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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 raised 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.

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

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 Person⁶ 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*

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

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.

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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

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.