone else my own relative might have appointed as a "trusted contact," predeceased him.

I'm months away from age 65. So I also find the targeting of this rule to someone of that age laughable. My own father is 91 years-old and is sharp as a tack! Yet, I could see firms, under this rule, at least temporarily freezing disbursement of his assets to me, if it ever becomes necessary, due simply to discrepancies between my maiden and married names, both of which I use.

Statistics on senior exploitation are sketchy. Published reports indicate that many such incidents go unreported. Do we honestly know there are more cases of financial exploitation of seniors or impaired persons other than brokers and firms?

FINRA and members would be better off working more closely with authorities knowledgeable about investigating financial exploitation of seniors, and concentrating on making sure that its own members act more responsibly to seniors and impaired persons. They also would do better to upgrade their efforts to encourage all clients to provide them with more than one back-up for a power of attorney designee, beneficiary and executor, so that client wishes are more certain to be followed. My own experience indicates most financial institutions today have no space in their computer systems for such back-up designees. This is significantly more important than getting clients to provide a “trusted contact,” which may or may not turn out to be as trustworthy or mentally competent as either the client or member firm believes.

Cetera® FINANCIAL GROUP

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Submitted Via Email to *pubcom@finra.org*

November 30, 2015

Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

Re: Proposed FINRA Rules 4512 and 2165 - Financial Exploitation of Seniors and Other Vulnerable Adults

Dear Ms. Asquith:

Cetera Financial Group, Inc. ("Cetera") appreciates the opportunity to respond to FINRA's request for comment on Regulatory Notice 15-37 ("RN 15-37" or the "Proposal"), which proposes rules addressing the financial exploitation of seniors and other vulnerable adults. Cetera is the holding company for or is affiliated with ten FINRA-member, independent channel broker-dealers,[1] with approximately 9,400 total financial advisors. Cetera's broker-dealers conduct retail business and serve a diverse range of customers, including seniors and other customers affected by this Proposal.

RN-15-37 proposes (1) amendments to FINRA Rule 4512 (Customer Account Information) to require firms to make reasonable efforts to obtain the name of and contact information for a trusted contact person for a customer's account; and (2) the adoption of new FINRA Rule 2165 (Financial Exploitation of Specified Adults) to permit qualified persons of firms to place temporary holds on disbursements of funds or securities from the accounts of specified customers where there is a reasonable belief of financial exploitation of these customers.

Cetera commends FINRA for its attention to this group of potentially at-risk customers. The Proposal is helpful in that it provides direction and, in certain circumstances, a safe harbor, to a firm that desires to help prevent suspected financial exploitation. However, Cetera is concerned that there is a lack of clarity in certain instances in the proposed rules, the Proposal may result in potential liability to members and their employees, and the Proposal may conflict with state laws, as outlined herein.

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[1] Cetera Advisors LLC, Cetera Advisor Networks LLC, Cetera Investment Services LLC, Cetera Financial Specialists LLC, First Allied Securities, Inc., Summit Brokerage Services, Inc., Investors Capital Corp., Legend Equities Corp., Girard Securities, Inc. and VSR Financial Services, Inc.

Cetera FINANCIAL GROUP

I. Firm Employees Should Be Protected from Liability.

As proposed, Rule 2165 states that if a Qualified Person reasonably believes that financial exploitation has occurred, is occurring, has been attempted, or will be attempted, the "*Qualified Person* may place a temporary hold on a disbursement of funds or securities…" (emphasis added). The term "Qualified Person" is defined as "an associated person of a member who serves in a supervisory, compliance, or legal capacity that is reasonably related to the Account of the Specified Adult." Cetera is concerned that, rather than providing a safe harbor, such wording could be interpreted to impose a duty, and therefore potential liability, on member firms' employees. For example, if it is discovered that a firm's customer is the victim of financial exploitation, the proposed wording of Rule 2165 could lead to a private action against any "Qualified Person," if the victim or his or her representatives assert that such person should have exercised his or her right to delay disbursements under the rule.[2]

To better protect firms' employees, Cetera believes that any rights granted under proposed Rule 2165 should be granted to the firm, and not to individual employees, especially since employees in the listed roles would not typically have direct contact with clients. Rather, supervisors, attorneys and compliance personnel would often be relying on a registered representative's account of his or her interactions with a client.

II. It Is Unclear What Constitutes a "Reasonable Belief" Under Proposed Rule 2165.

Rule 2165 does not provide guidance as to what constitutes a reasonable belief that: (i) financial exploitation has occurred or has been attempted; or (ii) a customer has a mental or physical impairment that renders the individual unable to protect his or her own interests. Such determinations are inherently subjective and, with respect to the latter and according to the Proposal, may be based on "facts and circumstances observed in the member's business relationship" with the person.

The proposed rule would essentially require a firm to act as a trier of fact; however, firms generally would not have the expertise to make determinations on either of the above-noted issues. A firm's decision on such subjective issues, either way, would create the potential for clients to dispute the "reasonableness" of a firm's actions.

In particular, a determination as to financial exploitation could be problematic for a firm. "Financial exploitation" is defined in the proposed rule to include "the wrongful or unauthorized taking, withholding, appropriation, or use of a Specified Adult's funds or securities." A reasonable belief that such an act has occurred, or will occur, would entail significant fact finding

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[2] While violation of FINRA Rules is often determined not to be grounds for a private cause of action, it is nevertheless common for claimants in arbitration to cite a violation of FINRA Rules as the basis for compensation.

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and record keeping on the part of member firms. For example, inherent in a determination of financial exploitation is determining the intended use of funds to be withdrawn from an account. A firm that investigates for financial exploitation, and intends to take advantage of the safe harbor, would seemingly be required to inquire as to a client's intended use of funds when a disbursement is requested. Such a practice would be fraught with issues and uncertainties, as it would force a firm to make a subjective determination as to what is and is not an appropriate use of funds. Such an inquiry is quite different from the typical fact finding undertaken by firms when recommending investments or investment strategies, and would require new policies and procedures, new expertise and new record keeping.

To comply with this rule and avoid client disputes, is it contemplated that firms would need to either retain outside experts or hire a specialist dedicated to these issues? Such a requirement would significantly increase the cost of compliance with this rule. In the absence of expert guidance or further clarification from FINRA, firms could potentially be pressured to "err on the side of caution" and hold disbursements when such action otherwise may not be warranted. The potential for unwarranted delays in disbursements could harm customers who are not victims of financial exploitation. Additionally, various firms would likely apply different "reasonable belief" standards, which could result in disparate application of the rule throughout the industry.

III. Firms Could Be Subject to Liability Whether or Not Disbursements Are Delayed.

Because of the competing interests in any given transaction, the right to delay disbursements could subject a firm to liability whether or not it chooses to exercise this right, as illustrated in the scenarios below.

If, pursuant to Rule 2165, a Qualified Person were to place a temporary hold on a disbursement and the member firm were to make all required notifications, the hold would simply expire in 15 business days, unless sooner terminated by a court or extended by either a court or the Qualified Person. Even if extended by the Qualified Person, the hold would expire in an additional 15 days in the absence of a court action.

It is unclear what is expected from the firm and the Qualified Person during the temporary hold. Rule 2165 would require that the firm notify the Trusted Contact Person and all parties authorized to transact business on the account, unless such persons are suspected of engaging in the exploitation. It is implied, but perhaps should be explicitly stated, that those notified individuals (rather than the firm) would then have responsibility for taking action in court or notifying any applicable state agencies of the suspected exploitation. Similar proposed state legislation has given firms the option to notify a state agency, which seems to better clarify the transfer of the matter from the firm to an agency that is empowered to address the financial exploitation. To that point, FINRA may consider whether state legislation, as opposed to a FINRA rule, is a more effective approach for addressing financial exploitation of seniors and vulnerable adults.

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Rule 2165 would also require that the firm undertake an internal investigation; but if, after such an investigation, the firm and Qualified Person still reasonably believe that financial exploitation will occur, is the firm nonetheless required to process the disbursement if the court has not acted, including in scenarios where the Trusted Contact Person doesn't take action to protect the client? A disbursement in these circumstances could lead to a private action against the firm. Meanwhile, in this scenario, the firm is also subject to liability to the client, who may allege that the delay is wrongful under state law. Cetera appreciates the safe harbor provided in the Supplementary Material to Rule 2165, but notes that while such safe harbor may protect a firm from enforcement of FINRA Rules, it would not necessarily prevent a firm's liability under applicable state laws.

Alternatively, if a firm declines to delay a disbursement, despite having a reasonable belief that financial exploitation is occurring, a client or his or her representatives may claim that the firm had a duty to exercise its rights under Rule 2165. Cetera supports the permissive nature of proposed Rule 2165, but sees potential that it may not be construed as such.

IV. The Proposed Rules May Contradict State Law.

There is a significant possibility that compliance with the proposed rules could be contrary to applicable state laws. For example, laws in certain states may not permit a broker-dealer to deny a client access to his or her property. Another potential conflict with state laws lies in the definition of "financial exploitation," which includes deceptive acts taken through the use of a power of attorney, guardianship or other authority. In some states, it is illegal to deny the authority of an attorney-in-fact. Finally, NASAA's proposed model rule on this issue would permit an initial delay on a disbursement for up to 10 days, with a possible extension for an additional 10 days. Such timing would contradict the 15-day initial delay and extension proposed by FINRA.

In each of the examples above, firms would face the dilemma of choosing between complying with a state law (and risking liability, as described in Section III) or taking advantage of the safe harbor provided by FINRA. It is unlikely that compliance with a FINRA rule would be deemed compliance with a state law that may be contrary.

V. The Minimum Age for "Specified Adults" Should Be Reconsidered.

Rule 2165 would cover any person over the age of 65, which would include many individuals under the typical age of retirement. Cetera notes that some customers at or near age 65 may take offense to being included in the definition of "Specified Adult" for purposes of this rule, and encourages FINRA to consider whether this minimum age should be raised.

Cetera FINANCIAL GROUP

VI. Conclusion

Cetera appreciates the opportunity to comment on this Proposal and commends FINRA for bringing attention to the issue of elder abuse. We encourage FINRA to consider the issues raised in this letter and to perhaps coordinate efforts with state agencies and authorities, who share our common goal of preventing this type of abuse.

Thank you for your consideration of these comments. If you have any questions or would like further information, please contact me at (310) 257-7474 or deidre.link@cetera.com.

Respectfully submitted,

Deidre D. Link

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Member FINRA/SIPC

November 30, 2015

Via E-mail: ***pubcom@finra.org***

Ms. Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

RE: Regulatory Notice 15-37: Financial Exploitation of Seniors and Other Vulnerable Adults – FINRA Requests Comment on Rules Relating to Financial Exploitation of Seniors and Other Vulnerable Adults

Dear Ms. Asquith:

Wells Fargo Advisors, LLC ("WFA") appreciates the opportunity to comment on the Financial Industry Regulatory Authority's ("FINRA") Proposal on the Financial Exploitation of Seniors and Other Vulnerable Adults, set forth in Regulatory Notice 15-37 (the "Proposal").[1] WFA applauds this plan to help strengthen efforts to curb the abuse of seniors.

WFA is a dually registered broker-dealer and investment advisor that administers approximately $1.4 trillion in client assets. We employ approximately 14,988 full-service financial advisors in branch offices in all 50 states and 3,838 licensed financial specialists in retail bank branches across the country.[2] Wells Fargo is committed to providing individuals and their families with the advice and guidance they need to plan for a long and healthy retirement.

[1] Regulatory Notice 15-37: Financial Exploitation of Seniors and Other Vulnerable Adults – FINRA Requests Comment on Rules Relating to Financial Exploitation of Seniors and Other Vulnerable Adults (October 2015).
[2] WFA is a non-bank affiliate of Wells Fargo & Company ("Wells Fargo"), a diversified financial services company providing banking, insurance, investments, mortgage, and consumer and commercial finance across the United States of America and internationally. Wells Fargo's brokerage affiliates also include Wells Fargo Advisors Financial Network LLC ("WFAFN") and First Clearing LLC, which provides clearing services to 78 correspondent

I. OUR EFFORTS TO PROTECT SENIORS

WFA has long recognized the challenges facing our elder and vulnerable adult clients,[3] particularly in the area of financial abuse. To help address this concern, we created the Elder Client Initiatives team in 2014, which specializes in providing internal support and the reporting of elder financial abuse issues for WFA. In addition, we made a number of improvements to better protect our clients through other efforts such as creating the *Emergency Contact Authorization* form, which provides clients with the option of adding an emergency contact person to their account; updating language in our general account agreement disclosure advising clients that we may put a hold on the disbursement of funds when we have concerns about "financial exploitation, dementia or undue influence;" and, updating our *Guide to Financial Protection for Older Investors* available to clients and prospects on our public website. We also provide annual training to our associates on elder financial abuse. In sum, WFA has been consistently engaged in addressing these issues and as a result, we've been recognized as an industry leader. Our desire is to continue to work in partnership with FINRA and others to protect our aging community. We offer the following supportive comments and suggestions with the aim of further strengthening the Proposal.

II. SUPPORT OF THE PROPOSAL

The Proposal allows member firms to hold the disbursement of funds, for up to 15 business days, from a retail account when financial exploitation of a senior or other vulnerable adult is suspected. To assist firms in investigating the suspected abuse, FINRA Rule 4512 has been expanded to provide for the collection of contact information for a "Trusted Contact Person." The "Trusted Contact Person" will likely be identified during the account opening process and will be a point of contact for member firms to discuss the client's situation or well-being when abuse is suspected. We are supportive of this approach and believe it creates a general framework that offers an appropriate amount of protection and guidance for firms while allowing the flexibility necessary to investigate and combat exploitation.

III. SUGGESTIONS FOR IMPROVING THE PROPOSAL

A. <u>The Defined Age Of A Senior Should Be Lowered.</u>

The Proposal helps protect seniors and other vulnerable adults. "Senior" is defined under the Proposal as a person age sixty-five or older. The Elder Justice Act,[4] the Older Americans Act,[5] along with states recently passing senior protection laws, like Missouri[6] and Washington,[7] have

clients, WFA and WFAFN. For the ease of discussion, this letter will use WFA to refer to all of those brokerage operations.

[3] Throughout this letter, the terms "elder" and "senior" are also intended to include the concept of "vulnerable adult."

[4] 42 U.S.C. §1397j(5).

[5] 42 U.S.C. §3002(40).

[6] Missouri SB 244, 2015.

defined a senior as being a person age sixty or older. Additionally, the North American Securities Administrators Association ("NASAA") recently put forth a proposed model act defining "eligible adults" to mean "a person sixty years of age or older."[8] We believe that aligning the definition in the Proposal with the definition used by the federal government, various states and NASAA will eliminate conflicting regulatory definitions and lessen confusion for member firms.

B. The Safe Harbor Should Be Expanded.

One of the Proposal's primary benefits to member firms is that it provides a safe harbor to investigate and report financial abuse. However, the concept of a safe harbor is not set forth explicitly in the proposed rule language. Instead, it is mentioned solely in the supplementary material.[9] Adding the safe harbor into the rule would strengthen member firms' ability to use Rule 2165 because they will be able to rely on the assurance of explicit rule language rather than mere guidance.

Another way to further develop the concept of a safe harbor is to expand the definition of a "Qualified Person." A "Qualified Person" is defined as an "associated person of a member who serves in a supervisory, compliance or legal capacity that is reasonably related to the Account."[10] Key members of the firm who have a direct relationship with the client, such as a financial advisor or a branch assistant, do not appear to be afforded the Proposal's protections, which may limit their ability to contact the "Trusted Contact Person." Often, these people are in the best position to identify the suspected abuse and provide valuable information during an investigation. In addition, operational personnel may play a part in putting a hold on a disbursement of funds but they also appear to fall outside of the definition. We would recommend removing the phrase "who serves in a supervisory, compliance or legal capacity that is reasonably related to the Account of the Specified Adult" so that "associated person of a member" is all that remains of the "Qualified Person" definition.

