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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

[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.

NASAA's and State Securities Regulators' Focus on the Protection of Seniors and Vulnerable Adults.

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

[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

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[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

Judith M. Shaw
NASAA President
Maine Securities Administrator