C. The Definition Of Immediate Family Member Should Be Expanded.

We are supportive of the Proposal's provision that allows for an "immediate family member" to be contacted in the event the "Trusted Contact Person" is unavailable or suspected of abuse. This concept provides member firms greater flexibility in addressing the problem of suspected financial exploitation. The definition of "immediate family member" is different for every client and FINRA should recognize this wide variance in its definition, opting to be more inclusive rather than exclusive. Unfortunately, in our experience, it is often an immediate family member whom the client trusts that seeks to take advantage of that trust for their own financial gain. The reality of intra-family elder abuse necessitates a broader definition of "immediate family members" to enable firms to avoid these bad actors.

[7] Washington State, Ch. 133, Laws of 2010.
[8] NASAA, Notice of Request for Comments Regarding NASAA's Proposed Model Legislation or Regulation to Protect Vulnerable Adults from Financial Exploitation, §2(3).
[9] Proposal, 15.
[10] Proposal, 13.

One option is to expand upon the definition from “immediate family member” to a “reasonably associated individual.” We have experienced situations where clients do not have any immediate family members to contact or there is a known professional, such as an attorney or accountant, who may be a more appropriate person to contact. In order to address this issue, we suggest allowing firms to contact any individual reasonably associated with the client, and known to the firm, to discuss the suspected financial exploitation activity. This practical expansion of permissible contacts should prove useful to member firms and impactful in preventing financial exploitation.

D. A Reference To Immediate Family Members (However Defined[11]) Should Be Added To Rule 4512 To Align With Rule 2165.

The supplementary materials to Rule 4512 make it clear that member firms shall disclose in writing to the customer that the member firm or an associated person of the member is authorized to contact the “Trusted Contact Person” and disclose information about the customer’s account to confirm a variety of information.[12] We agree that providing written notice at the time of account opening is appropriate. However, one minor drafting anomaly in the Proposal is that Rule 2165 allows members to contact an “immediate family member” when the “Trusted Contact Person” is suspected of abuse. However, “immediate family member” is not referenced in Rule 4512. The omitted reference to an “immediate family member” in Rule 4512 may imply that such notice is not required. We recommend making clear that the notice at account opening covers the “Trusted Contact Person” and potentially, the “immediate family member” as well.

E. The Timing Of Notice Of A Hold Should Be Modified To A Reasonable Standard.

Rule 2165 requires members to provide notice to all parties and the “Trusted Contact Person” of a hold on the disbursement of funds within two business days.[13] We believe under certain circumstances, the notification within two business days may not be achievable, thus causing the relief afforded under the Proposal to be unavailable to member firms that are unable to meet the deadline. We believe modifying the Proposal to require notice to the customer and the “Trusted Contact Person” “promptly” or “as is reasonable under the circumstances” would be a more appropriate standard.

IV. IMPLEMENTATION

FINRA has sought comment on the potential costs and benefits of the Proposal.[14] Based on our initial estimates, incorporating the “Trusted Contact Person” information into the account opening process and making the necessary system updates will cost WFA approximately $1.25

[11] WFA believes the definition of “immediate family members” should be expanded as described in section C above but has used the proposed definition for purposes of noting the omission from Rule 4512.
[12] Proposal, 12.
[13] Proposal, 14.
[14] Proposal, 8.

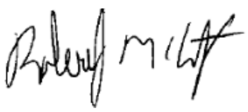
million. This is a sizeable investment but the strengthening of our ability to help protect clients from abuse makes it worthwhile.

Implementing the Proposal would include, among other things, updates to training and processes. We believe that one year would be an appropriate amount of time to allow for implementation, once a rule is made final.

V. CONCLUSION

WFA appreciates the opportunity to express its support for FINRA's Proposal and commends FINRA for its efforts to protect America's seniors. Should you have any questions, please feel free to contact me directly at (314) 242-3193 or robert.j.mccarthy@wellsfargoadvisors.com.

Sincerely,



Robert J. McCarthy
Director of Regulatory Policy

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November 30, 2015

VIA ELECTRONIC MAIL to pubcom@finra.org

Marcia E. Asquith
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1735 K. Street, NW
Washington, DC 20006-1506

RE: FINRA Regulatory Notice 15-37: FINRA Requests Comment on Rules Relating to Financial Exploitation of Seniors and Other Vulnerable Adults

Dear Ms. Asquith:

On behalf of the Bond Dealers of America (BDA), I am pleased to submit this letter in response to the Financial Industry Regulatory Authority's (FINRA) solicitation of comments in connection with Regulatory Notice 15-37 (Notice), proposed rules (Proposed Rules) relating to financial exploitation of seniors and other vulnerable adults. BDA is the only DC based group representing the interests of middle-market securities dealers and banks focused on the United States fixed income markets. We welcome this opportunity to state our position.

BDA supports FINRA's efforts to enhance the protection of seniors and other vulnerable adults from financial exploitation. Customer protection is a priority for BDA members and the marketplace generally. We applaud FINRA for the implementation of its Securities Helpline for Seniors and through enhanced policies at our firms, we want to continue to be a partner in improving protections designed to prevent exploitation of this group of investors. To that end, BDA and its member firms are offering comments to the Proposed Rules in an effort to help clarify and strengthen FINRA's efforts to expand the protections beyond those currently in place. BDA's comments are designed to simplify and clarify certain aspects of the Proposed Rule in order to avoid unintended consequences.

BDA Requests Further Clarification and Guidance

BDA is concerned with the lack of clarity regarding when a firm would be required to act on behalf of a senior or other vulnerable adult. While we agree this proposal is a good concept and seeks an outcome we support, the implementation of the Proposed Rules are nearly impossible to institute as currently drafted. The Proposed Rules are subjective; the proposal does not require "qualified person(s)" at a firm to have processes and procedures in place that will support a decision as to whether a person is mentally or physically impaired such that they are unable to protect his or her own interests or when a 'designated person' is attempting to exploit a "specified adult" investor. The Proposed Rules leave firms open to liability if, after analyzing a senior's mental state, it is found that the firm inaccurately determined, on that particular day, that there was not a problem when, in fact, there was. We are all aware of the day-to-day ups and downs an individual may face and we worry that an inaccurate assessment at one particular point in time leaves our firms without adequate protections. BDA therefore would request that FINRA make some adjustments and also provide guidance to our firms either in the form of Frequently Asked Questions or another similar format. The BDA would be happy to assist in contributing suggestions, comments, and draft questions and answers for inclusion in such a document.

Verification of and Reliance on Information Received

BDA firms will be required to take reasonable steps to collect the name and contact information for a trusted contact person for each new and current account (in line with current account update requirements). It is of concern to our members that they not be held responsible for anything beyond a reasonable attempt as noted in the proposal, to collect and update the required information, at the required time as set out by the parameters of the Proposed Rules, which are based on current regulatory requirements. It is of further concern that dealers could be held responsible for evaluating the mental capabilities of the trusted contact person and the "trusted contact's" intentions, either at the time of the collection of the information, or at any further point in which the firm holds an account for their customer if the trusted person meets the definition of a "specified adult(s)" as proposed. Therefore, we ask FINRA to provide additional guidance regarding exactly what it is they are requiring of member firms under this Proposal. Specifically, we would like for FINRA to address whether there will be documentation requirements as to the "reasonable attempts" taken by firms and if so, we would encourage FINRA to provide as much clarity as possible to our firms.

Information Provided to Trusted Contact

The BDA and its members request further instructions regarding the information that would potentially be given to a trusted contact, specifically to ensure SEC Regulation S-P is not violated. Once again, what can be discussed with a trusted contact is subjective and could potentially put member firms in the position where they unintentionally violate this rule.

Changes in Status for Trusted Contact Person

BDA is also concerned that the mental status of a trusted contact person can change over time. The Proposed Rules do not permit the trusted contact person to transact business in an account. However, BDA can envision issues arising when the legal status of the trusted contact changes in a way that alters their ability to perform the functions assigned to or assigned by the trusted contact. For example, an account holder may name their son or daughter as the trusted contact person at account opening, or at the time of a routine and required account information update, and then six months after being assigned the role as a trusted contact, the adult child is given power of attorney, thus giving them the ability to exercise control over the account, including the ability to authorize transactions. However, this change in status would then render the son or daughter unable to serve as the trusted contact person. How is the firm to know this change has occurred and what are the firm's responsibilities if they are not aware of this change?

Exclusion for Guardianship, Custodian or Power of Attorney

The BDA also requests that FINRA include additional language in the Proposed Rules specifically excluding accounts where there is a designated Guardianship, Custodian, or Power of Attorney (POA) appointed. These protections should be offered to firms above and beyond any safe harbor since there is greater concern with someone having account transaction authority as compared to a trusted emergency contact that does not have authorization on the accounts. If these accounts must be included in the Proposed Rules, then the associated language should state that when firms have a concern with these individuals, there is a heightened level of protection offered to the firm and/or qualified individual since the account holder themselves would have had to know that this person has transaction capacity for the account, resulting in an enhanced burden to the firm should they need to halt any transaction related activity made by such individual when suspicion arose. Furthermore, it is at the point when a power of attorney is presented to member firms, when member firms are concerned vulnerability may begin to occur. We ask FINRA to include language in the Proposed Rules that grants member firms authority above State requirements to accept instructions from a POA in a given time frame, providing member firms the ability to contact a trusted contact person previously designated on the account, or to provide similar flexibility in an alternate manner.

Qualified Person Should Realize Greater Protections

Qualified persons at a firm who are reasonably related to the account may not want to trigger an account hold because of the potential for mistakenly believing that exploitation has, is, or will occur. As a result, we would request that FINRA provide greater assurances beyond the safe harbor to ensure subjective decisions made by a qualified person cannot be used in a retaliatory manner. Furthermore, we would encourage FINRA provide guidance in instances where the owner of the account disagrees with the decision made by the qualified person. Without risking losing a customer, it is hard to justify questioning the decision of an account holder for his or her own account.

Additionally, firms might be hesitant to name someone to act as a qualified person if they are not already serving in a supervisory role at the firm and especially if they are not already serving in a supervisory role on the business side of the firm.

It would be helpful to our firms if FINRA could provide more clarity as to who they envision being capable of serving as the "qualified person" as related to the term "reasonably related," and to further pair with that guidance, certain protective parameters to ensure additional safe harbor protections against retaliatory action. We also request that FINRA clarify what they envision would be required to establish someone at the broker dealer a "qualified person". Are specific examinations, continuing education or background education required? Will clearing firms be required to have someone review the activity of their introducing firms and discuss potential issues or concerns?

BDA also suggests that FINRA consider additional safeguards for firms to utilize in the case of retaliatory action by customers as it relates to what would otherwise be reportable on the Form U4. Specifically, we would request that FINRA permit a process whereby firms who have acted in good faith with respect to the Proposed Rules do not experience any such complaints as reportable on a Form U4.

Temporary Hold on Disbursement of Funds or Securities

Our members are concerned that the proposed safe harbor does not extend far enough for individual or firm protections. BDA firms seek further clarification and guidance on this issue as it relates to having the proper documentation to act on a discretionary basis and we outlined some concerns we would like to have addressed below. For example, a temporary hold on a disbursement of funds could indemnify against a routine ACH or wire transaction, which in turn, may also be impacted by a whole account hold. We are very concerned that where liquidating transactions are involved, if no action is taken, this could be perceived as being discretionary, putting our firms at risk of litigation. Therefore, our members feel strongly that any action taken by the firm should be taken on a transaction-by-transaction basis.

Furthermore, BDA is concerned with the process for terminating the required 15-business-day hold. As proposed, the only way to terminate the hold early is through a court order. However, the proposal would require a firm that has initiated a hold to immediately engage in an internal review of the facts and circumstances which led to the decision to put a hold on the account. Placing a three-week hold on an account is a very serious business decision. BDA believes there will be circumstances in which an internal review quickly brings to light facts that reveal the hold to be unnecessary. In order to avoid unintended consequences, BDA believes FINRA should consider allowing an alternative avenue for removing a hold if the facts and circumstances brought to light in an internal review demonstrate that the hold was placed unnecessarily. BDA believes this would best protect investors because it allows the hold to be put on the account and then removed rather than requiring a three-week waiting period or a court order.

BDA believes that when a qualified person initiates a hold based on suspicion of exploitation, that the safe harbor should hold the firm and the qualified person harmless. For example, in a situation where an unsolicited order to liquidate securities or the entirety of an account is communicated to a broker, and that unsolicited order is the act that forms the basis for the qualified person to implement a hold, the firm and the qualified person should be explicitly held harmless from losses due to market movements in the securities that the customer was prohibited from selling due to the hold on the account. Of additional concern is a situation where the firm places a hold on an account where funds were to be used to meet a required obligation of the customer and the hold prevented the individual from meeting that obligation, the firm could be subject to liability. We would ask that FINRA address these concerns in amendments to the Proposed Rules and suggested future guidance language.

Coordination and Harmonization with State and Federal Laws

BDA firms would like for FINRA to coordinate its efforts under the Proposed Rules with existing rules and regulations at the state and federal level. Privacy laws, disability laws and any other overarching laws meant to protect seniors, vulnerable adults and others ideally should not be triggered by any activity undertaken in compliance with FINRA's Proposed Rules. We would caution against FINRA putting any rules in place which might be at odds with any state or federal laws since doing so might cause our firms greater exposure and vulnerabilities beyond those directly related to where FINRA can offer protection. Specific concerns we would identify include whether firms might run afoul of privacy laws since they would be required to contact an immediate family member under section (b)(1)(B)(ii) of Proposed Rule 2165 once a temporary hold on disbursements has been placed.

Again, we would stress the many legal problems identified above, as well as how the emotional impact that a subjective analysis of a senior's mental state could impact the seniors' personal and financial well-being.

Thank you again for the opportunity to submit these comments.

Sincerely,

Michael Nicholas
Chief Executive Officer
Bond Dealers of America

Dear FINRA:

Per Regulatory Notice 15-37, FINRA now would like us to use our judgment to perform social work. The history of FINRA is one of further and further denying firms and representatives from using their judgment in the business they live intimately and know better than FINRA, but now FINRA wants us to exercise our judgment in areas where we do not belong and where we are capable of making situations worse. What happens if our judgment about our client's incompetency is bad? What happens if the trusted contact person we select to disclose privileged information about one of our clients happens to be someone who very definitely should not have that information? What happens if our customer for legitimate reasons does not want that person to have such information? What happens to our relationship with our client after we have assumed his/her incompetence and looked around him/her for authority? What happens if the new trusted contact person really cannot be trusted or is incompetent in other ways? What happens after the protective holds we placed expire and those preying on our customers have waited us out? With responsibility comes liability, and once certain tools are put in place, even a regulatory statement that we can use our discretion will turn into our being held to a much higher standard in court or arbitration.

Firms need to understand that once FINRA gets under the tent, it tends to multiply. This area of its new rules will grow to something unrecognizable from it origins. The paperwork requirements will increase along with the liabilities at each level of a firm. The net result will be headaches for licensed personnel and ultimately the cold shoulder for the elderly. Let me propose a different strategy that would allow firms and licensed practitioners to perform a public service, while not creating new risks for themselves: Set up a government hotline where we can provide basic contact information about a customer and our generic concerns without disclosing financial information. Let qualified people who do this type of thing for a living attempt to make contact with the customer and, if necessary, contact related parties and use their judgment as to how to proceed. Give our industry some reasonable time to delay processing of a questionable customer request under the guidance of this third-party program. Have this third-party agency provide us with some type of document by mail/email/fax that we can put into the customer file to satisfy FINRA's prodigious appetite for disclosure.

We already care about our clients. And we do not need FINRA to help us care more. We do not want our clients to be harmed. Regulators and courts already hold us to ridiculous standards in our dealings with them. We cannot and should not meddle in their private activities other than to assist qualified government agencies, if we smell something funny.

Dan Pisenti

NAPSA NATIONAL ADULT PROTECTIVE SERVICES ASSOCIATION

November 24, 2015

Marcia E. Asquith
Office of the Corporate Secretary, FINRA
1735 K Street, NW
Washington, DC 20006-1506
RE: Regulatory Notice 15-37

Dear Ms. Asquith:

I am writing on behalf of the 800 members of the National Adult Protective Services Association to express NAPSA's support of FINRA's Regulatory Notice 15-37, *Rules Relating to Financial Exploitation of Seniors and Other Vulnerable Adults.*

FINRA is to be commended for taking steps to address the growing and very complex issue of elder and vulnerable adult financial abuse, which defrauds its victims, their families and taxpayers of untold billions of dollars a year, while contributing to illness and death among its victims as well.

NAPSA supports the proposal to allow firms to:

- Seek the name and contact information of a trusted third party to notify if exploitation is suspected; the trusted other would not be permitted to transact business on behalf of the account. This is consistent with the common practice of health care providers and other systems with strict confidentiality requirements requesting "in case of emergency" names and contact information. There is a risk that the trusted person may turn out to be an exploiter, and firms should put in place training and protocols to help mitigate or eliminate this risk.
- Place temporary holds on disbursements from client accounts when the firm has reasonable cause to believe that financial exploitation may be occurring. However, we suggest that firms be required to take measures to insure that such holds will not cause undue harm to the client, which may occur if the person's mortgage or other critical payments are not made in a timely manner.

NAPSA strongly urges FINRA to expand the proposed rule to require, or at a minimum, encourage, firms to:

- Report suspected financial exploitation to Adult Protective Services (APS). APS will independently investigate the allegations and will assess the totality of the person's needs, including their health, cognitive capacity, environment and support network. APS may be able to prevent further exploitation by putting interventions in place.
- Share client records with APS under the Gramm-Leach-Bliley exceptions to allow such sharing in order to prevent potential or actual fraud and to comply with authorized civil (as well as criminal and regulatory) investigations. APS is authorized under the statutes of every state to carry out civil investigations of financial exploitation.

NAPSA also suggests that FINRA amend the definition of "specified adults" to mean anyone 60 years or older and anyone who would be deemed vulnerable under the state's APS statute.

Thank you for the opportunity to comment.

Sincerely,

Kathleen M Quinn

NATIONAL ADULT PROTECTIVE SERVICES ASSOCIATION

Kathleen M Quinn
Executive Director

My main concern, as a person who is over 65, and thus, whose accounts would be affected by the rule is that I am without protection if such a suspension causes me to default on legal or contractual obligations. These leaves me responsible for misapprehensions by those who hold my financial accounts. Possible consequences could include losing my medical or other insurance, penalties for failure to meet RMD requirements on IRA's, penalties for late payment of real estate taxes, and so on. 30 business days tends to be way past any customary extension of time to pay. I hate to be put in a position where I need to make all critical payments and distributions 6 weeks early.

(1) In the event of suspension there needs to be a more substantial notice requirement than "attempt to contact" which could include be a little as ringing an unanswered phone without leaving a message.

(2) The principal as well as the trusted representative needs to be notified.

(3) A mechanism more accessible than a court of competent jurisdiction needs to exist for releasing the hold, perhaps through the trusted representative.

Alternatively, a federal law could provide relief in these circumstances.

The proposed rules appear to be a potential unreasonable intrusion into the financial affairs of competent individuals by "…"qualified persons" who reasonably believe that financial exploitation is occurring…" without any declaration of incompetency! In addition, the requirement to have a "Trusted Contact Person" should definitely be optional. A competent senior individual should have the right to opt out of any or all of the newly proposed rules.

"Reasonable belief" is extremely vague and potentially harmful to the investor.

INVESTMENT COMPANY INSTITUTE

1401 H Street, NW, Washington, DC 20005-2148, USA
202/326-5800 www.ici.org

November 25, 2015

Marcia E. Asquith
Office of Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

Re: Financial Exploitation of Seniors and Other Vulnerable Adults – FINRA Notice 15-37

Dear Ms. Asquith:

The Investment Company Institute ("ICI")[1] appreciates the opportunity to provide comments to FINRA on amendments proposed to Rule 4512, relating to customer account information, and proposed new Rule 2165, relating to the financial exploitation of specified adults. These rules are intended to enable FINRA members to better protect seniors and other vulnerable adults from financial exploitation by (1) requiring a member to maintain the name of a "trusted contact person" for each retail customer; and (2) enabling a FINRA member to place a temporary hold on a disbursement of funds or securities from the account of a specified adult in the event of suspected financial exploitation.[2]

ICI commends FINRA for its efforts to better protect senior citizens and other vulnerable adults and we share FINRA's concerns with the financial exploitation and abuse of such persons. As we support FINRA's efforts, we urge FINRA to consider further several issues raise by the proposal that impact privacy, due process, and civil liability. We also strongly recommend that FINRA resolve these issues prior to the rules' adoption. We discuss each of these issues in more detail below.

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[1] The Investment Company Institute (ICI) is a leading, global association of regulated funds, including mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and similar funds offered to investors in jurisdictions worldwide. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. ICI's U.S. fund members manage total assets of $17.1 trillion and serve more than 90 million U.S. shareholders.

[2] *See Financial Exploitation of Seniors and Other Vulnerable Adults*, FINRA Notice 15-37 (October 2015), which is available at: https://www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory-Notice-15-37.pdf (the "Notice").

As a preliminary matter, the Institute's interest in the rules is from the perspective of principal underwriters to mutual funds and the impact the rules will have on them and on the FINRA members they retain to distribute mutual fund shares to retail investors. Generally speaking, we do not expect the proposed rules to have any meaningful impact on mutual funds' underwriters inasmuch as these FINRA members typically do not interact with retail customers and do not maintain customer accounts.[3] We believe FINRA's proposal raises a variety of issues that warrant further deliberation prior to its adoption.

I. FINRA RULE 4512, TRUSTED CONTACT PERSON

The proposed amendments to FINRA Rule 4512 would require a member to maintain the name of a "trusted contact person" for each owner of a retail account.[4] Such trusted contact person would have to be age 18 or older and not authorized to transact business on behalf of the account. Pursuant to Supplementary Material .06, the account owner must be informed that the member is authorized to contact and may disclose to the trusted contact person "information about the customer's account to confirm the specifics of the customer's current contact information, health status, and the identity of any legal guardian, executor, trustee or holder of a power of attorney." According to FINRA's Notice, "FINRA intends the trusted contact person to be a resource for the firm in administering the customer's account and in responding to possible financial exploitation."[5]

We applaud FINRA's efforts to document the name of a person the member may contact in the event of possible financial exploitation. We support FINRA requiring that such person not be authorized to transact business on behalf of the account and FINRA requiring written disclosure to the account holder regarding what non-public personal information the member might share with the trusted contact person. We also support FINRA permitting members to maintain and service the accounts of investors who do not provide the name of a trusted contact person. To protect an account owner's financial privacy interests, we recommend that the Supplementary Material to the rule

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[3] We note, however, that the proposal could impact mutual fund complexes where, as a result of the fund's networking arrangements with its distributors, a mutual fund shareholder is able to contact a mutual fund to liquidate his or her shares after learning that a broker-dealer has placed a freeze on the brokerage account holding such shares. A mutual fund transfer agent may be wholly unaware of any freeze placed on a shareholder's brokerage account. In this case, the mutual fund possibly could disburse funds directly to the shareholder despite an active freeze on that shareholder's brokerage account pursuant to FINRA rules. Even if the mutual fund knew of the freeze, the provisions of Section 22(e) of the Investment Company Act of 1940, which governs the redemption of mutual fund shares, may require it to redeem the account in response to a customer's request.

[4] Importantly, pursuant to Supplementary Material .06 to the rule, the absence of a trusted contact person on an account shall not prevent the member from opening or maintaining the account provided the member "makes reasonable efforts to obtain the name of and contact information for a trusted contact person."

[5] Notice at p. 3.

expressly clarify that a member is prohibited from contacting a trusted contact person except as permitted by Rule 2165.

II. FINRA Rule 2165, Financial Exploitation of Specified Adults

The Institute supports FINRA's efforts to address the vulnerability of senior citizens and to protect such persons from financial exploitation. We are concerned, however, that proposed Rule 2165, which authorizes members to freeze disbursements from an account whenever a Qualified Person[6] believes financial exploitation may be occurring, sweeps far too broadly and, in the name of protecting account owners, may inadvertently violate their privacy interests, raise due process concerns, and subject FINRA members to potential civil liability.

A. Privacy Concerns

With respect to account owners' privacy interests, we concur that, as a result of the provisions of Rule 4512, in providing the name of a trusted contact person, the customer is consenting to the member contacting such person in the event financial abuse or exploitation is suspected and, therefore, such contact is consistent with the account owner's privacy rights under Regulation S-P. However, FINRA Rule 4512 would permit sharing of the customer's non-public personal information to persons *other than* the trusted contact person in the event the trusted contact person "is unavailable or the member reasonably believes that the Trusted Contact Person has engaged, is engaged, or will engage in financial exploitation" of the account owner. In such instances, proposed Rule 2165(b)(1)(B)(ii) would authorize "the member *[to] attempt to contact an immediate family member"* of the account owner to notify such person that a temporary hold has been placed on the owner's account. It is our understanding that Regulation S-P would prohibit the member from contacting *any* family member or other person about the account without the express approval of the account owner. Accordingly, we strongly recommend that FINRA revise this provision to be consistent with the limits Regulation S-P imposes on a member's ability to share customers' non-public personal information.

B. Due Process Concerns

1. Owner's Right of Recourse

The Notice does not address how Rule 2165 might implicate the account owner's due process rights in the event a freeze is placed on an account and what rights of recourse are available to such owners. According to Rule 2165(b)(2), "the temporary hold authorized by this Rule will expire *not later than 15 business days after the date the Qualified Person first placed the temporary hold* on the [account] . . . unless sooner terminated *by an order of a court of competent jurisdiction or extended by an*

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[6] "Qualified Person" is defined in Rule 2165(a)(3) as "an associated person who serves in a supervisory, compliance, or legal capacity that is reasonably related to the Account of the Specified Adult."

order of a court of competent jurisdiction." In other words, the rule appears to provide the account holder *no* recourse for lifting the hold aside from obtaining a court order.

Restricting an investor's access to his or her assets raises serious investor protection concerns – even when such restriction is well intentioned. Obtaining a court order can be a costly, time consuming, and unduly burdensome process. And yet, as currently drafted, a court order appears to be the only recourse available to an investor. We strongly oppose FINRA compelling account owners to obtain a court order to access the assets in their accounts in the event of a freeze. We recommend that FINRA, instead, consider providing owners other recourse that is not as time consuming, expensive, or burdensome. Such recourse should strike a more appropriate balance between a member's interest in protecting an account owner from abuse and the owner's legal right to their assets. Although the proposal clearly is intended to protect investors, it may have the opposite effect by denying investors access to their funds in time of need, or forcing them to engage in an expensive legal process to access their assets.

2. **Limit on the Number of Freezes**

An additional issue that we recommend FINRA consider that also might implicate the due process concerns of an account owner relates to the number of freezes that a firm may impose on an account. The proposal does not address whether firms can continue placing holds on an account after the initial 15 day period and additional 15 day extension. For example, under the proposal, it appears that a firm could freeze an account for 30 days, unfreeze the account for an unspecified period of time (a day or two), and then freeze it again for another 30 days. Permitting unlimited freezes has the potential to deny a shareholder access to his or her account over a long period of time. To avoid this, we recommend that the rule expressly limit the number of freezes that a member may impose on an account during a calendar year (or other specified period).[7]

3. **Jointly-Held Accounts**

The proposed rule also might implicate owners' due process concerns in connection with joint accounts. The Notice is silent on this issue. If a firm suspects exploitation of one of the account holders on a jointly-held account, it is unclear whether the firm can freeze all owners' access to the account. A joint owner who seeks a disbursement from the account may be surprised to find that the account is frozen for reasons wholly unrelated to that person. While the proposed rule requires that the firm notify all parties authorized to transact business on the account of the freeze within two business days, it does not address what rights a joint account holder has over the account following the notice. As discussed above, once a freeze is placed on the account, it would appear to deny *all* owners of the

[7] We recognize that, at best, a freeze will only temporarily delay a person intent on exploiting an account owner. Indeed, such person would need only to wait until the freeze is lifted prior to having the owner again seek a disbursement from the account.

account access to the account's assets unless an owner obtains a court order to lift a freeze. This construct would seem unduly harsh on any joint owners of the account. We recommend that FINRA address the impact of Rule 2165 on any jointly-held accounts.

C. Civil Liability Concerns

The Notice acknowledges that "there may be significant impacts with respect to legal risks and attendant costs to firms that choose to rely on the proposed rule in placing temporary holds on disbursements."[8] While acknowledging these risks, according to the Notice, "the proposed rules may provide some legal protection to firms if they are sued for withholding disbursements where there is a reasonable belief of financial exploitation." We concur with FINRA regarding the "significant legal risks" to a member freezing an account. While the rules may, in FINRA's view, provide members some legal protection, the adequacy of this protection ultimately will be up to the courts to decide and, due to the nuisance factor, members may elect to settle such suits in lieu of litigating these cases. To address this concern, we strongly recommend that Rule 2165 provide account owners a right of recourse – aside from obtaining a court order – in the event of a freeze. This should help assuage any civil liability concerns by providing account owners an alternative means to address their concerns with an inappropriate freeze – including the ability to recoup any damages caused by such freeze – without resort to a civil suit. In addition, we recommend that FINRA expressly include in Rule 2165 or its supplementary material language clarifying that (1) no member is required by FINRA to impose a hold on any customer account; and (2) a member's failure to impose a hold on a customer account pursuant to Rule 2165 shall not be deemed to be an abrogation of the member's duties under FINRA's rules. Such language should mitigate any civil claims that a member had a duty to impose an account freeze.

III. Coordination with NASAA's Proposed Solution to Financial Exploitation of Seniors

Finally, should FINRA determine to pursue adopting a revised version of its proposal, we strongly recommend that it consult with the North American Securities Administrators Association ("NASAA") and consider their efforts to protect seniors from financial abuse and exploitation. NASAA is currently seeking comment on a proposed regulation "to Protect Vulnerable Adults from Financial Exploitation."[9] While many of the provisions in NASAA's Proposal address the same issue as FINRA Rule 2165, there are some significant differences. In particular, NASAA's Proposal: (1) mandates reporting to the state adult protective services agency when the firm has a reasonable belief that financial exploitation of an eligible adult has been attempted or has occurred; (2) permits a hold on

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[8] Notice at p. 6.

[9] Notice of Request for Comments Regarding NASAA's Proposed Model Legislation of Regulation to Protect Vulnerable Adults from Financial Exploitation (Sept. 29, 2015) ("NASAA's Proposal"), available at http://www.nasaa.org/37294/nasaa-board-approves-release-for-comment-of-proposed-model-act-to-protect-vulnerable-adults-from-financial-exploitation.

an account to be lifted by the broker-dealer or investment adviser at any time once it determines the disbursement will not result in financial exploitation;[10] (3) limits disclosure regarding the account to only a third party designated by the account owner; and (4) contains four express provisions limiting the broker-dealer's or investment adviser's civil or administrative liability for acting in accordance with the rule.[11] In other words, many, if not most, of the concerns with FINRA's proposal that are discussed above appear to be addressed by NASAA's Proposal. Moreover, consistency between FINRA's approach to addressing financial abuse and the approach of the states would appear to be in the best interest of both investors and the financial institutions subject to both the states' and FINRA's rules.

* * *

We appreciate FINRA's consideration of our comments. If you have any questions concerning them, please do not hesitate to contact Linda French by phone (202-326-5845) or email (linda.french@ici.org) or me by phone (202-326-5825) or email (tamara@ici.org).

Sincerely,

/S/

Tamara K. Salmon
Associate General Counsel

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[10] NASAA's Proposal limits the initial freeze to 10 days; FINRA's proposal requires the initial freeze to last 15 days. To avoid an irreconcilable conflict between the length of a freeze permitted by NASAA and that permitted by FINRA, we recommend that FINRA conform its freeze period to that in NASAA's rule. *See* NASAA Proposal at Section 7(2)(b).

[11] For those states that incorporate NASAA's rule into their state securities act, the rule's immunity protection likely will provide financial professionals far more protection than any immunity provision in FINRA's rule inasmuch as the states' protections would extend to all civil or administrative actions brought under state law.

NAIFA

NATIONAL ASSOCIATION OF
INSURANCE AND FINANCIAL ADVISORS

November 30, 2015

Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

Via Electronic Mail: pubcom@finra.org

Re: FINRA Regulatory Notice 15-37-- Request for Comments on Rules Relating to Financial Exploitation of Seniors and Other Vulnerable Adults

Dear Ms. Asquith:

This letter will present the views of the National Association of Insurance and Financial Advisors ("NAIFA") in response to FINRA's request for comments on proposed rules pertaining to the financial exploitation of seniors and other vulnerable adults.

Founded in 1890 as The National Association of Life Underwriters (NALU), NAIFA is one of the nation's oldest and largest associations representing the interests of insurance professionals from every Congressional district in the United States. NAIFA members assist consumers by focusing their practices on one or more of the following: life insurance and annuities, health insurance and employee benefits, multiline, and financial advising and investments. NAIFA's mission is to advocate for a positive legislative and regulatory environment, enhance business and professional skills, and promote the ethical conduct of its members. Approximately two-thirds of all NAIFA members are licensed as registered representatives of broker-dealers and market and service mutual funds and other investment products to their clients.

The rules proposed by FINRA via Regulatory Notice 15-37 are designed to help broker-dealers, their associated persons and regulators protect seniors and other vulnerable adults from becoming victims of financial exploitation. As recent studies from both industry and consumer organizations have demonstrated, the financial exploitation of seniors is already a significant problem which is likely to worsen given current demographic trends towards an increasingly aging population. In addition, the recent growth of defined contribution retirement plans and corresponding decline of defined benefit types of retirement savings vehicles has resulted in seniors having greater individual control over often-significant account balances, which can result in increased attention from a broad variety of potential bad actors.

In light of the long-term relationships NAIFA members have with their clients and the detailed knowledge these advisors often have of their clients' investments, accounts and overall financial situation, a person's financial advisor is often on the front line of being able to identify indicators of attempted or ongoing financial exploitation of their clients. However, because of potential liability and privacy concerns financial advisors and their firms often feel constrained in their ability to protect their clients.

To address these issues, several states have recently enacted laws designed to protect seniors from becoming victims of financial fraud. These state laws typically call for financial advisors and their firms to report possible financial exploitation of a senior client to state authorities who can then conduct an appropriate investigation. Some of these state laws also permit a firm to delay a request for disbursement of funds for a specified number of days while the appropriate state agency reviews the disbursement for possible financial exploitation. Importantly, these state laws also provide advisors and firms with immunity from liability for taking steps to protect their client's financial assets by following the provisions of the law. In addition to the above-referenced state activity, the North American Securities Administrators Association is in the process of developing a model statute based in large part on these state laws.

NAIFA has been extensively engaged on this issue for over a year. We have conducted an educational session for our members on the topic of senior financial protection and exploitation, and NAIFA is currently in the process of developing a Senior Financial Protection Model Act for use by NAIFA's affiliated state associations. The NAIFA model would establish a voluntary reporting process under which advisors would report suspected financial exploitation of a senior client to their firm, who would review the possible exploitation and if appropriate inform the relevant state authorities. The NAIFA model, like the laws enacted in some states, would permit a firm to temporarily delay a client's requested transaction or disbursement if the firm suspects that financial exploitation of the client may be occurring, and it would shield advisors and their firms from liability for complying with the provisions of the law and taking steps to protect their senior clients.

NAIFA applauds FINRA for its involvement in this important issue and for its efforts to protect seniors and vulnerable adults from financial exploitation. While we generally support the approach taken in the proposed rules, we do have the following comments regarding the proposals:

1. <u>Safe Harbor/Limitation of Liability.</u> Because of the important protection provided by granting protection from liability for advisors, their supervisors and firms who act in accordance with Proposed Rule 2165 to protect their clients from financial exploitation, the safe harbor from liability that is currently referenced in Supplementary Material Section .01 should instead be included as an express provision in the body of the Proposed Rule. The language used in this section should also specifically reference registered representatives of a broker-dealer and "Qualified Persons" (as defined in the Proposed Rule) as being under the protection of the safe harbor.

2. Determination of Mental/Physical Impairment. While a member, its qualified persons and/or registered representatives may be in a position to observe behaviors that might be indicators of physical or mental impairment, they are not qualified medical professionals and do not have the proper training or experience to make such determinations. To ensure that inappropriate obligations and responsibilities with respect to such a determination are not imposed on a member or its qualified individuals/registered representatives, NAIFA recommends that the following language be added to the end of Supplementary Material Section .04 of Proposed Rule 2165: "…; provided, however, that any such belief or facts and circumstances observed in the member's business relationship with the Specified Adult shall not create an assumption or implication that the member or its qualified individuals/registered representatives are qualified to, have the ability to or are responsible for making a determination about any individual's mental or physical condition or possible mental or physical impairment."
3. Notification of State Securities Administrator. State securities regulators have a significant interest in the protection and well-being of their state's residents. In addition, these regulators can play an important role in determining if financial exploitation of a senior or vulnerable adult has occurred or is being attempted. In light of this, the proposed rule should include a provision to the effect that if a Qualified Person places a temporary hold on a disbursement of funds or securities from an account of a Specified Adult because the Qualified Person reasonably believes that financial exploitation of a Specified Adult is occurring/has occurred/will be attempted, the Qualified Person or firm shall then notify the appropriate state securities administrator of the action taken. The safe harbor contained in the rule should also be expanded to include protection against liability for actions taken in connection with notifying the appropriate state authorities.

Thank you for your consideration of NAIFA's views on this important issue. Please contact the undersigned if you have any questions regarding our comments.

Yours Truly,

Gary Sanders

Gary A. Sanders
Counsel and Vice President, Government Relations

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24 November 2015

Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

Re: From Financial Exploitation of Seniors and Other Vulnerable Adults

Dear Ms. Asquith:

CFA Institute[1] is pleased to comment on FINRA's proposed rules that seek to protect senior and other vulnerable adults from financial exploitation. CFA Institute represents the views of those investment professionals who are its members before standard setters, regulatory authorities, and legislative bodies worldwide on issues that affect the practice of financial analysis and investment management, education and licensing requirements for investment professionals, and on issues that affect the efficiency, integrity and accountability of global financial markets.

CFA Institute is an organization with a strong interest in investor protections. Accordingly, we strongly support FINRA's efforts to implement procedures for addressing situations where there is, or is a suspicion of, financial fraud involving an individual aged 65 or older or someone 18 or older who appears to the firm to be physically or mentally impaired to a degree that he or she cannot protect their own interests (collectively, "Vulnerable Adults"). FINRA is proposing a two-pronged approach to address financial exploitation of these individuals: securing information of a trusted contact from the client; and allowing members to halt accounts upon a reasonable belief of financially exploitative activity aimed at their client.

Trusted Contact Person

Proposed amendments to Rule 4512 would require firms subject to FINRA's jurisdiction to extend reasonable efforts to get the name and contact information of who is considered a "trusted contact person" of a retail client. Firms would be required to ask for this information when opening an account for a client and upon future updates of the account. Should the client not provide such information, the firm will have fulfilled its duty by making reasonable inquiry.

We believe this requirement will serve a valuable purpose should the firm need to cross-check what may appear to be suspicious activity connected with a client account. We suggest, however, that firms be required to update this contact information during periodic reviews and when clients' situations change, rather than merely considering whether to ask clients to review and update the information. This seems like a logical requirement if the objective is to help thwart financial exploitation of an aging population that becomes more vulnerable with increased age.

[1] CFA Institute is a global, not-for-profit professional association of more than 131,000 investment analysts, advisers, portfolio managers, and other investment professionals in 145 countries, of more than 123,300 hold the Chartered Financial Analyst® (CFA®) designation. The CFA Institute membership also includes 146 member societies in 71 countries and territories.

Temporary Ban on Account

A proposed new Rule 2165 would provide the option, but not the duty, for firms to temporarily block client accounts if there is a reasonable belief that financial exploitation of a Vulnerable Adult is occurring, has occurred, or will be attempted/occur if there is not a hold placed on the account. For purposes of this new Rule, "financial exploitation" includes not only wrongful or unauthorized taking, withholding, appropriation or use of Vulnerable Adults' funds or securities, but also acts and omissions by others, including those with power of attorney, to wrongfully obtain control over or convert the money, assets or property of the Vulnerable Adult.

Under the proposed Rule, once the firm has placed a hold on a client's account, it must immediately start an internal review of the underlying facts and notify within two business days the trusted contact person and any others authorized to transact business on that account. If the firm cannot reach the trusted contact person or believes that person may be involved in the wrongdoing, it will try to contact a family member, unless that member is also suspect. The temporary hold cannot exceed 15 business days, and if the firm's internal investigation supports its belief that exploitation is involved, the firm can extend the ban for another 15 days unless a court intervenes.

Firms electing to take such actions must create and retain certain records substantiating the basis for the firm's reasonable belief of financial exploitation, of the notice provided parties, of the disbursement requests that constitute the alleged exploitation and that result in the temporary hold(s) on the account(s), and of the firm's internal review. In addition, firms would be required to create and maintain written supervisory procedures and develop and document training policies or programs related to complying fully with the proposed rule.

The rise in financial exploitation of Vulnerable Adults—particularly by family members and other persons in positions of trust—needs to be addressed in a concerted effort by various groups, including the investment management profession. Thus, we appreciate and support FINRA's proposals for a safe harbor to those who refrain from executing transactions in situations where there is a reasonable belief that financial exploitation is involved. FINRA's proposal is largely consistent with the North American Association of Securities Regulators' recent proposal for a Model Act also addressing the financial exploitation of vulnerable adults.

In order to combat this unconscionable practice and to raise the trust in the industry, financial service providers need to take active measures to monitor suspected activity in connection with their clients' accounts and take necessary actions without fear of liability. We therefore strongly support the immunity from liability provided to firms when they take measures to halt transactions in a client account upon reasonable belief that the client is at risk for financial exploitation. Similarly, we support the added provision that the firm can extend the temporary halt another 15 days if the internal review substantiates there is a basis for concern.

While we support the legal safe harbor the proposal provides, the additional requirements and associated costs described above for firms and advisers to undertake when they believe clients are being exploited has the potential to reduce their willingness to consider calling for account freezes. And given these costs, it is conceivable that they may will defer taking action until or unless there is clear-cut, clearly provable abuse. Unfortunately, this could occur after the Vulnerable Adult's assets have been depleted. Therefore, we suggest that FINRA encourage, rather than simply allow, firms to assume the responsibility for undertaking actions in keeping with the proposal upon reasonable belief that financial exploitation of a Vulnerable Adult may be occurring, and to consider ways to incentivize firms to take on this needed responsibility.

We strongly support efforts by FINRA to address financial exploitation of the elderly and other vulnerable adults. Should you have any questions about our position, please do not hesitate to contact Kurt N. Schacht, CFA at kurt.schacht@cfainstitute.org, 212.756.7728 or Linda Rittenhouse at linda.rittenhouse@cfainstitute.org, 434.951.5333.

Sincerely,

/s/ Kurt N. Schacht

Kurt N. Schacht, CFA
Managing Director, Standards and
Financial Market Integrity
CFA Institute

/s/ Linda L. Rittenhouse

Linda L. Rittenhouse
Director, Capital Markets Policy
CFA Institute

November 30, 2015

By Electronic Mail to *pubcom@finra.org*

Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

Re: FINRA Regulatory Notice 15-37: Rules Relating to Exploitation of Seniors and Other Vulnerable Adults

Dear Ms. Asquith:

The Florida International Bankers Association (FIBA)[1] appreciates this opportunity to respond to FINRA's request for comment on Regulatory Notice 15-37 ("RN 15-37" or the "Proposal"), which contains proposed rules addressing the financial exploitation of seniors and other vulnerable adults.[2] The Proposal would amend FINRA Rule 4512 (Customer Account Information), and adopt a new FINRA Rule 2165 (Financial Exploitation of Specified Adults).

FIBA is committed to constructively engaging federal and state legislative and regulatory bodies on behalf of the international financial services community. FIBA members support the development of solutions to assist financial institutions in their efforts to prevent elder financial exploitation, but financial services firms are neither qualified nor well equipped to handle decisions relating to the capacity and personal family and other circumstances of the nation's seniors. While the Proposal is well intended, it fails to recognize the costs and challenges financial services firms will be forced to grapple with to comply with the requirements of the Proposal, particularly the placement of holds on vulnerable clients' funds or securities against

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[1] FIBA, founded in 1979, is a non-profit trade association representing the interests of the international financial services community in Florida. Members of FIBA include major banks, securities broker-dealers, and investment advisers headquartered in Europe, Latin America and the Caribbean, as well as the United States. The primary focus of FIBA members is the provision of financial services to non-U.S. residents, including in the areas of international trade finance, international correspondent banking, and wealth management and private banking services. Established on a foundation of ethics, service, and trust, FIBA is committed to the future of international banking and the financial services industry. For more information about our organization, education and advocacy programs, visit www.fiba.net.

[2] *See generally* RN 15-37 (October 2015), available at https://www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory-Notice-15-37.pdf (last visited Nov. 22, 2015).

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their wishes. These costs and challenges are particularly enhanced for FIBA's membership, which provide services primarily to a non-U.S. resident clientele.

Instead, to ensure effective protection of the elderly and others suffering from diminished capacity from financial exploitation, better coordination among state agencies, law enforcement, adult protective services, mental health and other medical professionals, and the courts is essential to the detection and prevention of financial abuse involving seniors.

FINRA member firms located in Florida already have a mandatory requirement to report to adult protective services when they have reasonable suspicion of financial exploitation of vulnerable adults. Firms are also encouraged to file a suspicious activity report ("SAR") to alert Financial Crimes Enforcement Network ("FinCen") of activity related to financial abuse of the elderly.

FIBA has identified several significant difficulties in complying with the requirements of the Proposal, including: (1) notification to seniors before taking protective measures and possible related conflicts, (2) the amount of time afforded by the Proposal to complete complex internal investigations of financial abuse, particularly where non-U.S. residents are involved, and possible governance committee review to authorize a hold on a customer account, (3) expansion of the scope for the safe harbor provision to the firm whether it decides to withhold disbursements or not to withhold disbursements, (4) the economic burden associated with complying with the Proposal compared to the anticipated benefits, (5) the consistency of the Proposal, as drafted, with existing domestic and foreign financial privacy regulation, including the SEC's Regulation S-P and (6) special issues relating to the application of the Proposal to non-U.S. clients who qualify as "Specified Adults" under the Proposal.

(1) Requiring Notification to Senior Clients, and Possible Conflicts
In a joint report, The National Senior Investor Initiative, published by the SEC's Office of Compliance Inspections and Examinations ("OCIE") and FINRA, the agencies addressed a number of key senior-related areas, including training concerning senior-specific issues and effective supervision of firm representatives who deal with senior investors.[3] Specifically, the report highlighted "examiner observations" and "notable practices" relating to what appears to be best practices employed at firms that can detect, mitigate, or prevent the risk of financial exploitation. For example, some of the notable practices include mandatory training on the stages of mental capacity, and solutions on handling potential diminished capacity of an investor (i.e., escalating concerns with state agencies and regulators). Particularly, as part of the examiner observations, the report emphasized that one firm's training materials on suspected senior financial abuse "encouraged the firm's representatives to ask questions, confirm who had

[3] *See generally* The National Senior Investor Initiative (April 15, 2015), available at http://www.finra.org/sites/default/files/SEC%20National%20Senior%20Investor%20Initiative.pdf (last visited Nov. 22, 2015).

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authorization on the account, contact the at-risk senior (separately from the suspected abuser), and escalate the matter to the appropriate supervisor."

Proposed New Rule 2165 authorizes firms to place holds on accounts of specified adults defines "specified adults" as seniors (over age 65), or other vulnerable adults (adults with mental or physical impairment unable to protect their own interests). The Proposal requires notification of a trusted contact (or in certain circumstances a family member) after the firm has placed a hold. The notification requirement is inconsistent with best practices identified in the joint report which encouraged firm representatives to "contact the at-risk senior (separately from the suspected abuser)" before escalating to their supervisor.

The Proposal also does not take into consideration that seniors may disagree with the firm's decision to place a hold. While age may lead to diminished capacity, neither age nor diminished capacity necessarily equate to a full lack of capacity. Seniors may not have pronounced symptoms and, as a consequence, the evaluation of diminished mental capacity of a client will in many cases be completely beyond the competence and expertise of a member firm. As such, firm representatives would be required to have sufficient knowledge of the various stages of mental capacity to identify when an elderly client's cognitive decline reaches the level of diminished capacity. In essence, firm representatives would be required to assess their client's capacity without the assistance of mental health professionals.

Further, Proposed New Rule 2165 requires notification of a hold to all parties authorized to transact business on the account and the trusted contact person. Admittedly, FINRA intends firms to rely on the trusted contact person in making decisions to take protective measures with regard to their clients' interests. However, relying on a trusted contact person, who is not an authorized person, to maintain a hold on an account may conflict with the interests of the client. When firm representatives are dealing with suspected financial abuse of their elderly or vulnerable clients, they would need to ensure there is no actual or potential conflict of interest.

FIBA also seeks clarification on what actions a firm should take when it has reasonable suspicion that financial exploitation has occurred with regard to a specified adult client and the suspected perpetrator also has an account with the firm. In such a situation, would the firm have authority to place a hold on the suspected perpetrator's account to protect the senior's funds?

(2) Governance Committee Review to Take Protective Measures

Proposed New Rule 2165 provides that a Qualified Person with reasonable suspicion that a financial exploitation has occurred, or is occurring, may place a hold on the specified adults account. The hold would trigger the initiation of an immediate internal investigation by the

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financial institution and an obligation to provide notice of the hold and the reason for the hold to all parties within two business days.

To achieve a balance between complying with a client's directive, protecting a specified adult that may be the subject of financial abuse, and limiting potential liability, firms may not take immediate action, resulting in postponing placement of a hold. Proposed New Rule 2165 provides firms only fifteen (15) days to complete an internal investigation to determine whether to extend the hold for an additional fifteen days. For example, complex financial exploitation cases may require more time to investigate to gather the relevant facts and circumstances, particularly when non-U.S. resident clients are involved. As such, a firm may not agree with a Qualified Person's assessment that the financial exploitation of a specified adult customer occurred, is imminent or ongoing. Under these circumstances, a senior or vulnerable client would benefit from an extension of time to complete an internal investigation and possible review by a governance committee, which would determine whether the facts and circumstances merit placing a hold on an account. In this regard, consideration should be given by FINRA to excepting non-U.S. resident clients from the coverage of the Proposal or to establishing a different process, including longer time periods, for application of the Proposal to non-U.S. resident seniors.

(3) Scope of the Safe Harbor

The Supplementary Material to proposed Rule 2165 indicates that Rule 2165 "provides members with a safe harbor when they exercise discretion in placing temporary holds on disbursements of funds or securities from the Account of a Specified Adult", as defined in the Rule. The Supplementary Material further indicates that the "Rule does not require members to place temporary holds on disbursement of funds or securities from the Account of a Specified Adult". However, notwithstanding its direct statement that temporary holds are not required, the Supplementary Material does not clearly or expressly extend the safe harbor available for temporary holds to decisions by members that a temporary hold is not appropriate under the circumstances.

The safe harbor also does not explicitly extend to the investigatory and due diligence process leading to the decision-making required by the Proposal, which under the definition of "financial exploitation" contained in proposed Rule 2165 would require the assessment by member firms of powers of attorney and guardianships; matters which require legal and judicial expertise well beyond the competence of member firms. Moreover, determinations by member firms that a trusted contact person is engaged in financial exploitation of a senior are also beyond the express coverage of the safe harbor.

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So long as members are charged with the burdensome and potentially difficult task of determining whether a temporary hold is or is not appropriate in accordance with proposed Rule 2165's requirements, all decisions of members made in good faith (as well as the investigation and due diligence process leading to such decisions) pursuant to Rule 2165 should be directly and explicitly protected by the safe harbor, irrespective of whether the decision of the member following due diligence and investigation is that the placing of a hold, or the release of funds or securities, is the appropriate course of action. Any approach other than explicitly extending the safe harbor to both the decision to place a hold and the decision not to do so, as well as the process of due diligence and investigation leading to such decisions, could have the perverse consequence of incentivizing members to place holds even when to do so would not be in the interests of the Specified Adult or such Adult's family and/or beneficiaries.

(4) Reimbursement of Costs and Expenses

The proposed amendments to Rule 4512 and proposed Rule 2165 will subject members to significant costs; not only for matters relating to the identification of a trusted contact person under Rule 4512 and the due diligence and investigation associated with the placement of temporary holds under Rule 2165 but also the establishment and maintenance of written supervisory procedures and the development of training policies and programs required under the Supplementary Material to proposed Rule 2165.

It is questionable whether the material costs associated with compliance with the Rule proposal will be worth any anticipated benefits, particularly since members are not expert in matters of competence of seniors and since the effective investigation of the occurrence of financial exploitation of a senior could be time consuming, difficult, and extremely expensive. Although it might be reasonable to expect members to absorb the costs of the development of policies and procedures and training programs required by the Rule proposal, it does not seem at all reasonable to require members to absorb the costs associated with the due diligence and investigation needed to determine if a temporary hold is appropriate and, if made, whether it should be extended. Reasonable costs associated with those due diligence and investigatory processes, including responding to inquiries of the trusted contact person, family members, and/or other interested parties, should be borne by the accountholder and be chargeable against the relevant account(s).

(5) Inconsistency with Financial Privacy Regulation

The Proposal contemplates the disclosure of confidential financial information of seniors to their trusted contact persons, without clearly specifying the types of confidential information that may be disclosed. As drafted, such disclosures may run afoul of U.S. and foreign laws and regulations protecting the confidentiality of seniors' confidential financial information held by member firms, including Regulation S-P promulgated by the SEC.

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(6) Special Considerations for Non-U.S. Seniors

The time periods and other requirements of the Proposal are unduly burdensome for member firms with a primarily domestic client base, but the burdens are magnified for member firms that primarily serve non-U.S. clients. Such clients may be subject to different laws in their home countries governing matters such as mental and physical impairment and guardianships. Delegation of power to a trusted contact that is not court appointed, as contemplated by the Proposal, may be restricted under non-U.S. law. Moreover, non-U.S. clients of member firms who are Specified Adults will likely designate trusted contacts who are not U.S. persons, and who have non-U.S. person family members, leading to increased costs and difficulties associated with contacting such persons within the time frames provided under the Proposal.

Consequently, FINRA should reconsider the application of the Proposal to Specified Adults who are not U.S. persons. In this regard, non-U.S. persons might be excepted entirely from the coverage of the Proposal or, at a minimum, a separate process should be developed and implemented for the application of the Proposal to such non-U.S. person clients.

We appreciate the opportunity to comment on the proposal. Please feel free to contact me at (**David Schwartz telephone number**) or dschwartz@fiba.net, if you have any questions concerning these comments or would like to discuss these comments further.

Respectfully submitted,

David Schwartz
President and CEO
FIBA

Copies to: Mr. Fernando Capablanca
Ms. Patricia Hernandez
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Mr. Bryan Wells

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NASAA

November 30, 2015

Via e-mail to pubcom@finra.org

Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

Re: FINRA Regulatory Notice 15-37

Dear Ms. Asquith:

The North American Securities Administrators Association, Inc. ("NASAA")[1] submits the following comments in response to FINRA Regulatory Notice 15-37, Financial Exploitation of Seniors and Other Vulnerable Adults. ("the FINRA proposal" or "the proposal").[2] Addressing senior financial exploitation has long been a primary focus of NASAA members and at the end of September NASAA published for comment proposed model legislative/regulatory language ("the NASAA proposal" or "the model language") aimed at combatting this pernicious conduct.[3] Both the NASAA and FINRA proposals contain provisions that are similar to statutes currently enacted in three states.[4] The comment period for the NASAA proposal has closed, and we are in the process of evaluating the comments received regarding our proposal.

NASAA supports efforts to address senior financial exploitation and welcomes the opportunity to work with FINRA as it develops its final rules. We hope that the final outcome of both the FINRA proposal and the NASAA proposal are complementary, with FINRA rules complementing state legislation or regulations, giving senior investors and other vulnerable adults

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[1] NASAA is the association of the 67 state, provincial, and territorial securities regulatory agencies of the United States, Canada, and Mexico. NASAA serves as the forum for these regulators to work with each other in an effort to protect investors at the grassroots level and to promote fair and open capital markets.
[2] *See* FINRA Regulatory Notice 15-37 (Oct. 2015), *available at* https://www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory-Notice-15-37.pdf.
[3] *See* Notice of Request for Comments Regarding NASAA's Proposed Model Legislation or Regulation to Protect Vulnerable Adults From Financial Exploitation (Sept. 29, 2015), *available at* http://nasaa.cdn.s3.amazonaws.com/wp-content/uploads/2015/09/Request-for-Comments-Model-Seniors-Legislation-Final-2.pdf ("NASAA Model").
[4] The three states that have adopted similar statutes are Delaware, DEL. CODE ANN. tit. 31, § 3910(c), Missouri, Senior Savings Protection Act, Missouri Senate Bill 244, § 409.610, and Washington, WASH. REV. CODE ANN. § 74.34.215.

the protections they need. To this end, NASAA offers comments below describing both its own initiatives related to protecting seniors and vulnerable adults as well as areas where NASAA's and FINRA's respective frameworks could be complementary.

<u>NASAA's and State Securities Regulators' Focus on the Protection of Seniors and Vulnerable Adults</u>.

State securities regulators have a long-standing commitment to protecting senior investors[5] and a long history of protecting investors at the local level day in and day out.[6] State securities regulators have pledged to protect all investors and are often geographically closest to those that they serve, including senior investors. This is especially important considering that many in our elderly population are vulnerable due to social isolation and distance from family, caregivers, and other support networks. The days of Americans growing old in communities, surrounded by generations of family members, social clubs, or religious and community organizations, are fading into the past. NASAA's members are keenly aware of this as they interact with senior investors on a regular basis, whether as a result of investor education events or through senior investors calling their regulator.

State securities regulators often initiate investigations as a result of complaints from investors who feel they have been wronged by a professional in, or claiming to be part of, the securities industry. Based on information from the 2010 Investor Protection Trust Elder Fraud Survey, we know that one out of every five citizens over the age of 65 has been victimized by a financial fraud.[7] Seniors are regularly contacted, over the phone, through mail, and on the internet, by solicitors asking for money, claiming a senior won a foreign lottery, or attempting to perpetrate any number of other schemes. Unfortunately, even family members and other trusted caregivers or advisers sometimes fraudulently try to solicit money from the elderly.

A large portion of callers to state securities regulators tend to be seniors, who prefer to use the phone. We applaud the work of FINRA's Senior Investors Hotline, as we well know that for senior investors, the easiest and most logical way to seek help is to pick up the phone. While we appreciate the wealth of resources available on the internet, including the NASAA Senior Resource Center,[8] we also know that for certain investors, particularly seniors, nothing replaces being able to have a conversation.

The NASAA Committee on Senior Issues and Diminished Capacity ("Seniors Committee"), formed in 2014, is the latest in a series of initiatives from NASAA and its members to protect senior investors since the launch of the Senior Investor Resource Center in 2003 and the

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[5] *See, e.g.*, SEC and NASAA Launch Program to Protect Senior Investors (May 8, 2006), *available at* http://www.nasaa.org/7627/sec-and-nasaa-launch-program-to-protect-senior-investors/.

[6] *See* 2015 NASAA Enforcement Report, *available at* http://nasaa.cdn.s3.amazonaws.com/wp-content/uploads/2011/08/2015-Enforcement-Report-on-2014-Data_FINAL.pdf (highlighting enforcement statistics, trends, and risks to investors).

[7] 2010 Investor Protection Trust Elder Fraud Survey, *available at* http://www.investorprotection.org/downloads/EIFFE_Survey_Report.pdf.

[8] *See* Senior Investor Resource Center, NASAA, http://www.nasaa.org/1723/senior-investor-resource-center/ (last visited Nov. 30, 2015).

adoption of a model rule on the use of senior-specific certifications and professional designations in 2008.[9] In addition, NASAA members actively bring important investor protection and awareness information to seniors in each of their jurisdictions through workshops, forums, and other public events. Because the most effective way to address the protection of seniors and vulnerable adults is through a holistic approach, the Seniors Committee is advised by an advisory committee drawing from representatives from industry, academia, regulatory agencies and elder advocates.

NASAA's Proposed Model Legislative and Regulatory Language To Protect Vulnerable Adults

A cornerstone of the Seniors Committee's work has been developing a NASAA proposal for model language that could be used in a legislative or regulatory context by NASAA members.[10] Released in September for public comment, the NASAA proposal applies to broker-dealers and investment advisers, including certain qualified individuals; namely any broker-dealer agent, investment adviser representative or person who serves in a supervisory, compliance, or legal capacity for a broker-dealer or investment adviser.[11] The core components of the NASAA proposal include:

- Governmental reporting requirement by qualified individuals as well as broker-dealers and investment advisers;[12]
- Notification to third parties with consent;[13]
- The authority to delay disbursement of funds;[14]
- Immunity from civil and administrative liability for notifications and delays.[15]

Furthermore, in recognition of the important role of state and local Adult Protective Services ("APS") in senior investor protection, the NASAA proposal mandates reporting to APS[16] and includes a core provision regarding providing documents to APS offices.[17]

In response to its proposal, NASAA received 21 comments from elder advocates, industry trade associations, and members of the public.[18] The comments were generally supportive, acknowledging the importance of protecting seniors and vulnerable adults. We encourage FINRA to review the comments to the NASAA proposal as they could provide additional information and

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[9] *See* NASAA Model Rule on the use of Senior-Specific Certifications and Professional Designations, *available at* http://www.nasaa.org/wp-content/uploads/2011/07/3-Senior_Model_Rule_Adopted.pdf.
[10] *See* NASAA Model.
[11] NASAA Model § 2(7).
[12] NASAA Model § 3.
[13] NASAA Model § 5.
[14] NASAA Model § 7.
[15] NASAA Model § 4 (government disclosures); NASAA Model § 6 (third-party disclosures); NASAA Model § 8 (delaying disbursements).
[16] NASAA Model § 3.
[17] NASAA Model § 9.
[18] *See* Comments on Proposed NASAA Model Act to Protect Vulnerable Adults from Financial Exploitation, NASAA, http://www.nasaa.org/regulatory-activity/nasaa-proposals/public-comment-on-nasaa-proposals/comments-on-proposed-nasaa-model-act-to-protect-vulnerable-adults-from-financial-exploitation/ (last visited Nov. 30, 2015).

perspective on the important issue of how best to prevent and mitigate exploitation of seniors and vulnerable adults. NASAA is currently in the process of finalizing its review of the comments received and considering any revisions to the NASAA proposal in light of the comments noted above and other suggestions made by commenters.

NASAA Comments on FINRA Proposal

NASAA appreciates the opportunity to provide comments to FINRA to ensure that both the NASAA and FINRA proposals complement one another. As noted above, NASAA supports FINRA's proposal as it is a promising first step to add additional layers of protection beyond state and federal law. The FINRA proposal necessarily can only address broker-dealer activities, meaning it cannot be a substitute for the NASAA proposal, which covers both broker-dealers and investment advisers.

Scope of FINRA Proposal

The scope of FINRA's proposal should be expanded to include a notice requirement to FINRA and state regulators. NASAA's proposal contains an immunity provision tied to the reporting of suspected financial abuse to governmental agencies, as well as separate immunity provisions for reporting to designated third parties and for delaying disbursements. The immunity provisions allow for immunity from administrative and civil liability for qualified employees, broker-dealers, or investment advisers who, in good faith and exercising reasonable care, comply with the provisions of the NASAA proposal. At the core of these immunity provisions, however, is the underlying policy conclusion that when the concern for abuse rises to the level of delaying disbursement or notifying a third party, a regulator should be notified as well.

Should FINRA expand its proposal to include a notice requirement to FINRA and state regulators, the scope of FINRA's proposal should also be expanded to include all employees, going beyond its current definition of qualified person which focuses solely on associated persons of a firm who serve in supervisory, compliance or legal capacities. This would bring FINRA's proposal more in line with NASAA's proposal and reduce potential confusion and conflict between the two, though it is important to note that expanding the definition of qualified employee should not result in broker-dealer agents having the authority to put a disbursement hold on an account. In the NASAA proposal, this authority to put a disbursement hold rests with the entity (broker-dealer or investment adviser), not with the individual registered individuals.

The importance of having broker-dealer agents and supervisors in the field providing notice to FINRA and state regulators cannot be understated. When talking about elder financial exploitation, we know that time is of the essence and that is even clearer when one considers the fact that elder financial exploitation is often accompanied by some other form of elder abuse or self-neglect. The ability to have a regulator assess the situation and determine whether additional resources should be brought to bear is a key component of any approach intended to provide meaningful protection to vulnerable investors.

Expanding the scope of the proposal to include both a notice requirement to FINRA and the applicable state regulator, as well as expanding the definition of qualified person, would align FINRA's proposal more closely with NASAA's proposal, enhance uniformity and increase the potential for securing the financial safety and well-being of vulnerable investors.

Definition of Eligible Adult / Specified Adult[19]

As currently drafted, NASAA's proposal would apply to adults subject to their state APS statutes and those 60 years or older. In contrast, FINRA's proposal would apply to persons 18 years or older with a mental impairment that adversely impacts their ability to manage their affairs or those adults age 65 or older. NASAA believes that the reference to state adult protective service statutes should replace FINRA's proposed language given the highly generalized nature of the language used to describe a person suffering from an impairment. In addition, NASAA believes age 60 is the appropriate age in light of provisions in various federal statutes.[20] That said, NASAA recognizes that the recently introduced Senior$afe Act applies to individuals aged 65 or older and that, for the most part, individuals generally retire after reaching age 65.[21]

An instructive aspect to the comments in response to the NASAA proposal was an encouragement to raise the minimum age of an eligible adult from a person sixty years of age or older to sixty-five years of age or older. It is important to note, however, that the minimum age is not dispositive for evaluating whether an adult is considered eligible under the model language as the model language also makes reference to adults meeting the definitions found in state APS statutes. Rather, the minimum age allows broker-dealers and investment advisers to have a single age applicable across jurisdictions to utilize as a uniform input in their monitoring systems.

Temporary Holds on Disbursements of Funds Should Include Notice to Regulators and to State and Local APS Offices

With regard to the permissible time periods for placing and extending a temporary hold on disbursements pursuant to Proposed FINRA Rule 2165, NASAA urges FINRA to reconsider and shorten the timeframes. Providing a broker-dealer with the unilateral authority to delay a disbursement is essentially empowering the firm to deny an investor access to his or her funds, and under the FINRA proposal this delay could be in place up to 6 business weeks. NASAA is sensitive to industry comments to the NASAA proposal noting that 20 days is too short a time period,[22] as well as to comments from investor advocates about depriving investors' access to their

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[19] The NASAA proposal refers to eligible adult, while the FINRA proposal refers to specified adult in proposed FINRA Rule 2165.
[20] *See* The Older American's Act, Pub. L. 89–73, 79 Stat. 218, codified at 42 USC § 3001 et seq. (defining the term "Older Americans" as those 60 and older); see also, The Elder Justice Act of 2009, 42 USC § 1397 et seq. (defining the term "Elder" as an individual age 60 or older).
[21] Senior$afe Act of 2015, S. 2216, 114th Cong. (2015).
[22] *See, e.g.*, Letter from Marin Gibson, Managing Dir. and Assoc. Gen. Counsel State Gov't Affairs, Securities Industry and Financial Markets Association ("SIFMA") to NASAA, (Oct. 29, 2015), *available at* http://nasaa.cdn.s3.amazonaws.com/wp-content/uploads/2015/10/Gibson102915.pdf.

funds.[23] NASAA understands that this authority may well be an effective tool in preventing financial exploitation and has included it in its proposal. However, given the extraordinary nature of this authority, NASAA would urge FINRA to modify its proposal to include both FINRA and state regulator review, as well as adopt shorter time frames in an effort to mitigate any unintentional harm to the investor that may result from the disbursement delay.

First, notice to regulators should be part of the rule when the firm's concerns rise to the level of delaying disbursement. Therefore, in instances where a firm decides to delay a disbursement, the rule should require not only notification to the account holders but also notice to FINRA and state securities regulators. As proposed, the rule establishes that the temporary hold can only be exercised when a firm has a reasonable belief that exploitation has occurred or will be attempted. Given that a broker-dealer has come to a reasonable belief that exploitation is happening or will happen, the broker-dealer should be required to report such belief to its regulators. Second, NASAA encourages FINRA to shorten the time frames applicable to the temporary holds and believes that any delay extending beyond the initial investigatory stage should only occur with explicit regulator approval from at least FINRA or a state regulator. Even a slight modification to the time frames contained in the FINRA proposal would help ameliorate any potential adverse consequences that might result from such delay.

Furthermore, NASAA believes it is crucial that the FINRA proposal include a provision that would facilitate the sharing of information between broker-dealers and state APS offices, as these elder advocates are truly on the front lines of protecting seniors from financial exploitation. Whether it is through the FINRA proposal, or the Securities and Exchange Commission's adopting release of the FINRA proposal, language that facilitates cooperation and recognition of the role of APS offices is an important step in highlighting awareness surrounding protection from senior financial exploitation.

Third Party Notification

The FINRA proposed rule would allow a broker-dealer to contact an immediate family member in instances where a trusted contact is not available. The issue of contacting an immediate family member implicates privacy concerns and may well serve to exacerbate the very problem it is meant to resolve. For instance, the rule would not authorize a firm to contact a non-marital partner with whom an investor may share a home while allowing a firm to contact an estranged child. Additionally, elderly individuals often are reluctant to reach out to their adult children when it comes to financial issues for fear that their children will place them in a nursing home. While a challenge to balance, it is important that any approach, whether NASAA's or FINRA's, recognizes the need for and respects the independence of investors particularly as they age. Part of that balance includes honoring elderly investors' ability to designate a responsible third party for purposes of notification. NASAA would encourage FINRA to consider restructuring its proposal so that broker-dealers are required to obtain trusted contact information from clients and to update

[23] *See, e.g.*, Letter from Barbara Roper, Dir. of Investor Protection, Consumer Federation of America to NASAA, (Nov. 10, 2015), *available at* http://nasaa.cdn.s3.amazonaws.com/wp-content/uploads/2015/10/Roper111015.pdf.

this information on a regular basis similar to the manner in which firms collect and maintain client suitability information.

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Thank you for the opportunity to comment. We support FINRA's efforts to address senior financial exploitation and welcome the opportunity to work with FINRA on this important regulatory initiative. We hope that the final outcomes of both the FINRA proposal and the NASAA proposal are complementary. Should you have any questions or like further information or clarification, please contact me, or NASAA's Executive Director Joseph Brady (jb@nasaa.org), or NASAA's General Counsel A. Valerie Mirko (vm@nasaa.org) at (202) 737-0900.

Sincerely,

Judith M. Shaw
NASAA President
Maine Securities Administrator

If it were shown that Blacks are victims of financial fraud more than Non-blacks (which is probably true), would it be okay to allow financial institutions to require all Blacks to register a responsible Non-black to manage their affairs if the institution deems it advisable?

If the proposed regulations were put into effect, could I take some sort of cognitive test to be exempted if I passed? Or would a note from my children be sufficient?

Interpolating statistics is as dangerous as extrapolating individual data.

Peter Stoehr (D/B 4/17/46)

47 Cormack Ct.

Babylon, NY 11702

631-422-1420

I would like to strongly object to the proposed rule.

This is age discrimination. I being 75 years old have as much right to my money as anyone else.

If this is implemented it should apply to all ages and be voluntary.

This helps to explain why polls show many citizens do not trust the government.

Peter Thomson

Onaway , MI

Insured Retirement Institute
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www.IRIonline.org
www.myIRIonline.org

November 30, 2015

Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506
Via Email: pubcom@finra.org

Re: Regulatory Notice 15-37 – Financial Exploitation of Seniors and Other Vulnerable Adults

Dear Ms. Asquith:

On behalf of our members, the Insured Retirement Institute ("IRI") appreciates the opportunity to provide comments to the Financial Industry Regulatory Authority ("FINRA") regarding Regulatory Notice 15-37, FINRA's proposal to amend FINRA Rule 4512 (Customer Account Information) and adopt new FINRA Rule 2165 (Financial Exploitation of Specified Adults) (collectively, the "Proposal"). The Proposal would impose new obligations on FINRA member firms to help detect and prevent financial exploitation of vulnerable adults. IRI and its members agree with and support the overall objectives of the Proposal, and applaud FINRA for taking this positive and timely step to address this critical issue. In this letter, we will identify and explain a number of potential unintended consequences, and offer constructive suggestions to address these concerns without impeding the intended goals of the Proposal.

About IRI

IRI is the only national trade association that represents the entire supply chain of the retirement income industry. IRI has more than 500 member companies, including major life insurance companies, broker-dealers, banks, and asset management companies. IRI member companies account for more than 95% of annuity assets in the United States, include the top 10 distributors of annuities ranked by assets under management, and are represented by more than 150,000 financial professionals serving over 22.5 million households in communities across the country.

Much like FINRA, IRI has undertaken significant efforts over the past year to help protect older Americans and other vulnerable adults from financial exploitation. The population of older Americans is one of the fasting growing cohorts in the United States, with this segment of our nation's population expected to double in size to nearly 84 million Americans by 2050[1]. This continued growth highlights the need for greater focus on financial elder abuse, cognitive impairment, and diminished capacity.

Our initiatives are intended to raise awareness of these issues, and to provide a variety of older investor protection resources for consumers, financial advisors, and financial services firms (available at irionline.org/research-and-education/protecting-older-investors), including:

- An interactive map to find local resources to protect older consumers who may be the victim of financial elder abuse.
- Information for consumers to help prevent becoming the victim of financial fraud.
- Tip sheets for financial advisors on spotting signs of diminished capacity and financial elder abuse.
- Regulatory notices, guidance and reports for financial services firms on interacting with older clients.

IRI also convened its first annual Older Investors Summit earlier this year to explore the issues of diminished capacity and financial elder abuse with key stakeholders, including representatives from the U.S. Department of Health and Human Services Administration for Community Living, the U.S. Securities and Exchange Commission, and U.S. Consumer Financial Protection Board's Office of Older Investors, as well as leading executives from financial services companies, nationally recognized academics and researchers, and other thought leaders. Throughout the event, participants identified a number of best practices and other measures firms and financial professionals can take to protect older clients from financial harm. A report on the findings of the summit is attached for your convenience, and is posted on IRI's website at www.myirionline.org/docs/default-source/conferences/iri-older-investors-summit-executive-report.pdf?sfvrsn=0.

With this perspective in mind, we have a number of comments about the Proposal, including concerns about (a) the limitations on the scope of information that members may discuss with Trusted Contact Persons, (b) the need for consistency in defining Specified Adult, (c) the limitations on the scope of transactions on which a temporary hold may be placed, (d) the time-frames for notifications to be provided to the Trusted Contact Persons and/or immediate family members, and (e) the requirement to notify all authorized parties on the account and immediate family members.

These concerns are explained in greater detail below. To address these concerns, we respectfully request that the proposed amendments to Rule 4512 and proposed Rule 2165 be revised as follows:[2]

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[1] U.S. Census Bureau, *An Aging Nation: The Older Population in the United States – Population Estimates and Projections* (May 2014), *available at* https://www.census.gov/prod/2014pubs/p25-1140.pdf.

[2] We have intentionally omitted those portions of the Proposal with respect to which we are not requesting any revisions at this time.

Proposed Amendments to Rule 4512

• • • Supplementary Material: --------------

.06 Trusted Contact Person

(a) With respect to paragraph (a)(1)(F) of this Rule, at the time of account opening, a member shall disclose in writing, which may be electronic, to the customer that the member or an associated person of the member is authorized to contact the trusted contact person and disclose **any and all** information about the customer's account to confirm the specifics of the customer's current contact information, health status, ~~and~~ the identity of any legal guardian, executor, trustee or holder of a power of attorney, and as otherwise permitted by Rule 2165, **including information necessary to investigate whether financial exploitation (as defined in Rule 2165) of a Specified Adult (as defined in Rule 2165) has occurred, is occurring, has been attempted, or will be attempted**.

Proposed Rule 2165

2165. Financial Exploitation of Specified Adults

(a) Definitions

(1) For purposes of this Rule, the term "Specified Adult" shall mean: (A) a natural person age ~~65~~ **60** and older; or (B) a natural person age 18 and older who the member reasonably believes has a mental or physical impairment that renders the individual unable to protect his or her own interests.

* * * * *

(b) Temporary Hold on Disbursements **and Other Account Transactions**

(1) A Qualified Person may place a temporary hold on a disbursement of funds or securities from**, or any other transaction involving,** the Account of a Specified Adult if:

(A) The Qualified Person reasonably believes that financial exploitation of the Specified Adult has occurred, is occurring, has been attempted, or will be attempted; and

(B) The member not later than ~~two~~ **seven** business days provides notification of the temporary hold ~~and the reason for the temporary hold~~ to:

(i) ~~all parties~~ **any party** authorized to transact business on the Account; and

(ii) the Trusted Contact Person, unless the Trusted Contact Person is unavailable or the member reasonably believes that the Trusted Contact Person has engaged, is engaged, or will engage in the financial exploitation of the Specified Adult, in which case the member ~~shall~~ **may** attempt to contact an immediate family member of the Specified Adult, if available, unless the member reasonably believes that the immediate family member has engaged, is engaged, or will engage in the financial exploitation of the Specified Adult; and

(C) The member immediately initiates an internal review of the facts and circumstances that caused the Qualified Person to reasonably believe that the financial exploitation of the Specified Adult has occurred, is occurring, has been attempted, or will be attempted**, which may**

include discussing any information relevant to such internal review with the Trusted Contact Person (or an immediate family member of the Specified Adult if the member reasonably believes that the Trusted Contact Person has engaged, is engaged, or will engage in the financial exploitation of the Specified Adult) if and to the extent deemed necessary and appropriate in the member's sole discretion.

(2) The temporary hold authorized by this Rule will expire not later than ~~15~~ **45** business days after the date that the Qualified Person first placed the temporary hold ~~on the disbursement of funds or securities~~, unless sooner terminated by an order of a court of competent jurisdiction or extended either by an order of a court of competent jurisdiction or pursuant to paragraph (b)(3) of this Rule. **In the event that an action has been initiated to request an extension of a temporary hold from a court of competent jurisdiction and such court has not ruled on such request within the specified period, the temporary hold will, upon notification thereof by the member to FINRA, be deemed automatically extended until such time as the court rules on the request, and unless or until such automatic extension is terminated by FINRA.**

(3) Provided that the member's internal review of the facts and circumstances under paragraph (b)(1)(C) of this Rule supports the Qualified Person's reasonable belief that the financial exploitation of the Specified Adult has occurred, is occurring, has been attempted, or will be attempted, the temporary hold authorized by this Rule may be extended by a Qualified Person for no longer than ~~15~~ **45** business days following the date authorized by paragraph (b)(2) of this Rule, unless sooner terminated by an order of a court of competent jurisdiction.

(c) Record Retention

Members shall retain records related to compliance with this Rule, which shall be readily available to FINRA, upon request. The retained records shall include, but shall not be limited to, records of: (1) request(s) for disbursement **or other transactions** that may constitute financial exploitation of a Specified Adult and the resulting temporary hold; (2) the finding of a reasonable belief that financial exploitation has occurred, is occurring, has been attempted, or will be attempted underlying the decision to place a temporary hold **pursuant to paragraph (b)(1) of this Rule** ~~on a disbursement~~; (3) notification(s) to the relevant parties pursuant to paragraph (b)(1)(B) of this Rule; and (4) the internal review of the facts and circumstances pursuant to paragraph (b)(1)(C) of this Rule.

• • • Supplementary Material: --------------

.01 Applicability of Rule. This Rule provides members with a safe harbor when they exercise discretion in placing temporary holds on disbursements of funds or securities from**, or other transactions involving,** the Account of a Specified Adult under the specified circumstances denoted in the Rule. This Rule does not require members to place temporary holds on disbursements of funds or securities from**, or other transactions involving,** the Account of a Specified Adult.

Limitation on Information to be Discussed with Trusted Contact Persons

The ability to speak with a trusted contact person is essential for firms to fully and thoroughly investigate suspected financial exploitation. However, the Proposal appears to limit the scope of discussions with trusted contact persons to merely confirming the potential victim's contact information, health status, and legal representatives, and providing notice of temporary holds on disbursements. IRI and its members believe firms should have the discretion to disclose and discuss any information relevant to the investigation to the trusted contact person. The requested revisions provided above include changes to Supplementary Material .06 to Rule 4512 and paragraph (b)(1)(C) of Rule 2165 to address this concern.

Need for Consistency in Defining Specified Adult

Given the rapidly growing body of laws and rules applicable to senior financial protection issues, IRI and its members believe consistency, to the extent appropriate, would be beneficial for consumers, regulators and the industry. The age referenced in the definition of the term "Specified Adult" is one area in which uniformity would be useful and can be easily achieved. Half of the states currently define vulnerable or specified adults as 60 or older, as does the recently proposed North American Securities Administrators Association "Proposed Model Legislation or Regulation to Protect Vulnerable Adults from Financial Exploitation." As such, our requested revisions above would lower the age of a "Specified Adult" from 65 to 60 years of age.

Limitation on Transactions that May Be Delayed

Under the Proposal, a Qualified Person is permitted to delay disbursements if the Qualified Person "reasonably believes that financial exploitation of the Specified Adult has occurred, is occurring, has been attempted, or will be attempted". However, disbursements are just one way in which financial exploitation can occur. Seniors and other vulnerable adults can also potentially be harmed by, for example, investment re-allocations, beneficiary changes, transfers to a joint account, execution of other brokerage instructions and other account activities. As such, we believe the Proposal should be revised to permit firms to delay any financial transaction it reasonably believes will result in financial exploitation. Our requested revisions to paragraphs (b) and (c) of proposed Rule 2165 and Supplementary Material .01 to proposed Rule 2165 would address this concern.

Applicable Time-Frames for Notifications

We believe the time-frames provided in paragraph (b) of proposed Rule 2165 are insufficient and should be extended. Notifications and investigations of suspected abuse cannot and should not have to be rushed merely to satisfy an arbitrary deadline. When a qualified person suspects financial abuse, the employee will have to report such suspicions to the firm's compliance unit, which will then have to coordinate with the firm's legal, internal audit, and fraud units, to review and investigate the report before determining whether the transaction should be delayed. It is impractical to expect this notification and investigation process to be effectively completed in two (2) business days and fifteen (15) business days respectively. As a result, some transactions where abuse actually is occurring may not be delayed because the firm's investigation could not be completed in two days, thereby defeating the purpose of the Proposal.

In addition, some firms may simply decide to use a lower threshold for delaying transactions to maximize the likelihood of preventing financial abuse, thereby significantly increasing the burden on the member to investigate numerous cases in which suspicions ultimately prove to be unfounded. As such, we believe the time frame for notification should be extended to at least seven (7) business days to allow firms adequate time to conduct internal reviews and that internal reviews be extended to minimum of forty-five (45) business days in the instances of sub-sections (2) and (3), as it is not reasonable to assume that a court of competent jurisdiction would be able to take action within fifteen (15) business days.

Moreover, we note that there may be instances in which a court of competent jurisdiction may not have the resources to take action to extend holds within the applicable time-frames. As such, we believe it would be appropriate to permit automatic extensions under such circumstances upon notification to FINRA until such time as a court of competent jurisdiction takes action on an extension request, unless FINRA takes action to deny the automatic extension.

The requested revisions to paragraph (b) of proposed Rule 2165 reflect these suggested changes.

Mandatory Notifications to All Parties and Immediate Family Members

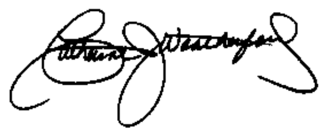
As proposed, Rule 2165 would require that notification of a hold be provided to all parties authorized to transact business on the Account, as well as the Specified Adult's Trusted Contact Person or an immediate family member (if the Trusted Contact Person is suspected of involvement in the abusive conduct). We have two concerns with this requirement. First, we note that it is not uncommon for multiple parties to be authorized to transact business on an account, and that requiring notification to all such authorized parties as a condition of imposing a temporary hold could inadvertently interfere with the intent of the Proposal if a member has trouble locating one or more authorized parties. Second, the financial professional who has a relationship with a particular client may have reason to believe the client would not want an immediate family member to be contacted even if his or her Trusted Contact Person is unavailable or suspected of involvement in financial exploitation. We believe it would be appropriate to give discretion to the member to determine whether it would be appropriate to contact an immediate family member under those circumstances, rather than requiring it in all cases, as contemplated the Proposal. Our requested revisions to paragraph (b)(1)(B)(i) and (ii) of proposed Rule 2165 would address these concerns.

Need for Regulatory Coordination

Senior protection is an issue of concern to a wide variety of federal and state regulators. As FINRA moves forward with the Proposal, we strongly encourage FINRA to engage in discussions and coordinate with these other agencies. In particular, IRI and its members believe it is critical that FINRA work with NASAA, the NAIC and state insurance regulators in an effort to develop a cohesive regulatory framework that extends from product manufacturers (e.g., insurance companies) to distribution (e.g., broker-dealers, investment advisers, insurance agencies and producers), and aligns with related issues (e.g., privacy, anti-money laundering). This will ensure that all consumers have the same level of protection regardless of the type of product they buy, avoid imposing potentially conflicting rules on firms that operate in multiple lines of business, and empower firms and advisors to protect their clients against those seeking to take advantage of them during their most vulnerable years.

Thank you again for the opportunity to comment on the Proposal. Please feel free to contact Jason Berkowitz, IRI's Vice President & Counsel for Regulatory Affairs (jberkowitz@irionline.org, 202-469-3014), or Paul Richman, IRI's Vice President for Regulatory Affairs & Compliance (prichman@irionline.org, 202-469-3004), if you have any questions or would like to discuss this matter further.

Sincerely,



Catherine J. Weatherford
President & CEO
Insured Retirement Institute

Cc: James J. Wrona, Vice President and Associate General Counsel, Office of General Counsel, FINRA
Ann-Marie Mason, Director and Counsel, Shares Services, FINRA
Jeanette Wingler, Assistant General Counsel, Office of General Counsel, FINRA

Attachment: IRI 2015 Older Investor Summit Report

INSURED RETIREMENT INSTITUTE
IRI OLDER INVESTORS SUMMIT – EXECUTIVE REPORT

BACKGROUND

The population of older Americans is one of the fasting growing cohorts in the United States and is expected to double in size to nearly 84 million Americans by 2050. This continued growth is necessitating more focus and information on issues specific to this population – including financial elder abuse, cognitive impairment, and diminished capacity.

In response to this important challenge, IRI began a heightened effort in 2014 to focus attention to issue impacting older Americans and to disseminate resources to consumers and the financial professionals who service these customers. As part of this effort, IRI launched a web-based resource center focused on protecting older Americans that features information for consumers, financial advisors, and financial services firms on these issues. The site includes an interactive map to find local resources to protect older consumers who may be the victim of financial elder abuse, information for consumers to help prevent becoming the victim of financial fraud, tip sheets for financial advisors on spotting signs of diminished capacity and financial elder abuse, as well as regulatory notices, guidance and reports for financial services firms on interacting with older clients.

As a next step, to establish a national dialogue on these issues with various stakeholders, IRI convened the first IRI Older Investors Summit: Strengthening Financial Security for Older Americans in New York on May 27, 2015. The event served to explore the issues of diminished capacity and financial elder abuse, and identify best practices and other measures to protect older clients from financial harm.

EVENT OVERVIEW

The IRI Older Investors Summit was designed as a roundtable discussion featuring top executives from financial services companies; nationally recognized academics and researchers; regulators, public policymakers, and other public officials with responsibilities for protecting older investors; and other thought leaders in this area. Throughout the day, attendees provided presentations to engender discussions to identify best practices, initiatives and public policies to protect older investors.

The day commenced with a keynote address from Judith Kozlowski, representing the U.S. Department of Human Services' Administration for Community Living, and an overview of the latest research findings on financial elder abuse led by Allianz Life CEO Walter White. Subsequent discussions were based on themes including regulatory efforts to protect older Americans, training and compliance programs at financial services firms, and best practices for working with older clients.

EVENT HIGHLIGHTS & FINDINGS

- Financial abuse is the fastest growing form of elder abuse. MetLife estimates that the cost of financial exploitation is $2.9 billion/year, which may be higher due to underreporting.

- One of the first signs of cognitive capacity is diminished financial decision-making, which generally peaks at 53 and then declines.
- There are two key issues in financial exploitation: cognitive impairment and social isolation. Social isolation can be especially dangerous.
- Different firms are addressing the problem in different ways. There is a need to share best practices across the industry.
- Social service workers and police officers generally do not fully understand the scope of financial elder abuse, including identifying indicators of exploitation.
- Law enforcement can be an important resource in protecting older investors. Law enforcement be deployed to slow certain financial transactions to allow more time to mobilize other resources.
- Victim of financial crimes are often embarrassed, resulting in low reporting rates of financial elder abuse. In other instances, victims may not want to "out" a family member as a perpetrator.
- Firms are showing an increased sensitivity to state issues, including state privacy laws, language of insurance contracts, and educating and training brokers and clients.
- Stronger frontline and field education is needed across the board.

DISCUSSION HIGHLIGHTS

Retirement Planning and Older Investors – Judith Kozlowski, Senior Advisor for Elder Justice, Administration for Community Living, Department of Health and Human Services:

- Financial abuse is the fastest growing form of elder abuse.
- While financial abuse is underreported, the cost of financial exploitation is estimated by MetLife to cost at least $2.9 billion/year.
- Cognitive impairment and social isolation are two issues that contribute to financial exploitation. Social isolation can be particularly dangerous.
- A federal initiative has commenced to collect data from Adult Protective Service agencies across the country to define scope of the problem.
- The Elder Justice Act passed in 2010 and created the Elder Justice Coordinating Council, which includes 12 different agencies working on elder abuse issues.

Preventing Elder Financial Abuse: The Role of Insurance Carriers - Walter White, President and CEO, Allianz Life:

- Older Americans are targeted for financial exploitation due to wealth, living alone, dependence, and cognitive impairments or diminished capacity.
- 52 percent of financial elder abuse cases are perpetrated by family, friends, or caregivers.
- Victims of elder abuse are the retirement income industry's customers and acts of abuse undermine our goal of helping create secure retirements.

- An Allianz Life study found one in five (19%) adults age 40-64 reported having an older friend or family member who has been a victim of financial elder abuse. Of this 19%, more than half said victims did not report abuse. The average financial loss in these incidents was $30,000, and 10 percent of victims reported suffering losses of $100,000 or more.
- Financial professionals are in a unique position to detect abuse. Distributors should utilize proper estate planning documents and validate policies/procedures of product providers.

Understanding the Issues Facing Older Investors - Ronald Long, Wells Fargo Advisors; Angela Gutchess, Ph.D., Brandeis University; Rosa Maymi, AARP; Gregory Samanez-Larkin, Ph.D., Yale University:

- Speed of processing information, working memory, and ability to multitask are among the cognitive abilities that decline with age.
- Emotional well-being improves with age, which produces less unnecessary negativity but also creates the potential susceptibility to financial fraud.
- Risk aversion is believed to increase with age, but that may only be a perception. The bottom line is don't assume risk aversion in decision behavior in older-age consumers.
- Any prevention policies should apply to individuals of all ages.
- Victims of financial crimes are embarrassed, which leads to under-reporting of fraud. Under-reporting is also exacerbated by victims' desire not to "out" family members and friends as perpetrators.

Regulator Roundtable: Initiatives to Educate and Protect Older Americans - Paula Nelson, Global Atlantic Financial Group/Forethought Distributors; Lourdes Gonzalez, U.S. Securities and Exchange Commission; Nora Eisenhower, Consumer Financial Protection Bureau:

- Seven regulatory agencies issued guidance to financial institutions to clarify the applicability of privacy provisions of the Gramm-Leach-Bliley Act (GLBA) to reporting suspected financial exploitation of older adults.
- Preventing fraud and financial exploitation should start with the most common red flag: money movement.
- Washington State has a 10-day waiting period on financial transactions, which can be a model for other states.
- New resources for consumers include the Department of Justice's local support tool, which identifies local agencies based on zip code, and FINRA's toll-free securities hotline for seniors.

Investor Education: Media Perspectives - Gregory Crawford, Investment News; Ashlea Ebeling, Forbes; Richard Eisenberg, PBS NextAvenue.org:

- Journalists can help get the story out on these issues, but need industry professionals to be willing to talk to them.

- Industry and regulators should consider alternative communication approaches beyond the internet, as not all older Americans have access to the web.

The Emotional Connection: Financial Planning in the Shadow of Dementia - John Koehler, Senior Vice President of Advanced Markets, Transamerica Capital:

- Deaths from Alzheimer's disease increased 71 percent from 2000 to 2013, making it the fastest growing disease in the United States.
- Best practices for helping clients who may have or may incur dementia include:
    - Provide written guidance to employees on senior-related issues
    - Communicate policies regarding durable powers of attorney
    - Suggest customers invite a friend or family member to meetings
    - Revise privacy policies to address diminished capacity
    - Offer training to help registered representatives understand and meet the needs of older investors
    - Provide education to customers about how to avoid being victims of financial fraud or abuse
- The three most important things advisors should do when helping clients with dementia are getting someone else involved, recognize that most forms of dementia are progressive, and suggest your client see a doctor.

Protecting Older Investors: The Role of Training and Compliance Programs - Timothy Keeton, LPL Financial; Jennifer Lewis, MetLife, and Shawn Scholz, Ameriprise Financial:

- Reported incidents typically spike following training, when most advisors/agents are most sensitive and aware of financial elder abuse.
- Best practices should be shared across the industry, not performed by one company in a vacuum.

Best Practices for Working with Older Investors - Thomas M. Mierswa, Morgan Stanley Wealth Management; Jamie Cox, Harris Financial Group; and Wendy Johnson, U.S. Bancorp Investments:

- Front line staff, equipped with a standard set of procedures, is the first line of defense to protect older clients. The company is engaged only when issues are escalated.
- Best practices include:
    - Always documenting every interaction with the client, and sending follow up letters.
    - Knowing your clients' family members and other members in spheres of influence.
    - Getting to know elder law attorneys in the community, social service case workers, and professional guardian/POA representatives.
    - Call on local law enforcement for "well checks" if you suspect fraud.

Public Policy: Opportunities to Meet the Needs of Older Investors - Lee Covington, Senior Vice President & General Counsel, Insured Retirement Institute:

- A national oversight agency is needed to coordinate Adult Protective Services. There is no infrastructure that looks are these issues holistically, as Adult Protective Services are funded on the state level. Some states even differ county by county, with no integrated network and computer systems.
- Work is need on privacy safe harbors.
- Local police departments are ill-equipped to manage these issues. Developing training material and other partnership opportunities with law enforcement should be explored.

CONCLUSIONS & RECOMMENDATIONS

As a result of the conversations during the IRI Older Investors, IRI identified several initiatives, public policy recommendations, and financial services best practices to better protect older Americans.

- Establishing an independent third-party to call when financial abuse is suspected.
- Requiring regular training on elder issues for frontline and field staff.
- Establishing a training video for law enforcement and/or explore other opportunities to partner with law enforcement.
- Creating a fraud watch network, and researching the possible development of a data system algorithm to trigger fraud alert.
- Developing better assessments to determine when intervention is necessary.
- Considering extending waiting periods for financial transactions, such as emulating Washington State's 10-day waiting period.

IRI will continue its work promoting resources to protect consumers from becoming the victim of financial elder abuse and to help advance a national dialogue on issues impacting older Americans. This includes preparing a webinar for members that builds on themes included in the IRI Older Investors Summit. IRI also will continue to examine which initiatives it can help advance, and which public policy recommendations it can help advocate for.

ADDITIONAL RESOURCES

- IRI's Protecting Older Investors Resource Center
- IRI Older Investors Summit Final Program
- Preventing Elder Financial Abuse: The Role of Insurance Carriers - Walter White, President & CEO, Allianz Life
- Financial Planning in the Shadow of Dementia: The Heart of the Matter - John Koehler, SVP, Advanced Markets, Transamerica

- IRI Older Investors Summit: Strengthening Financial Security for Older Americans - Nora Eisenhower, Assistant Director, Office of Older Americans, Consumer Financial Protection Bureau
- Cognitive Changes with Aging - Angela Gutchess, Ph.D., Associate Professor of Psychology, Brandeis University
- Understanding the Aging Decision Maker - G.R. Samanez-Larkin, Ph.D, Assistant Professor of Psychology, Cognitive Science and Neuroscience, Yale University
- Public Policy and the Needs of Older Investors - Lee Covington, Senior vice President and General Counsel, Insured Retirement Institute

ACKNOWLEDGEMENTS

IRI thanks John Papadopulos, President, Wells Fargo Retirement, Wells Fargo & Company, and the Treasurer/Secretary of the IRI Board of Directors, for his leadership in moderating the IRI Older Investors Summit. IRI also appreciates the participation of Allianz Life CEO Walter White, IRI Board Members Paula Nelson, Executive Vice President, Global Atlantic Financial Group and Head of Annuity Distribution, Forethought Distributors, and Bill Lowe, President Sammons Retirement Solutions. IRI also expresses its appreciation to Nationwide, Forethought, MetLife, Allianz Life, Transamerica and U.S. Bancorp for their support of the IRI Older Investors Summit.

NAELA™
National Academy of Elder Law Attorneys, Inc.
Leading the Way in Special Needs and Elder Law ℠

November 18, 2015

Marcia E. Asquith
Office of the Corporate Secretary
FINRA 1735 K Street, NW
Washington, DC 20006-1506

Subject: Rules Relating to Financial Exploitation of Seniors and Other Vulnerable Adults

Dear Ms. Asquith,

On behalf of the National Academy of Elder Law Attorneys (NAELA) and its Guardianship and Conservatorship Section Steering Committee, we appreciate the opportunity to comment on Regulatory Notice 15-37, concerning the amendments to Rule 4512 and the creation of a new Rule 2165.

NAELA is comprised of over 4,500 attorneys with experience and training to provide legal advocacy, guidance, and services to enhance the lives of persons with disabilities and people as they age. The Steering Committee consists of members who possess a high level of dedication and expertise on issues related to the legal appointment of decision-makers for incapacitated individuals.

We are encouraged to see FINRA's continuing efforts to prevent and curtail the financial exploitation of persons with disabilities and seniors. While the proposed rules are moving in the right direction, stronger steps need to be taken to make a serious impact against financial exploitation.

4512(a)(1)(F) Customer Account Information
The rule allows an account holder to designate a trusted person to be contacted regarding the account. As the "trusted person" cannot be authorized to transact business on the account, presumably fiduciaries such as trustees and Powers of Attorney cannot be the trusted person. While some of the worst instances of financial exploitation are committed by legal fiduciaries, in many cases, the agent under a Power of Attorney or a trustee may be in the best position to protect the individual. As many financial exploitation victims tend to be more isolated without close and caring family members, account holders may not be in a position to name a trusted person. It is also possible that potential exploiter may seek out the role of a trusted individual to gain access to information about a vulnerable person's assets.

2165 Financial Exploitation of Specified Adults
Specified adult is defined as individuals 65 and older or persons over 18 with a mental or physical impairment that renders the person unable to protect his or her own interests. This characterization is consistent with several elder abuse laws throughout the country.

Section (b) provides for a temporary hold on disbursements and this provision is a very positive step towards protecting individuals from financial exploitation. This provision allows a temporary hold on account for a period of not more than 15 days unless terminated or extended by a court order. This section also requires notice to be provided within two days to all parties authorized to transact business on the account, as well as they trusted contact person unless the member reasonably believes that the trusted contact person has engaged, is engaged, or will engage in the financial exploitation of the account holder. The proposed rule provides a safe harbor for members who act with a reasonable belief that exploitation has occurred or may be attempted. This rule should also be expanded to allow a temporary hold when an individual is showing signs of a significant cognitive decline and is at risk of financial exploitation even if there is no alleged exploiter in the picture.

The safe harbor rule is consistent with the banking laws which enable banks to take protective action when financial exploitation concerns are present. While the temporary hold is a significant improvement, the limitations on reporting may significantly weaken this provision. If the exploiter is an individual with an authority to act on the account, or the trusted contact person, the reporting obligation may actually be more detrimental to the account holder. The reporting should be directed to the local Adult Protective Services agency and law enforcement, as they are in the best position to assist a victim. The proposed rules do not appear to allow the financial institutions to reach out to Adult Protective Services and law enforcement. In several states, banking institutions are mandated elder abuse reporters and they routinely report to Adult Protective Services. Even in states without mandatory reporting, APS agencies work closely with bank personnel to stop financial exploitation. While trusted contact persons may have good intentions, they may not have the financial resources to take the necessary legal actions, such as pursuing a temporary guardianship or conservatorship, to protect the account owner.

While staff training is mentioned for purposes of carrying out the protective procedures laid out in the proposed rule, much broader staff training is necessary to reduce the risk of financial exploitation. Banks, in states such as Illinois, are requiring their employees to undergo training to be aware of red flags and other indicators that an individual is at victim or at risk of financial exploitation. In Illinois, for example, the APS Programs help coordinate these training programs. Staff members who have direct contact with the account holders should be given training to allow them to identify red flags such as drastic changes in the management of an account, changes in an individualôs appearance and increased reliance on another individual.

Conclusion
The proposed rules show FINRA's acknowledgment of the serious problem of financial exploitation of seniors and persons with disabilities. The ability to place temporary holds on the accounts is a very positive step. The biggest problem is the notification component. The inability of financial institutions to notify the entities charged with protecting seniors and persons with disabilities from financial exploitation will ultimately greatly limit the effectiveness of this

proposed rule. Finally, it is very important to provide meaningful training which will enable employees of financial institutions to identify cases of potential financial exploitation of seniors or persons with disabilities.

Thank you for consideration of our comments. If you have any questions, please contact David Goldfarb (dgoldfarb@naela.org/ 703-942-5711 #232).

Sincerely,

Shirley B. Whitenack, Esq., CAP
President
National Academy of Elder Law Attorneys

Wendy Cappelletto, CAP
Chair
Guardianship and Conservatorship Section
Steering Committee
National Academy of Elder Law Attorneys

Simcha Ben Yaakov
Long Island, New York

November 24, 2015

Ms. Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street
Washington, DC 20006-1506

Re: Regulatory Notice 15-37, FINRA Rule 4512 and FINRA Rule 2165

Dear Ms. Asquith:

I applaud FINRA for taking this step. Although nothing will eradicate financial abuses of seniors, the adoption of the new proposals may have positive consequences.

I would like to add several comments which FINRA may elect to include in the final version.

1. The rules should state that the disbursements which can put on hold include payments to an account holder's bank. In my experience, assets are often transferred from the BD to the account holder's bank, from which point they are then withdrawn or transferred yet again. While transfers to banks is clearly a subset of disbursements, specifically telling compliance and supervisory personnel that the new rule would apply in that circumstance can only have a positive effect.

2. FINRA should address those instances in which the customer's account has check writing privileges. While only someone known to the BD can ask for a check to be issued from an account, anyone with physical access to the checks can use them. All of us know that no one verifies signatures. It is not clear from the proposed text if the broker-dealer will be authorized to place a temporary hold on that type of withdrawal. In a similar vein, do the proposals apply to credit or debit cards associated with brokerage accounts? Can they be blocked?

3. Just as FINRA expects RRs and BDs to disclose relevant risks, FINRA should disclose that the safe harbor provisions only extend to actions which FINRA might bring. Payees of a check which has been stopped or some similar act made in good faith under the proposals may incur financial harm. Despite good intentions, actions can create liabilities for a BD. FINRA will not insure BDs for those acts, nor should they, but FINRA should explain the limitations of the safe harbor provisions.

Best regards,

EXHIBIT 5

Below is the text of the proposed rule change. Proposed new language is underlined; proposed deletions are in brackets.

* * * * *

4500. BOOKS, RECORDS AND REPORTS

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4512. Customer Account Information

(a) Each member shall maintain the following information:

(1) for each account:

(A) through (C) No Change.

(D) signature of the partner, officer or manager denoting that the account has been accepted in accordance with the member's policies and procedures for acceptance of accounts; [and]

(E) if the customer is a corporation, partnership or other legal entity, the names of any persons authorized to transact business on behalf of the entity; <u>and</u>

<u>(F) subject to Supplementary Material .06, name of and contact information for a trusted contact person age 18 or older who may be contacted about the customer's account; provided, however, that this requirement shall not apply to an institutional account.</u>

(2) through (3) No Change.

(b) through (c) No Change.

• • • Supplementary Material: --------------

.01 through .05 No Change.

.06 Trusted Contact Person

(a) With respect to paragraph (a)(1)(F) of this Rule, at the time of account opening a member shall disclose in writing, which may be electronic, to the customer that the member or an associated person of the member is authorized to contact the trusted contact person and disclose information about the customer's account to address possible financial exploitation, to confirm the specifics of the customer's current contact information, health status, or the identity of any legal guardian, executor, trustee or holder of a power of attorney, or as otherwise permitted by Rule 2165. With respect to any account that was opened pursuant to a prior FINRA rule, a member shall provide this disclosure in writing, which may be electronic, when updating the information for the account pursuant to paragraph (b) of this Rule either in the course of the member's routine and customary business or as otherwise required by applicable laws or rules.

(b) The absence of the name of or contact information for a trusted contact person shall not prevent a member from opening or maintaining an account for a customer, provided that the member makes reasonable efforts to obtain the name of and contact information for a trusted contact person.

(c) With respect to any account subject to the requirements of SEA Rule 17a-3(a)(17) to periodically update customer records, a member shall make reasonable efforts to obtain or, if previously obtained, to update where appropriate the name of and contact information for a trusted contact person consistent with the requirements of SEA Rule 17a-3(a)(17).

Text of Proposed New FINRA Rule

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2100. TRANSACTIONS WITH CUSTOMERS

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2165. Financial Exploitation of Specified Adults

(a) Definitions

(1) For purposes of this Rule, the term “Specified Adult” shall mean: (A) a natural person age 65 and older; or (B) a natural person age 18 and older who the member reasonably believes has a mental or physical impairment that renders the individual unable to protect his or her own interests.

(2) For purposes of this Rule, the term “Account” shall mean any account of a member for which a Specified Adult has the authority to transact business.

(3) For purposes of this Rule, the term “Trusted Contact Person” shall mean the person who may be contacted about the Specified Adult’s Account in accordance with Rule 4512.

(4) For purposes of this Rule, the term “financial exploitation” means:

(A) the wrongful or unauthorized taking, withholding, appropriation, or use of a Specified Adult’s funds or securities; or

(B) any act or omission by a person, including through the use of a power of attorney, guardianship, or any other authority regarding a Specified Adult, to:

(i) obtain control, through deception, intimidation or undue influence, over the Specified Adult’s money, assets or property; or

(ii) convert the Specified Adult's money, assets or property.

(b) Temporary Hold on Disbursements

(1) A member may place a temporary hold on a disbursement of funds or securities from the Account of a Specified Adult if:

(A) The member reasonably believes that financial exploitation of the Specified Adult has occurred, is occurring, has been attempted, or will be attempted; and

(B) The member, not later than two business days after the date that the member first placed the temporary hold on the disbursement of funds or securities, provides notification orally or in writing, which may be electronic, of the temporary hold and the reason for the temporary hold to:

(i) all parties authorized to transact business on the Account; and

(ii) the Trusted Contact Person(s), unless the Trusted Contact Person is unavailable or the member reasonably believes that the Trusted Contact Person(s) has engaged, is engaged, or will engage in the financial exploitation of the Specified Adult; and

(C) The member immediately initiates an internal review of the facts and circumstances that caused the member to reasonably believe that the financial exploitation of the Specified Adult has occurred, is occurring, has been attempted, or will be attempted.

(2) The temporary hold authorized by this Rule will expire not later than 15 business days after the date that the member first placed the temporary hold on the disbursement of funds or securities, unless sooner terminated or extended by a state regulator or agency of competent jurisdiction or a court of competent jurisdiction, or extended pursuant to paragraph (b)(3) of this Rule.

(3) Provided that the member's internal review of the facts and circumstances under paragraph (b)(1)(C) of this Rule supports the member's reasonable belief that the financial exploitation of the Specified Adult has occurred, is occurring, has been attempted, or will be attempted, the temporary hold authorized by this Rule may be extended by the member for no longer than 10 business days following the date authorized by paragraph (b)(2) of this Rule, unless sooner terminated or extended by a state regulator or agency of competent jurisdiction or a court of competent jurisdiction.

(c) Supervision

(1) In addition to the general supervisory and recordkeeping requirements of Rules 3110, 3120, 3130, 3150, and Rule 4510 Series, a member relying on this Rule shall establish and maintain written supervisory procedures reasonably designed to achieve compliance with this Rule, including, but not limited to, procedures related to the identification, escalation and reporting of matters related to the financial exploitation of Specified Adults.

(2) A member's written supervisory procedures also shall identify the title of each person authorized to place, terminate or extend a temporary hold on behalf of the member pursuant to this Rule. Any such person shall be an

associated person of the member who serves in a supervisory, compliance or legal capacity for the member.

(d) Record Retention

Members shall retain records related to compliance with this Rule, which shall be readily available to FINRA, upon request. The retained records shall include records of: (1) request(s) for disbursement that may constitute financial exploitation of a Specified Adult and the resulting temporary hold; (2) the finding of a reasonable belief that financial exploitation has occurred, is occurring, has been attempted, or will be attempted underlying the decision to place a temporary hold on a disbursement; (3) the name and title of the associated person that authorized the temporary hold on a disbursement; (4) notification(s) to the relevant parties pursuant to paragraph (b)(1)(B) of this Rule; and (5) the internal review of the facts and circumstances pursuant to paragraph (b)(1)(C) of this Rule.

• • • Supplementary Material: --------------

.01 Applicability of Rule. This Rule provides members with a safe harbor from FINRA Rules 2010, 2150 and 11870 when members exercise discretion in placing temporary holds on disbursements of funds or securities from the Accounts of Specified Adults under the circumstances denoted in the Rule. This Rule does not require members to place temporary holds on disbursements of funds or securities from the Accounts of Specified Adults.

.02 Training. A member relying on this Rule must develop and document training policies or programs reasonably designed to ensure that associated persons comply with the requirements of this Rule.

.03 Reasonable Belief of Mental or Physical Impairment. A member's reasonable belief that a natural person age 18 and older has a mental or physical impairment that renders the individual unable to protect his or her own interests may be based on the facts and circumstances observed in the member's business relationship with the natural person.